ROLE OF THE COURT UNDER ARBITRATION ACT 1995: COURT INTERVENTION BEFORE, PENDING AND AFTER ARBITRATION IN KENYA

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ABSTRACT

This paper examines critically the role of the court in arbitration in Kenya as stipulated by Arbitration Act, Act No. 4 of 1995 of laws of Kenya.[2] The court intervention before, pending and after arbitration (in interlocutory and other matters) in arbitral proceedings in Kenya is analyzed in detail. In addition, necessary reforms as far as court intervention is concerned are proposed.

The legal provisions in the Arbitration Act 1995, as amended by the Amending Act of 2009, giving the court power to intervene are highlighted and reviewed in the context of the Kenyan case law and legal practice. The paper aims at establishing whether court intervention is a facilitator of expeditious arbitration or a hindrance.

No doubt parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. In addition, recognition and enforcement of arbitral awards in court has often been unduly reduced to a sure wait-and-see game to the detriment of parties in whose favour the awards are made. Can something be done to reverse this trend? What reform measures can be undertaken to ensure that arbitration is the expeditious process it is supposed to be?

Underlying the discussion is the hypothesis that court intervention in interlocutory and other matters leads to delay and can be used by parties to frustrate the arbitral process. The extent to which this is true or otherwise of the role of the courts is what the paper grapples with.

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[2] The discussion also takes cognizance of the provisions in the Arbitration (Amendment Act) 2009 which was given presidential assent on 1st January 2010 and will come into force by notice in the Gazette on such date as the Minister may appoint.

The discourse takes us through the legal provisions that entitle parties to seek court intervention and the actual instances of court intervention in arbitration. The paper also attempts a critical examination of the role of the court in arbitration with a view to establishing whether court intervention is a friend or a foe to the expeditious and fair determination of arbitral matters.

1.0 INTRODUCTION

As the title hints, this paper is a critical examination of role of courts in arbitration in Kenya as stipulated by the Arbitration Act, Act No. 4 of 1995 Laws of Kenya. The court intervention before, pending and after arbitration (in interlocutory and other matters) in arbitral proceedings in Kenya is analyzed in detail. In addition, necessary reforms as far as court intervention is concerned are proposed.

The legal provisions in the Arbitration Act, 1995 (hereinafter the Act) giving the court power to intervene are highlighted and reviewed in the context of the Kenyan case law and legal practice. The paper aims at establishing whether court intervention is a facilitator of expeditious arbitration or a hindrance.

No doubt parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. In addition, recognition and enforcement of arbitral awards in court has often been unduly reduced to a sure wait-and-see game to the detriment of parties in whose favour the awards are made. Can something be done to reverse this trend? What reform measures can be undertaken to ensure that arbitration is the expeditious process it is supposed to be?

Underlying the discussion is the hypothesis that court intervention in interlocutory and other matters leads to delay and can be used by parties to frustrate the arbitral process. The extent to which this is true or otherwise of the role of the courts is what the paper grapples with.

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1.1 GENERAL PRINCIPLE ON ROLE OF THE COURT IN ARBITRATION

The general key principles of arbitration have received a restatement in section 1 of Arbitration Act, 1996 of United Kingdom as follows:

> **"1. …**
>
> **(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;**
>
> **(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. …"**

If one affords the above principles a literal interpretation, then, it becomes apparent that court's intervention is to be restricted as far as it may result in unnecessary delay and expense in the arbitration. Further, that the object of intervention of the court should be to guarantee fair and impartial resolution of disputes. Even more importantly, it is inferable that parties' autonomy is not to be restricted unnecessarily by courts except in public interest.

In Kenya, the general approach on the role and intervention of the court in arbitration in Kenya is provided in section 10 of the Arbitration Act 1995. The section provides:

> **"10. Except as provided in this Act, no court shall intervene in matters governed by this Act."**[3]

The section, clearly in mandatory terms, restricts the jurisdiction of the court to only such matters as are provided for by the Act. This section epitomizes the recognition of the policy of parties' autonomy which underlie the arbitration generally and in particular the Arbitration Act, 1995. The section articulates the need to restrict the court's role in arbitration so as to give effect to that policy.[4]The principle of party autonomy is recognized as a critical tenet for guaranteeing that parties are satisfied with results of arbitration. It also helps achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense.

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[3] This section was not affected by the 2009 Amendments.

[4] Sutton D.J et al (2003), Russell on Arbitration (Sweet & Maxwell, London, 23rd Ed.) p. 293

On the face of it, section 10 of the Act permit two possibilities where the court can intervene in arbitration. First is where the Act expressly provides for or permits the intervention of the court. Then, in public interest where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. It is trite that the Act cannot reasonably be construed as ousting the inherent power of the court to do justice especially through judicial review and constitutional remedies. This latter instance can only be countenanced in exceptional instances.

In the case of ***Epco Builders Limited-v-Adam S. Marjan-Arbitrator & Another***[5], the appellant had taken out an originating Summons before the High Court (Constitutional Court) under, *inter alia*, sections 70 and 77 of the constitution of Kenya; section 3 of the Judicature Act and section 3A of the Civil Procedure Act. The appellant's contention in the constitutional application was that its constitutional right to a fair arbitration had been violated by a preliminary ruling of the arbitrator.

In essence, the applicant's main complaint was that it likely would not obtain fair adjudication and resolution of the dispute before the arbitral tribunal. That was, it argued, in view of the arbitrator's "unjustified refusal to issue summons to the Project Architect and Quantity Surveyor" who are crucial witnesses for a fair and complete resolution of the matters before the tribunal. Consequently, the applicant argued that such refusal was a violation of its rights under sections 70 and 77 of the Constitution of Kenya.

The application was opposed and urged to be stuck out on the basis that it "disclose[d] no reasonable cause of action", was incompetent and did not lie in law, and that the court lacked jurisdiction to entertain the questions raised by it. The counsel for the Chartered Institute of Arbitrators-Kenya Branch, an interested party, submitted during trial that arbitration must have an end. In counsel's view, while she did not refute the application under section 77 (9) of the constitution, she was of the considered view that the procedure laid down under the Arbitration Act should be exhausted first before such application. The majority of the court, while avoiding making a conclusion as to whether the application disclosed a cause of action were of the view that the same was not frivolous. It was thus ordered that the application of the appellant be heard by the High Court on merits.

[5] Civil Appeal No. 248 of 2005

On his part, Justice Deverell contributing to the majority decision impressed the importance of encouraging alternative dispute resolution to reduce the pressure on the court from the ever increasing number of litigants seeking redress in court. He was of the view that every civil dispute dealt with by arbitration should result in a corresponding reduction in the pressure on the courts. Thus, articulating the precarious balance and interest at stake in the application he added:

> **"If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the courts. This does not mean that recourse to a constitutional court during an arbitration will never be appropriate. Equally it does not mean that a party wishing to delay an arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a constitutional issue as to fairness of the "trial" when the Arbitration Act 1995 itself has a specific provision in section 19 stipulating that "the parties shall be treated with equality and each party shall be given full opportunity of presenting his case," in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR."**

The dissenting judge in the ***EPCO Case*** (supra), Githinji, JA who considered the merits of the application was of the view that arbitration disputes are governed by private law and not public law and by invoking section 84(1) of the constitution, the appellant was seeking a public remedy for a dispute in private law. The judge also impressed that the subject matter of the constitutional application was a matter of discretion of the arbitral tribunal and where the same was exercised erroneously, the error could be corrected within the parameters of the Arbitration Act which provides effective remedies for such errors as deny the arbitral parties fair hearing and/or yield breach of nature justice. Thirdly, the learned judge of appeal emphasized the fact that just because the law is contained in the constitution does not *ipso facto* mean that the breach of that law has to be redressed through a constitutional application under section 88(1) of the Constitution.

The learned judge reasoned that the right to fair hearing under section 77(9) of the constitution is applied by the courts in ordinary civil proceedings even without constitutional application and is one of the cardinal rules of natural justice. In his learned view, fair hearing is also incorporated by section 19 of the Act which provision the appellant could have invoked in a normal application to get redress for breach of principle of fair hearing, if any. In conclusion, the learned judge found that there is clear law and procedure (under Arbitration Act and the rules there under) for redress of the grievances of the appellant raised under the constitutional application and the law should be strictly followed. He thus held that the application to be not disclosing *ex facie* a constitutional issue and further that it was frivolous and gross abuse of the constitution and the process of the court. He was for the dismissing of the appeal but for the fact that the majority of court was of a different view ruling against considering the merits of the application.

In the England case of ***Coppee-Lavalin SA/NV-v-Ken-Ren Chemicals and Fertilizers Ltd [1994] 2 All ER 465*** the House of Lords drew a distinction, which is relevant for our purpose, between three groups of measures that involve courts in arbitration. First are such measures as involve purely procedural steps and which the arbitral tribunal cannot order and/or cannot enforce. For instance, issuing witness summons to a third party or stay of legal proceedings commenced in breach of the arbitration agreement. Second are measures meant to maintain the status quo like granting of interim injunction or orders for preservation of the subject matter of the arbitration. Lastly are such measures as give the award the intended effect by providing means for enforcement of the award or challenging the same.

There is no doubt that the three measures engender differing degrees of encroachment on the arbitral proceedings and by extension party autonomy. Indeed, sometimes the measures result in court's direct or indirect interference in the arbitral tribunal's task of deciding on merits of the dispute. Hence the need to ensure that such intrusion is kept to the bare minimum and only be exercised when the occasion merit it.[6]

The role of the courts at various stages of arbitral proceedings is discussed below together with the procedure for applying to the court to intervene. In particular, the following section considers court's

[6] See Lord Mustill's dicta in Coppee-Lavalin SA/NV case (supra) page 469-470 on the ideal court's approach in such intrusion.

intervention in arbitral proceedings before reference to arbitration, during course of arbitral proceedings and after arbitral award.

2.0 ROLE OF THE COURT BEFORE REFERENCE TO ARBITRATION

There are at least two instances where the court intervenes in a matter subject of arbitration agreement strictly before commencement of any efforts to refer the dispute to arbitration. These are:

2.1 STAY OF LEGAL PROCEEDINGS

Generally, the courts have no direct power, and of their own motion, to compel arbitration. However, courts can do so indirectly, and upon application of a party to an arbitration agreement. This is possible where the court, after an application for stay of proceedings for reference to arbitration, refuses the claimant audience and/or remedy through the court process. An order for stay of proceedings has the effect that if aggrieved party wants to pursue his claims, he can only do so by arbitration.[7]

The necessity of stay of proceedings arises where the parties have a valid arbitration agreement and upon a dispute arising on a matter covered by the same, one party goes to the court in breach of the Arbitration agreement.[8] An application for stay of the legal proceedings is what Section 6 of the Arbitration Act avails the other party if it is to give effect to the arbitration agreement. This section in the principle Act has now been amended[9] as hereunder;

(a) in subsection (1), by deleting the words "files any pleadings or takes any other step in the proceedings" and substituting therefor the words "takes the appropriate procedural step to acknowledge the legal proceedings against that party".

(b) by deleting subsection (2) and substituting therefor the following new subsections -

[7]The justification is that agreements to refer disputes to arbitration are mainly contractual undertaking by parties to settle disputes out of the court and with the help of an arbitrator. The courts exist to enforce and give force of law what parties, exercising their freedom to contract, choose to agree to be bound by.

[8] Parties commence court action despite arbitration agreement for a number of reasons. The action may be inadvertent, because s/he challenges the existence or validity of the arbitration agreement or merely to breach the arbitration agreement.

[9] Vide section 5 of the Amending Act.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

An arbitration clause or arbitration agreement in a contract is not an impediment to resolving disputes in court until a party objects. In ***Rawal-v-The Mombassa Hardware Ltd***[10] it was held that an arbitration agreement does not limit or oust the jurisdiction of the court to grant reliefs sought by way of a Plaint In the recent case of ***Peter Muema Kahoro & Another-v-Benson Maina Githethuki***[11] a Plaintiff had filed a suit seeking to enforce an agreement for sale of land by way of permanent injunction and in addition applied and was granted ex-parte temporary injunction pending a inter-partes hearing of the application. The said agreement contained an arbitration clause under which parties had undertaken to refer any dispute arising to a single arbitrator appointed by the Law Society of Kenya. The Defendant entered appearance and in addition filed grounds of opposition against the application for injunction.

The Defendant then brought an application seeking to strike out the plaintiff's suit and the application thereof on the ground that the court was not seized of jurisdiction to try the matter. The learned counsel for the Defendant argued in support of that ground that the Plaintiff having failed to invoke fully the arbitration agreement clause, the court has no jurisdiction to entertain the suit and/or the application as the relief's sought by the Plaintiff were best sought under inter section 7 of the Arbitration Act. The Plaintiff in response cited the above ***Rawal case*** arguing that an arbitration clause does not limit or oust the jurisdiction of the court and that the Defendant had taken steps in the suit.

The court found for the Plaintiff holding that striking out the suit was beyond the ambit of section 6 of the Arbitration Act. The court further held that the Defendant having failed to move the court in appropriate time under section 6 to refer the matter to arbitration and instead taking steps in the

[10] [1968] E.A. 398

[11] [2006] HCCC (Nairobi) No. 1295 of 2005

proceedings, he waived his right to rely on and invoke the arbitration agreement. Thus the Defendant's application to strike out the suit and/or stay the proceedings was thus dismissed with costs.

In other words, the parties can choose to ignore the arbitration agreement and file the proceedings in a court. However, if one of the parties is desirous of effectuating the arbitration agreement when the other has gone to court, then the former party may seek an order of the court under section 6 of the Arbitration Act staying the court proceedings. The grant of the order of stay of legal proceedings under section 6 leaves the initiator of the court proceedings with no option but to follow the provisions of the arbitration agreement if he wishes the dispute to be resolved.

In granting stay of proceedings, the courts generally have regard to the following conditions:

(i) The applicant must prove the existence of an arbitration agreement which is valid and enforceable.[12] The rationale here is that to stay proceeding where there is no valid Arbitration Agreement would otherwise amount to driving the claimant to the seat of justice as s/he cannot get redress by enforcing the arbitration agreement.

The doctrine of separability 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.[13] Even if the underlying contract is void, the parties are presumed to have intended their disputes to be resolved by arbitration. If the arbitration agreement's validity is questioned the court should endeavour to ascertain the same before staying the proceedings. At least, it should stay the proceedings pending the determination of the issue of validity.

Section 6 of the Act is to the effect that the court shall grant stay unless, *inter alia*, it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. For instance, if the arbitration agreement is inconsistent with a law or is incapable of being performed. The court will also not stay proceedings if it finds that there no dispute between the parties on matters agreed to be arbitrated.

[12] In fact, section 6(1) (a) of the Act stipulates that court refuse to grant stay of proceedings where 'the arbitration agreement is null and void, inoperative or incapable of being performed'.

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

The ideal policy for the court under this condition is anything but unequivocal. For instance it is not clear whether the court should lean towards giving effect to the Arbitration Agreement as far as possible or vice-versa.

(ii) The applicant for stay must be a party to the arbitration agreement or at least a person claiming through a party e.g. a personal representative or trustee in bankruptcy. This requirement is in view of the doctrine of privity of a contract, which is to the effect that only parties to a contract can enforce it and a party not party to a contract cannot enforce it.

In ***Chevron Kenya Limited-v-Tamoil Kenya Limited***[14], the Learned Azangalala found that the Defendant was not a party to the agreement enshrining the arbitration agreement on basis the matter was sought to be stayed and referred to arbitration. He therefore refused to stay the proceedings, *inter alia*, on that ground stating in the ruling:

> **"To my understanding of [section 6(1)] of the Act, only a party to the arbitration agreement has the right to apply for stay of proceedings. As demonstrated above, the defendant is not a party and was [therefore] not entitled to lodge this application."**

Indeed, it seems that only the Defendant is permitted to apply for stay of proceedings under section 6 of the Act. In ***Pamela Akora Imenje-v-Akora ITC Intenational Ltd & Another*** [15]section 6 the court ruled to the effect. The learned Waweru, J held that the provisions of section 6(1) of the Act are available only to the Defendants. Therefore the judge ruled that the application to stay the suit by the Plaintiff was misconceived as the Plaintiff having chosen to file the suit, she could not purport to later have recourse to section 6(1) of the Act. The judge's conclusion was based on what he considered to be the plain and obvious impression of the wording of subsection 6(1) of the Act. Therefore, the Plaintiff having made her bed, as it were, she was bound to lie on it. She chose to file a suit; she had to stand or fall by it.

[14] HCCC (Milimani) No. 155 of 2007

[15] HCCC (Milimani) No. 368 of 2005

(iii) 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 arise instances where the parties intended only some limited disputes to be referred 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 court action is not in breach of the same. The court is bound to stay the proceedings unless, *inter alia*, it finds:

> **"that there is not in fact any dispute between the parties with regard to the matters referred to arbitration."**[16]

In ***TM AM Construction Group (Africa) v. Attorney General***[17] the plaintiff opposed the application for stay, *inter alia*, on basis that the AG was in fact making an application under section 6 of the Arbitration Act as a delaying tactic as there was not in fact a dispute about the claim. It was submitted that the AG took long and did not do anything and thus was precluded under section 6 (1) (b) of the Arbitration Act.

The AG claimed that there was a dispute between it and the respondent that deserved to be referred to arbitration. The respondent retorted that there was not in fact any dispute between the parties with regard to matters agreed to be referred to arbitration. The court found that there was failure by AG to tender any evidence showing that there was in fact any dispute between the parties and that this meant that no basis had been established to show that a dispute in fact existed to justify staying the proceedings and referring the proceedings to arbitration.

The provisions of the Act are not clear on whether an applicant stay part of the proceedings where the other parts are not subject of the agreement. For example, in a suit involving both tort and contract claims and the scope of arbitration is confined to contractual agreement, it is not clear whether one can be granted a stay for the contractual claim only. Similarly, there is uncertainty as to what the courts are to do in case of an Alternative Dispute Resolution clause as opposed to an arbitration one. With such a clause, usually the dispute cannot be referred to arbitration immediately without first exhausting the

[16] Section 6(1) (b) of the Arbitration Act 1995

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

other agreed methods. It is proposed that the position of the House of Lords in ***Channel Tunnel Corporation Ltd and others-v-Balfour Beatty Construction Ltd***[18] that should not prevent the court from staying the proceedings, a position adopted in UK Arbitration Act of 1996[19], should be the norm.

(iv) The party making the application for stay must not have taken steps in the proceedings to answer the substantive claim. For instance, the party must not have served defence or taken another step in the proceedings to answer the substantive claim. The rationale of this requirement is to ensure that stay of proceedings for reference to arbitration is not used as a delay tactic by the defence. The reasoning is that by taking steps to answer the substantive claim, the party submits or is at least taken to be submitting to the jurisdiction of the court and electing to have court deal with the matter rather than insisting on the right to arbitration.[20]

Under section 6 of the Arbitration Act, a party wishing to enforce the arbitration agreement in a situation where the other party has initiated court proceedings must apply to the court not later than the time when that party enters appearance or **takes the appropriate procedural step to acknowledge the legal proceedings against that party**.[21]

In ***Eagle Star Insurance Company Limited-v-Yuval Insurance Company Limited***[22], Lord Denning MR was of the view that to merit refusal of stay, the step in the proceedings must be one which "**impliedly affirms the correctness of the [Court's] proceedings and the willingness of the defendant to go along with the determination by the courts instead of arbitration**". In other words, the conduct of the applicant must be such as demonstrates election to abandon the right to stay in favour of the court action proceeding. However, the courts in Kenya have opted to interpret the proviso to section 6 of the Act

[18] [1993] 1 Lloyd's Rep. 291, HL

[19] Section 9(2) Arbitration Act 1996

[20] Russell on Arbitration (supra) p. 301.

[21] The 1995 Act made reference to when that party enters appearance or "files any pleadings or takes any other step in the proceedings".

[22] [1978] Llods Rep. 357

strictly and will not stay proceedings unless the application was filed at the time of filling the memorandum of appearance.

In the recent case, ***Chevron Kenya Ltd-v-Tamoil Kenya Limited (supra)***, the learned judge relied and upheld Lord Denning's dictum above. In the case, an application for stay was opposed, *inter alia*, on the ground that the Defendant took steps in the proceedings contrary to section 6(1) of the Arbitration Act. According to the counsel for the Plaintiff, the Defendant was not entitled to apply for stay of the proceedings having filed a notice of appointment unaccompanied by the application. According to the Plaintiff's counsel, the application for stay should have been lodged not later than when the notice of appointment of the advocates was filed. The application had been filed two days after the Notice of Appointment and the Plaintiff's counsel was of the view that as a result, it was barred by section 6(1) of Arbitration Act, 1995.

The Counsel for the Defendant on his part contented that the filing of a Notice of Appointment of Advocates did not constitute taking a step in the proceedings as disentitles the defendant from applying for stay of proceedings under section 6 of the Arbitration Act, 1995. The learned counsel proffered in support of the contention that a Notice of Appointment could not be construed as a step taken in the proceedings. At least, the counsel's view, not the kind of "steps taken in the proceedings" envisaged under section 6(1) of the Arbitration Act. The counsel further argued that for an act to amount to a 'step taken in the proceedings' it must be one that acknowledges the jurisdiction of the court to entertain the dispute.

The learned judge agreed with the Defendant's counsel on the point holding that a notice of appointment of advocates cannot be described as a step taken in the proceedings so as to deprive a Defendant of recourse under section 6(1) of the Arbitration Act for stay of proceedings. In the judge's view, a notice of appointment of advocates does exactly that: inform the court and the other side that the Defendant will from the date of the notice be acting through the named counsel. As such, a notice of appointment of advocates does not, in itself, acknowledge the jurisdiction of the court to determine the dispute. The court applying the standard set by Lord Denning in the dictum above found that a notice of appointment is not a step in the proceedings that impliedly affirms the correctness of the proceedings and the willingness of the Defendant to go along with the determination of the court instead of arbitration.

In the leading case of ***TM AM Construction Group (Africa) v. Attorney General***[23], an application for stay of proceedings under section 6 of the Act had also been opposed for having been filed after defendant had entered appearance. The plaintiff in the case had instituted the suit against the Attorney General on 21st January 2001. The learned AG then entered appearance on the 15th March 2001. The application for stay of proceedings was then made on the 25th April 2001.

Mbaluto J (as he then was) held that an applicant was obliged to apply for a stay **'not later than the time when he entered appearance'**. The court thus found that the AG had lost the right to rely on the arbitration clause because if the AG was to rely on it he was obliged to make an application under section 6 not later than when he entered appearance.

The decision in foregoing ***TM AM case*** was followed in ***Victoria Furniture Limited-v-African Heritage Limited & Another***.[24] The case involved third-party proceedings where the third-party sought a stay of 'all the proceedings' and reference to arbitration under, *inter alia*, section 6 of the Arbitration Act. The applicant had been served with a Third Party Notice to which it had made an appearance on 10.8.2001. However, the applicant did not file the application for stay until 11.10.2001.

The Court in this latter case held that the clear position was that if a party wishes to take advantage of an arbitration agreement under section 6(1) of the Arbitration Act, he was obliged to apply for a stay '**not later than the time when he**

(a) enters appearance; or
(b) files any pleadings; or
(c) takes any other steps in the proceedings.'

In the court's view, the above means that if a party takes any of the steps above without at the same time applying for a stay of proceedings, then s/he losses the right to subsequently make the application. The

[23] supra

[24] HCCC (Milimani) No. 904 of 2001

court in so holding upheld the decision in ***TM AM Constuction Group Africa case*** **(supra)** on the same point.

The learned Mbaluto J in the latter case reasoned that if the section were to be interpreted to mean that a party could file an appearance or take the two other steps and then wait for some time before applying for stay of proceedings, the phrase 'not later than the time he entered appearance or etc,' would be not only superfluous but also meaningless. In any case, the court found that in the instant case there was delay of more than 31 days after appearance had been made which situation in the court's view was not what was contemplated under Section 6 (1) of the Arbitration Act.

The matter of what time an application for stay must be lodged was settled in the recent case of ***Kenya Seed Co. Limited-v-Kenya Farmers Association Limited.***[25] Justice Visram upholding the TM AM Construction Case (supra) and finding that section 6 was not clear cut concluded that the correct position on the time to lodge an application was that:

> **"A party wishing for the proceedings to be stayed and the matter referred to arbitration under an arbitration agreement must apply not later than the time he enters appearance (if indeed he enters appearance) or not later than the time he files any pleadings (if he does not enter appearance) or not later than the time he takes any other steps in the proceedings (if he does not enter appearance or file any pleadings)."**

What if the party has indicated that it still intends to seek stay despite the act? For instance, if a party seeks leave to defend and stay of default judgement-is he to be taken as taking steps in the proceedings as preclude his/her entitlement to a stay? The Court of Appeal of England in ***Patel-v-Patel***[26] thinks not. What do you think?

[25] HCCC (Nairobi) No. 1218 of 2006

[26] [1998] 3 WLR 322

It is to be noted that an action to resist interim injunction is not a step in proceedings. Applications for interim applications are interlocutory proceedings whereas the steps proscribed have to taken in substantive proceedings.

Even where the stay is sought against a counterclaim or set off, the rule on prohibition to taking steps in proceedings still apply with equal force. So that the party seeking stay of the counterclaim must not have filed a defence/reply to the counterclaim or at least any pleading after the counterclaim. The applicant must also not have filed an application to strike out the counter-claim or taken any other steps in the proceedings.[27]

The court in the **Victoria Furniture Case** (supra) also grappled with the issue of whether stay of proceedings will be granted where a third party, not party to the arbitration agreement, is involved. In the case, the arbitration agreement was only applicable as against the Defendant and the third party to the exclusion of the Plaintiff.

The application for stay was opposed on the ground that the suit would ultimately, and in any event, have to be determined by the Court. The court upheld the opposition on the point finding that apart from the Defendant and the applicant, there was another party involved, namely the Plaintiff. The court reasoned that as such, whether or not either of the Defendant or applicant was liable, the matter will still have to come back to court for final adjudication as between either of them and the Plaintiff. The court further reasoned that the process of arbitration could only decide the issue of who, between the Defendant and the applicant was liable, but not the issue of liability to the defendant. The court also found that there were several questions of law to be resolved in the case.

The court then upheld as extant in matter the following grounds supplied in **Emden & Gills Building Contracts and Practice 7th Edition, at page 363** upon which a court may refuse to stay proceedings and refer a matter to arbitration:

1. **where there are questions of law involved;**

[27] Chappel-v-North [1891] 2 Q.B 252

2. **where there is multiplicity of proceedings and (it is necessary to avoid) inconsistent findings of facts;**

3. **where the arbitration is appropriate, (as was obviously the case in the matter) for only a part of the dispute.**

The court concluded that it would be a miscarriage of justice to parties if the proceedings were stayed and the matter referred to arbitration. In a word, the court's ruled that a stay may be refused where there are questions of law involved; where there is multiplicity of proceedings and (it is necessary to avoid) inconsistent findings of facts; and where the arbitration is appropriate, for only a part of the dispute e.g. in third party proceedings as was the case in the matter.

The position seems to be that where a third party is involved, the court may refuse to stay the proceedings as the case will only be appropriate for only a part of the dispute. It is noteworthy that the position in UK has changed and involvement of third party is no longer a reason to refuse stay.

What if the suit is brought by a claimant who is a pauper and can show the court that he is not in position to afford arbitration? Generally, the position in UK is that the poverty of the Defendant is not a ground for staying arbitration unless the same has been brought about by the breach of contract on part of the Defendant.[28]The court has been enjoined to take into account whether or not the Plaintiff would be unable to receive legal aid for arbitration proceedings.[29] In addition, the court may also consider taking into account the ability of the Plaintiff to fund the take off of the arbitration process.

There is also the issue of the contractual limitation period which may arise as a ground for stay or preliminary point. In ***Barlany Car Hire Services Limited-v-corporate Insurance Limited***[30], an application for stay pending reference to arbitration was accompanied by a request that filing of the Defence be stayed pending the determination by the court on a preliminary point of law whether the

[28] At least this was the position taken by the court in Fakes-v-Taylor Woodrow Construction Limited [1973] Q.B. 436

[29] Edwin Journeys-v-Thyssen (GB) Ltd [1991] 57 Build. L.R 116

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

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 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 then 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)***[31] where a clause to similar effect was upheld. The court quoted the following holding in that case with approval:

> **"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."**[32]

The court also 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 upheld the comments in 4th Edition of Halsbury Vol. 2 Para. 515 holding those words answered the Plaintiff's suggestion that the matter was governed by section 4 of the Limitation of action Act. The court was of the view that the section of the Act merely gives a maximum time limit within which a suit may be brought. Halsbury Para. 515 provide:

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[31] 1922 2 KB 797

[32] *Ibid.* page 810

"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."

2.2 INTERIM MEASURES OF PROTECTION

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 judgement; 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, it 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***[33]Ojwang J dealt with application for interim injunctive orders pending arbitration. The Defendant in the case had declined arbitration 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 on final matter so as to prevent appeals on arbitral rulings on

[33] HCCC No. 104 of 2004

applications. The rationale here is to prevent multiple applications, situations of delay occasioned by applications, or parties seeking to clog and/or stall arbitral proceedings by making frivolous applications under the section.

2.3 PROCEDURE FOR APPLICATIONS BEFORE ARBITRATION

The party seeking stay of legal proceedings and/or interim measures moves the court in the manner provided under rule 2 of the Arbitration Rules 1997. Rule 2 of the Arbitration Rules 1997 provides that an application under section 6 and 7 of the Act shall be made by summons in the suit. The chamber summons, as a matter of practice, is accompanied by a supporting affidavit usually annexing the arbitration agreement if the application is for a stay of the proceedings.[34]

Some judges are of the view that if you move the court using a wrong procedure the error is fatal to the application. So that in a case like if instead of a chamber summons one prefers a notice of motion, the application may be struck-out though there are conflicting decisions on this. In **James Muhando Mwangi-v-B.O.G Premier Academy & Another**[35] an application for stay of proceedings under section 6 of the Arbitration Act was opposed on the ground that, *inter alia*, it did not comply with the requirements of Rule 2 of the Arbitration Rules.

The argument in the case was that Rule 2 requires that an application under Section 6 (and 7) of the Arbitration Act be made by summons in the suit while the application was headed "Chamber Summons" but took the form of a Notice of Motion. The Respondent's Counsel was of the view that, that was a defect, which could not be cured by amendment and urged for the dismissal of the application. However, the court held that the chamber summons, though wrongly taking the form of a Notice of Motion, did not invalidate the application which the rules require to be made. The court reasoned that the defects manifested were in form only and not substance and the respondent was not prejudiced thereby.[36]

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[34] Arbitration Rules, 1997 provide that the Civil Procedure Rules apply where appropriate. There being no provision on whether a supporting affidavit or not in the rules, recourse is had to the Civil Procedure Rules on chamber summons. Order 50 R. 3 therefore applies..

[35] HCCC (Milimani) No. 78 of 2001

[36] The High Court here was following the decision of the Court of Appeal in **Boyes-v-Gathure (1969) E.A. 385** where the court held that use of the wrong procedure does not invalidate the proceedings unless the same goes to jurisdiction and/or it caused prejudice to the other party.

In **Nakumatt Holdings Limited-v-Kenya Wildlife Services**[37] the plaintiff was seeking orders to refer a dispute between it and the Defendant to arbitration and appointment of an arbitrator from the list of three availed to the court. The application did not disclose which Arbitration Act was being invoked nor did the title of the summons indicate under which rule the matter had been brought. On that basis, the Originating Summons was preliminarily objected as patently incompetent and sought to be dismissed. The learned judge upheld the objection holding that the application was patently defective and could not succeed. As a result, the Originating Summons was dismissed with costs.

The moral? To be on the safe side do not overlook such minor issues as ensuring that the heading indicates that the Arbitration Act 1995 is the applicable Act and indicating the rules under which the application is brought in the application.

Generally, there is no requirement that reference to arbitration have started before application for stay of proceedings. However, the Act allows a party to commence arbitral proceedings despite pendancy of stay of proceedings application. The position is that while the application for stay is pending, arbitration may still be commenced and an arbitral award made.[38] This provision appears justified given the not infrequent delay witnessed in our court system.

Can a party obtain interim anti-arbitration injunction to restrain the other party from commencing arbitration until the conclusion of the stay application?

3.0 THE ROLE OF THE COURT DURING ARBITRATION

The Arbitration Act makes provision for the following interventions by the High Court of Kenya during arbitral proceedings or at least after it becomes certain that the parties or one of them is decided on enforcing the arbitration agreement. There is a difference between the court's intervention measures that appear under this heading but strictly occur before commencement of arbitral proceedings and those classified under the previous heading as preceding arbitration. The pre-arbitration measures (those

[37] HCCC (Milimani) No. 1131 of 2001 (O.S.)

[38] Section 6(2) of the Act

discussed in the previous section) are basically preliminary to the arbitration while those placed under the present heading are largely facilitative of arbitration and/or reference thereof.

3.1 ROLE OF THE COURT IN APPOINTMENT OF ARBITRATORS

Generally, the arbitration agreement will specify the number of arbitrators and the mode of appointing the arbitral tribunal they would prefer to arbitrate their disputes.[39] There are several types of arbitral tribunals, the main ones being a sole arbitrator; a tribunal of two arbitrators, with an umpire in reserve; a tribunal of three arbitrators; a tribunal of more than three arbitrators; and an umpire.[40]

Subject to the arbitration agreement, the parties may agree on who is to arbitrate their dispute, even after dispute. In an arbitration with two arbitrators, each party shall appoint one arbitrator[41] and in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed.[42] Unless the parties otherwise agree, where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") -

(a) has indicated that he is unwilling to do so;

(b) fails to do so within the time allowed under the arbitration agreement; or

(c) 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),

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.[43]

If the party in default does not, within fourteen days after notice under subsection (3) has been given -

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[39] Section 11(1) and 12(2) of the Act. The 2009 Amending Act has introduced a new Sec. 12 (3) which provides that Where an arbitration agreement provides that the reference shall be to two arbitrators, then, unless a contrary intention is expressed in the agreement, the agreement is deemed to include a provision that the two arbitrators shall appoint a third arbitrator immediately after they are themselves appointed."

[40] 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

[41] Sec. 12 (2) (b) as amended by the 2009 Act.

[42] Sec. 12 (2) (c) *supra.*

[43] Sec. 12(3) *supra.*

(a) make the required appointment; and
(b) 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.[44]

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.[45] 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.[46] 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.[47] A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.[48]

As a matter of general rule, the courts assistance in appointment of arbitral tribunal is required in instances discussed above. Section 12 of the Arbitration Act 1995 stipulates the extent of the courts' power in making appointments of arbitral tribunals in Kenya. It is worth noting that the jurisdiction to make appointment to arbitral tribunal is vested exclusively in the High Court of Kenya. The Act premiers by acknowledging the parties autonomy to agree on who or how to appoint the arbitral tribunal to arbitrate between them. Thus the court appointment has provided for a default arrangement if efforts by the parties to appoint a tribunal encounter a stalemate. The High Court will be faced with diverse situations where it is required to make such appointments. These include where there is no agreement on appointment between the parties, where there is failure to appoint a sole arbitrator, where there is failure to appoint one of the two arbitrators, where there is failure by the two arbitrators to appoint the third

[44] Sec. 12(4) *supra.*

[45] Sec. 12 (5) *supra*

[46] Sec. 12 (6) *supra.*

[47] Sec. 12 (7) *supra.*

[48] Sec. 12 (8) *supra.*

arbitrator, where the parties had agreed that an appointing authority undertake appointment and the same is in default and finally to fill a vacancy. [49]

The High Court is enjoined in making such appointment to consider the qualifications required of the arbitrator by the agreement of the parties.[50] For instance, in a building arbitration, the court may consider appointing an architect as an arbitrator especially where the parties had agreed that an arbitrator be a distinguished person in the construction industry.

The court is also bound to make sure it secures appointment of independent and impartial tribunal.[51] Considerations of impartiality will depend on the circumstances of the dispute such that where the arbitral tribunal is proposed by one party and the other party has entered appearance in the appointment proceedings, the court may give audience to that other party either to raise objections against appointment of the proposed arbitrator(s) and/or to propose alternative ones.

The court is also to take into account the advisability of appointing an arbitrator of an arbitrator of a nationality other than those of the parties.[52] 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. The decision of the High Court shall not be subject to appeal.

3.2 CHALLENGING ARBITRATOR(S) THROUGH COURT

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 agree 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, to

[49] *Ibid.*

[50] Section 12(9) of the Act as amended by the 2009 amending Act.

[51] *Ibid.*

[52] Ibid.

determine the matter.[53] The High court may confirm the rejection of the challenge or may uphold the challenge and remove the arbitrator.[54]

The decision of the High Court on the challenge shall be final and is not subject to appeal.[55] Where an arbitrator is removed by the High Court under this section, the court may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.[56] While an application under subsection (3) 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.[57]

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 or "*if he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so*".[58] 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.[59]

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 act without undue delay. In

[53] Section 14 (3) of the Amending Act. Under Sec. 14 (4) the arbitrator who has been challenged shall be entitled to appear and heard before the High Court determines the application.

[54] Sec. 14 (5) of the Amending Act.

[55] Sec. 14 (6) *supra*.

[56] Sec. 14 (7) *supra.*

[57] Sec. 14 (8) *supra.*

[58] See Sec. 9 of the Amending Act.

[59] Section 13 of the Act

alternative, where an arbitrator resigns or parties agree to terminate his/her mandate, his office shall terminate. But in the instances where the above grounds are contested, recourse is to be heard at the High Court upon application of a party for a decision on the termination. Such decision shall be final and not appeal able. 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. 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.[60]

Thus as a general rule, an 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.

3.3 DETERMINING THE ARBITRAL TRIBUNAL'S JURISDICTION

As per the doctrine of "*kompetenz kompetenz* ", the arbitral tribunal may rule on its own jurisdiction. Such ruling may encompass matters including existence or validity of the arbitration agreement. [61] 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.[62]

[60] Section 15 of the Act

[61] Section 17 (1) of the Act

[62] Section 17 (4) of the Act

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.[63] 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.[64] However, the arbitral tribunal has the discretion to admit a later plea where it considers the delay justified.[65]

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.[66] 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 application must be made within 30 days of notice of the award[67] and the decision of the High Court shall be final.[68] 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.[69]

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.[70] 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.[71]

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[63] Section 17 (2) of the Act

[64] Section 17 (3) of the Act

[65] Section 17 (4) of the Act

[66] Section 17 (5) of the Act

[67] Section 17 (6) of the Act

[68] Section 17 (7) of the Act

[69] Section 17 (8) of the Act as amended by the Act of 2009.

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

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

3.4 INTERIM ORDERS OF PROTECTION DURING ARBITRATION

Save where parties have otherwise agreed, the arbitral tribunal may at request 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 of the dispute.[72] In that connection, the tribunal may require a party to provide security for the measure requested for [73]or order any party to provide security in respect of any claim or any amount in dispute[74] or order a claimant to provide security for costs.[75]

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.[76] 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 the equivalent the one 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.[77]

3.5 ASSISTING IN TAKING EVIDENCE FOR USE IN ARBITRATION

The High court has power to take evidence for use at the arbitral hearing. This happens upon request of either a party or arbitral tribunal. The High Court has discretion to execute the request within its competence and its rules on taking evidence. The High Court's assistance in this instance includes issuing summons to the witness to secure attendance of the witness if the witness is within Kenya and refuses to attend and give evidence. If such a witness refuses to attend even after such summons, he will be liable to be punished for contempt of court. The High Court may also order examination of a witness on oath before an officer of the court or any other officer. Where the witness is outside the jurisdiction,

[72] Section 18 (1) (a) of the Act as amended by the Act of 2009.

[73] *Ibid.*

[74] Sec. 18 (1) (b).

[75] Sec. 18 (1) (c).

[76] Section 18 (2) of the Act

[77] Section 18 (3) of the Act

the court may order the issue of order for taking of evidence by commission or request for examination of a witness outside the jurisdiction.[78]

3.6 DETERMINATION OF A QUESTION OF LAW

The parties to a domestic arbitration may agree that application be made by a party to the High Court for determination of questions of law arising in arbitration.[79] The parties may also agree that appeal be available to aggrieved party on questions of law arising out of the award. Such appeal shall be to the High Court.[80]

On such application or appeal the High Court has two options available to it. It can either determine the question of law arising or confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration.[81] Where another tribunal has been appointed, remittance of the matter to this latter arbitral tribunal is permitted.[82]

The decision of the High Court is subject to appeal to the Court of Appeal if the following two conditions being met. The parties must have agreed to appeal and the High Court grants leave to appeal.[83] A party aggrieved by the High Court's refusal of leave to appeal may seek special leave to appeal from the Court of Appeal.[84] The court appeal has jurisdiction on such appeal to exercise any of the powers exercisable by the High Court on application for determination of questions of law in arbitration.[85]

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[78] Section 28 of the Act

[79] Section 39 of the Act

[80] *Ibid.*

[81] *Ibid.*

[82] *Ibid.*

[83] Section 39(3) of the Act

[84] *Ibid.*

[85] Section 39 (3) of the Act

The Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum Limited***[86] held that public policy considerations may endure in favour of granting leave to appeal just as they would to discourage it. In the case, leave to appeal on a question of law was denied on ground of public policy. The court stated:

> **"We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in this matter were conducted underscores that policy….We do not feel compelled Therefore to extend the agony of this litigation on account of the issues raised by the Applicant."**

3.7 PROCEDURE FOR COURT APPLICATION DURING ARBITRATION

The procedure for applications during arbitration is provided for under Rule 3 of the Arbitration Rules, 1997. The same are in Originating Summons supported by an affidavit. This is because originating summons is the method best suited as it initiates a suit as well as serve as an application. The summons must be served on all parties before the hearing date indicated on it.[87] Any other application subsequent to the originating summons and pursuant to the same is to be by way of chamber summons, which must be served seven days clear of the hearing date indicated on them.[88]

4.0 ROLE OF THE COURT AFTER ARBITRATION

This role involves mainly how the court may intervene after grant of award, the role of the court after arbitration involves essentially setting aside, recognition and/or enforcement of arbitral awards.

4.1 SETTING ASIDE ARBITRAL AWARD

This is the only recourse in the High Court against an arbitral award permitted by the Arbitration Act, 1995.[89] The instances when the High court may set aside an arbitral award are specifically stipulated in the act.[90] First, the arbitral award may be set aside where it is proved that a party to the arbitration

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[86] Civil Appeal (Nairobi) No. 57 of 2006

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

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

[89] Section 35(1) of the Act

[90] Section 35(2) of the Act

agreement was under incapacity.[91] When the presence of such incapacity is material is not stipulated. However, it seems that this ground applies where it is shown that the arbitration agreement is invalid as a party to it lacked capacity to enter it. The condition will be met where it can be shown that a party was a minor, or mentally incapacitated, insolvent or even in case of a company unincorporated at the time it purportedly entered the arbitration agreement.

The second ground under which an arbitral award may be set aside is invalidity of the arbitration agreement under the laws governing the dispute.[92] The parties are free to agree on the law that will govern the arbitration in default of which arbitration shall be governed by Kenyan laws. Thus upon proof that the arbitration agreement is invalid under the applicable law, the High Court may set aside the arbitral award made pursuant to a reference under the agreement.

A further ground for setting aside arbitral award is if proper notice of appointment of an arbitrator or arbitral proceedings was not given.[93] The ground will have been met if the applicant can show that s/he was unable to present his case for any other reason.

The High Court may also set aside the award if it deals with a dispute not contemplated by or falling within scope of the terms of reference to the arbitration. Similarly, an award may be set aside if it contains decision matters beyond the scope of the arbitration reference. But if the decision on the matters referred to arbitration can be separated from that on extraneous ones, on the latter part of the award may be set aside.[94]

In addition, the fact that the composition of the arbitral tribunal or the procedure during the proceedings was not as per the parties' agreement furnish a ground for setting aside arbitral awards. However, if the

[91] *Ibid.*

[92] *Ibid.*

[93] *Ibid.*

[94] *Ibid.*

agreement was in conflict with a provision of the Act which the parties are not allowed to derogate from or there was no agreement on derogation, then the award shall not be set aside.[95]

An arbitral award may also be set aside where the High Court finds that the dispute is incapable of settlement by arbitration under the law of Kenya. The court will also set aside an award that is in conflict with public policy of Kenya.[96] These were the grounds relied upon in ***Macco Systems India PVT Limited-v-Kenya Finance Bank Limited***.[97]

Ringera J (as he then was), after examining several authorities, in **Christ For All Nationals vs. Apollo Insurance Co. Ltd**[98] and formed the view that: -

> **"Although public policy is a most broad concept incapable of precise definition…. . an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:**
>
> **a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten or**
> **b) inimical to the national interest of Kenya or**
> **c) contrary to justice and morality."**

An arbitral award can also be set aside where the making of the award was induced or affected by fraud, bribery, undue influence or corruption.[99]

The law requires that an application for setting aside an arbitral award be made within three months of receipt of the award by the applicant. If the application is made pursuant to an application for recognition of award the same must be within 3 months of the award.[100]

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[95] *Ibid.*

[96] Section 35 (2) (b) of the Act

[97] HCCC (Milimani) No. 173 of 1999

[98] [2002] 2 EA 366

[99] Sec 35 (2) (v).

[100] Section 35(3) of the Act

A party to the arbitral proceedings whose award is sought to be set aside may apply suspension of the setting-aside proceedings. The High court may exercise the discretion to suspend such proceedings where it deems the same appropriate. A suspension shall be for such determined time and for the purpose of giving the arbitral tribunal an opportunity to resume the arbitral proceedings or take a remedial action for purging the grounds for setting aside the arbitral award.[101]

4.2 RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

Generally, an arbitral award is recognised as binding regardless of the state in which it was made. Thus on application to High Court, a domestic arbitral award shall be enforced subject to relevant provisions of the Arbitration Act, 1995.[102] An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.[103] Any party may apply for enforcement of arbitral award.[104] But often application for enforcement is made by the party in whose favour the arbitral award was made and the other party will reply to the application.

The law requires that the High Court be furnished with a duly authenticated original arbitral award or duly certified copy thereof.[105] In addition, the parties should supply the original arbitration agreement or a certified copy of it to the superior court. However, the High Court may order otherwise where a party seek indulgency on compliance with these requirements to supply those documents. The arbitration award furnished must be in English and if the original was not English, the law requires a duly certified translation to be availed to the court.[106]

[101] Section 35 (4) of the Act

[102] Section 36 (1) of the Act

[103] Sec. 36 (2) of the Act as amended by the Act of 2009.

[104] *Ibid.*

[105] *Ibid.*

[106] *Ibid.*

In ***Kundan Singh Construction Ltd-v-Kenya Ports Authority***[107]an application for recognition and enforcement of an arbitral award was struck out for failure to comply with section 36(2) of the Arbitration Act. The judge found that there was not a duly authenticated original arbitral award or a duly certified copy of it. Rather, he found that what was on court record were photocopies of the arbitral award and arbitration agreement contrary to the requirements of section 36(2) of the Act which could only be waived upon application which had not been made.

Section 37 provides the ground on which the High Court may refuse to recognise an arbitral award irrespective of the state of origin. At the request of the party against whom the award is sought to be invoked the court refuse to enforce award if the party proves any of the following: that the party to the agreement was under incapacity, that the arbitration agreement is not valid under the applicable law, that proper notice of appointment or arbitral award was not given the party or otherwise the party was unable to present his case, that the award does not fall within or is incurably beyond the scope of the reference to the arbitration, that the composition of the arbitral tribunal was not as per the parties agreement or was afoul the law applicable to the arbitration or the making of the award was induced or affected by fraud, bribery, undue influence or corruption. A proof that the arbitral award has not yet become binding on the parties or has been set aside or suspended is also a ground for refusal to enforce the award, at least temporarily.[108]

The High court may also, on its own motion or upon request by a party, refuse to enforce an arbitral award on the grounds provided for in section 37 (1) (b) of the Act. Here, the court has to find that subject matter of the dispute is not referable to arbitration under the laws of Kenya. Whether or not the matter was capable of settlement by arbitration in the country of origin of the award is not a valid consideration of the court. In alternative, the court will refuse to enforce an arbitral award where its recognition or enforcement would be contrary to the public policy in Kenya. These grounds are in recognition of the court's role as custodian of the laws and public interest in Kenya and the resultant duty on the courts to uphold the same.[109]

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[107] HCCC(Milimani) No. 794 of 2003

[108] Section 37 (1) (a) of the Act

[109] Section 37 (1) (b) of the Act

The law allows the High Court the discretion on proper occasions to adjourn its decision on refusal to recognise an arbitral award. The discretion is applicable where an application for setting aside or suspension has been made in a competent court in the state of origin of the arbitral award. The court may also on application of the party seeking recognition or enforcement order the other party to provide appropriate security before embarking on the application to consider grounds adduced for refusal to enforce an arbitration award.[110]

4.3 PROCEDURE FOR COURT INTERVENTION AFTER AWARD

Any application after the arbitral award is preceded by filling of the award. If an application had been made during arbitration, the award is to be filed under the same cause and is therefore not given a new number. In any other case, the award after filing is given a serial number at the civil registry. The party filing the award must give notice to all concerned parties of the filing of the award indicating the date thereof, the cause number and the registry of filing. As proof of service of the notice, the party is required to file an affidavit of service.[111]

Generally, all applications subsequent to the filing of the award must be served seven days clear of the hearing date. If no application to set aside an arbitral award has been made according to section 35 of the Act i.e. within three months after receipt of the award by the parties, the party filing may apply *ex parte* by summons for leave to enforce the award as a decree.[112]

An application to set aside the arbitral award is by way of summons[113] supported by an affidavit specifying the grounds relied upon. The application and the affidavit must be served on the other party and the arbitrator.

An application for recognition and enforcement of the award is by summons in Chambers.[114] The Civil Procedure Rules apply in such application as far as appropriate. Generally, the Civil Procedure Rules

[110] Section 37 (2) of the Act

[111] Rule 5 of the Arbitration Rules, 1997.

[112] Rule 4 of the Arbitration Rules, 1997

[113] *Ibid*. Rule 4(2)

apply to all proceedings under the Arbitration Act subject to the provisions of the Arbitration Rules, 1997 as to appropriateness of their application.[115]

5.0 COURT INTERVENTION IN ARBITRATION: FRIEND OR FOE?

In determining whether court intervention is friend or foe of arbitration, due appreciation must be had of the factors upon which the issue depends. In essence, the effect of court intervention on arbitral proceedings depends on three critical factors, namely the provisions of the law on court intervention, the general policy and attitude of the court towards its role in arbitration and arbitration generally and, finally the approach of lawyers and their clients on court intervention.

The legal provisions on court intervention are mainly to be found in the arbitration Act, 1995 and the rules there under (discussed extensively above) and the Civil Procedure Act (section 59) and the Civil Procedure Rules. There are chances of conflict of rules and uncertainty in the laws as to court intervention especially given the fact that there is not a one-stop source of law on the matter. However, all the instances of court intervention provided for in the legal framework as demonstrated above are justified and necessary.

For instance, stay of proceedings application is meant to give effect to the arbitration agreement where one party has filed a suit in court in breach of the agreement. The interim measures of protection before arbitration offer an opportunity for a party to an arbitration agreement to take measures to secure the status *quo* of the subject matter of the intended arbitration. This is clearly an appreciation of the reality that reference to arbitration to arbitration does not happen overnight.

The court intervention measures during arbitration as provided for under the law are similarly based on demonstrable logic and rationalization. The provisions on court involvement in appointment of arbitral tribunal offers a default measure where parties' efforts to pursue the agreed modes of appointment have hit a dead end. On its part the opportunity to challenge arbitrators, just like the opportunity to challenge the bench in civil proceedings, is meant to ensure that justice is not only done but seen to be done. It also

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[114] *Ibid*. Rule 9

[115] *Ibid*. Rule 11

avoids the likelihood of the disgruntled party opting to later challenge the arbitral award on ground he could have raised as preliminary matters as that would imply extra expenses and delay in holding fresh arbitration proceedings if the challenge succeeds. It is universally accepted that jurisdiction is everything[116] and a party should thus not be compelled to put up with an award of a tribunal whose jurisdiction he would rather challenge whether on basis of substance or procedure. This is the basis for the provisions on challenging the jurisdiction of the arbitral tribunal.

The court is also permitted opportunity to facilitate and aid arbitration especially in matters that, as an emanation of a private arrangement, the arbitral tribunal cannot undertake and or purport to compel. The provisions for assisting in collecting evidence, assisting in enforcing interim measures of protection and interpreting questions of law fall under this category. In fact, even in normal civil proceedings, parties are entitled to appeal on questions of law and as such, except on express agreement, parties to an arbitration agreement cannot be said to waive that right merely by agreeing to arbitrate their disputes.

The opportunities for court intervention after the award are even more justified and necessary. The need to set aside arbitral awards that visit manifest injustices on a party cannot be admitted to debate. In the same breath, arbitral awards being a result of private contractual arrangements cannot attain immediate force of law until they are adopted by the court. The court, being the custodian of public policy in Kenya, cannot reasonably be expected to perform a mere rubber-stamping role. The High Court is thus afforded an opportunity to scrutinise the arbitral award. No doubt this also helps secure the party adversely affected by the arbitral award a right to be heard in the interest of natural justice.

But while the instances of court intervention are rationally justified, the provisions relating to them are far from being perfect and unambiguous. For instance, the provisions on stay of proceedings are beset with unnecessary conditions that even a well-meaning court is disadvantaged in expediting the application especially when the Plaintiff is not receptive. For instance, nothing a judge can do when an application for stay of proceedings is inadvertently lodged a day after entry of appearance except to dismiss it-there is no room for equity when the law is strict in its stipulations.

[116] Nyarangi, JA in Owners' of the Motor Vessel "Lillian S"-v-Caltex Oil Kenya Ltd. [1989] KLR 1

The point is that the law on court intervention is in dire need of reforms especially on matters to do with fine details. The procedure for applying for court interventions is very strict as to afford lawyers intending to delay arbitration proceedings room for manoeuvres. There is no reason why the procedure for such applications cannot be relaxed to ensure that it secures justice for the opposite party without being tyrannical and prone to abuse. For example, it could help providing that applications under the Arbitration Act be not dismissed for adopting wrong procedure and that the courts endeavour to uphold them with due regard to the justice and fairness to the parties need to avoid delays in arbitration.[117] The law may also be amended to provide that arbitration applications be heard on priority basis.

The uncertainty of the law has yielded emergency of constitutional applications in arbitration proceedings. The argument in support is largely that the legal framework on arbitration cannot reasonably be interpreted as ousting the inherent and constitutional rights of parties to fair hearing and natural justice. The counter argument is that arbitral proceedings are private and contractual arrangement where a party by choice opts to contract to sort out disputes outside the public domain. Thus, by extension, the parties are taken to have waived access to public remedies afforded under such vehicles as judicial review and constitutional applications. But this argument is clearly out of ignorance of the limitation of freedom to contract as one cannot contract away his/her basic rights.

The other argument offered in support by antagonists of constitutional and judicial review applications in arbitration is that there is an adequate mechanism offered under the law and one should exhaust that first. But rights are, by nature, matters urgent and emotional and remedies meant to enforce are permitted to be invoked despite other alternatives.

When a party feels his/her constitutional rights are being infringed, there is no denying that the first impulse is to doubt the arbitrator's jurisdiction. To make it compulsory that s/he first submits to the jurisdiction of the arbitral tribunal before he can be entertained in a constitutional court is unconscionable. If anything, no party would admit to arbitration knowing that the arbitral process will infringe his/her right to fair trial. If arbitration is to be made the choice mode of dispute resolution, the law must afford parties flexibility to make it fair and just process. In fact, the possibility of a

[117] This has been done for matters under the Children Act, if a demonstration that it is doable is needed!

constitutional application or judicial review, like the sword of Damocles, can help keep the arbitral tribunal guarded all for the best for the parties and arbitration in Kenya.

The best that can be done is to offer optional but efficient and appealing alternatives to constitutional application and judicial review and leave it to the choice of the aggrieved party. In addition, constitutional applications could be expedited make them more expedient and simple as possible. At least, there is no reason why this is not possible given that hardly is *viva voce* evidence adduced in such application. If that was done, the argument against constitutional and judicial review application in arbitration i.e. that they delay the process will be a thing of the past. The above measures are better than limiting the rights of parties in arbitral proceedings to recourse to the constitution court and judicial review applications. This latter measure is wont to set a bad precedent that might serve to affect the general attitude to arbitration and even serve as an impediment to parties genuinely out to secure their rights.

With regard to the court's approach to intervention in arbitration, the same has considerably changed from that of indifference to perception of the process as facilitative of arbitration. The sentiments of the court of appeal in the ***Epco case*** (supra) and Kenya Shell Case (also supra) are indicative of this change of heart. The courts now see arbitration as an opportunity to wrestle backlog of cases and yield justice on parties' terms. If only this positive attitude could be coupled with necessary reforms on the law proposed below much ground would be covered in making court intervention a friend, rather than foe, of arbitration.

There is also need to curb lawyers and arbitral parties bent on abusing court intervention to clog the arbitration process. The problem with the adversarial systems is that it often forces the court to stand aside and watch parties obviate each other's cause of action with all imaginable tricks like a lame duck. The few remedies fashioned to prevent abuse of court process do not offer much help especially when lawyers get into the fray with their bagful of tricks-and delay is the darling trick of most lawyers! Soon, what was a simple issue is reduced to complex lawyers' business. The court's interventions in arbitration are not immune to lawyers out to abuse the process of the court. It emerges that hoping to cure the abuse of arbitral process only by addressing the problem in arbitral proceedings is like proposing to cut a malignant finger when the whole blood system is poisoned.

Arbitration is part of the justice system of Kenya and the fates of each of the two are inseparably tied together and interdependent. The general duty of advocates as officers of the court needs to be addressed. So is counsel's allegiance and compliance to clients' whims. The two are matters belonging to the realm of professional ethics. Undoubtedly, they go to the training and orientation of the lawyers. Local law schools will do better to impress upon their students the role of ADR and arbitration in general and the fact that two are not 'mechanisms designed by non-legal professionals to drive legal practitioners out of business.' Also, legal professional organizations like Law Society of Kenya and affiliate bodies like Chartered Institute of Arbitrators-Kenya branch need to adequately orient their members on ADR and adopt specific policies for the members to follow when involved in litigation affecting arbitration.

The foregoing discussion renders it clear that court intervention in Kenya cannot be dismissed as detrimental to the ideals of arbitration. No doubt, the role of the court so far exonerates it from being a foe of the arbitral process in Kenya. But it also leaves a lot to be desired especially due to the constrictions that are imposed by the provisions of the Arbitration Act that the courts are called to apply in their intervention in arbitration. Thus, many reforms are needed if role of the court is to become facilitative of arbitration and to shake off such qualities as we have seen above which unnecessarily render arbitration inexpedient and cumbersome.

6.0 REFORMING THE ROLE OF THE COURT IN ARBITRATION IN KENYA

The reforms herein are based on the discussion above. On its part, the Arbitration (Amendment) Act, 2009[118] (hereinafter 'the Amendment Act') introduces a number of reforms on the Arbitration Act, 1995 that go to the core of the role of the Court in Arbitration Proceedings. The objectives of the amendments are clearly noble and far reaching.

The Amendment Act, *inter alia*, aims to make further provision as to the time within which an application to stay legal proceedings, provide for the appointment of a chairman in relation to an arbitration conducted by two or more arbitrators, provide for a right to challenge an arbitrator on the ground of physical or mental unfitness, permit an arbitrator to resign his appointment as arbitrator and

[118] The Amendment Act is a result of joint efforts by the Law Reform Commission, the Chartered Institute of Arbitrators-Kenya Branch and other stakeholders

permit the High Court to exculpate such an arbitrator from liability.[119] In addition, the amendments are aimed at limiting the right of appeal from the High Court on a point of law, make further provision for the expedition of arbitration proceedings and the obligations of parties and the powers of arbitrators, allow an arbitrator to request evidence to be given on oath and make other amendments of a minor character for the better operation of the law.[120]

Firstly, the provisions on the time for applying for stay of proceedings have been amended in a bid to render them more certain. The Amendment Act provides that the application for stay be made when a party enters appearance or takes the appropriate procedural step to acknowledge the legal proceedings against that party. The effect of this amendment is that it makes it compulsory for a party to enter appearance to be entitled to application for stay. However, it fails to the change the *status quo* obtaining as an application will still have to be made 'when a party enters appearance'.

The clause on the other alternative i.e. 'takes the appropriate procedural step to acknowledge the legal proceedings against that party' will likely be interpreted by courts to apply only where entry of appearance does not apply. The best provision would be that contained in the Repealed Arbitration Act, Cap. 49 i.e. 'any time after appearance or when the party otherwise acknowledges the claim against him."[121] A proviso that, on application, the court may extend the time for making application despite delay upon citing the reasons and finding that it will not unduly prejudice the plaintiff should also be added.

The strict condition for grant of stay that there should be a dispute between the parties with regard to matters agreed to be referred to arbitration makes proceedings unduly cumbersome as it shifts the burden of proof to the applicant for stay.[122] That the applicant can prove that the matter is the subject of an arbitration agreement should be enough to shift the burden to the party opposing the application to

[119] Wako, S.A, Memorandum of objects and Reasons of Arbitration Bill, 2007

[120] *Ibid.*

[121] Section 6 of the Repealed Arbitration Act, Cap. 49 of the Laws of Kenya

[122] The Arbitration (Amendment Act) 2009 does not amend section 6(1) (b) which engenders this requirement.

show that either there is no dispute or the instant dispute is not one of those contemplated by the arbitration agreement for reference to arbitration.

The Amendment Act provides that upon application for stay, the proceedings sought to be stayed be put on hold until the ruling on the application.[123] The strict implication of ***Scott & Avery*** clauses is exempted where the court refuses stay or proceedings as is the case in United Kingdom.[124] This is meant to ensure that a party can launch a suit despite the fact that arbitration is not possible. There is need to also make provisions for instances where the clause in question provides for reference to arbitration only after exhaustion of other dispute resolution measures e.g. as is the case with Alternative Dispute Resolution clause.[125]

The amendments on appointment in the Amendment Act make provisions for appointment of chairman (chairperson) and a tribunal of two arbitrators. In addition, major amendments have been introduced with regard to the grounds of challenge of arbitrators. The physical and mental incapacity of an arbitrator or justifiable doubt of the same is made a ground for challenge. The High Court is restricted in the instance of challenge of an arbitrator to either uphold or reject such a challenge. The High Court is also to rule on entitlement to fees and expenses of the arbitrator upon removal following a challenge.[126]

The amendments also seek to bland the effect of continuation of arbitration during a challenge as currently provided in the arbitration Act, 1995 and provide that an arbitration award shall be void if the application is successful.[127]

The Amending Act also makes provisions for what happens when an arbitrator withdraws. S/he is to apply to High Court for decision on relief for liability incurred by him/her and fees and expenses or

[123] Sec. 6 (2) of the Amendment Act.

[124] Section 9(5) of the Arbitration Act 1996 of UK

[125] See Ibid. Section 9 of the UK Act

[126] Sec. 16A of the Amending Act.

[127] Sec. 14(8) *supra.*

repayment of the same. The court is bound to satisfy itself on the reasonableness or otherwise of the withdrawal before granting relief to the arbitrator.[128]

The Amending Act also introduces immunity of an arbitrator and his/her employees from liability for anything done or omitted during the arbitration.[129] But the same has to have been done in good faith in discharge or purported discharge of the arbitrator's office. The difference between the immunity proposed under the Amending Act and that existing in the UK is on whom the burden of proof is placed. In the Amending Act, it is not clear who is to show that the acts sought to be immunised from liability were done in good or bad faith. In the UK however, the party seeking to prove that the arbitrator is liable bears the responsibility of proving that the acts complained of were done in bad faith. In any case, the amendments do not cover any liability that may be incurred by reason of the arbitrator's withdrawal from office and a suit may be launched in that regard.

The interim powers of the arbitrators and, by extension, the High Court, during arbitration have been expanded in the Amending Act to include orders for party to provide security in respect of claim or amount in dispute or to provide security for costs.[130] This is in recognition of the fact that arbitration tribunals have to meet commercial requirements of expediency of decisions and to avoid frivolous claims and defence. But interim orders have been relegated in that they are not to be construed as awards and therefore the principles of recognition and enforcement of awards are not to apply to them. This helps save time as the parties will be limited in their ability to clog arbitration with unnecessary and indirect challenges to interim orders through the channels provided for challenging arbitral awards.

The amendments seek to enjoin parties to arbitration to do all things necessary for proper and expeditious conduct of the arbitral proceedings.[131] But what is proper is not necessarily in the interest of expediency nor does it necessarily yield just results. The word 'proper' is clearly amenable to many meanings and could easily become a versatile ground for extraneous applications.

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[128] *Supra,* note 125.

[129] Sec. 16B of the Amending Act.

[130] Sec. 18 (1) (a), (b) and (c).

[131] Sec. 19A of the Amending Act.

Beyond the amendments contained in Amending Act, there are more reforms that are needed to our legal framework to streamline the role of the court in arbitration in Kenya. There is, for instance, need to incorporate the law regulating arbitration into an omnibus Act. There is also need to revaluate the provisions concurrent arbitral and court proceedings and cater for consolidation of proceedings where necessary. The powers of the court in facilitating and aiding arbitration proceedings need to be clearly stipulated. The effect of a court order admitting challenges to enforcement of arbitral award is also not very clear.

There is undue constriction on the power to appeal from interlocutory orders and even arbitral awards. This unnecessarily limits growth in arbitration jurisprudence in Kenya and makes arbitration less appealing choices for contracting parties. There is, therefore, need for amendment to permit appeal on agreement between parties and with leave of the court. There is also no reason why the bulk of jurisdiction on arbitration matters should be limited only to the High Court. Presently, the parties are constrained to the extent that where the value of some of the dispute does not merit a suit in the High Court they opt not to seek court intervention. It would be better if a graduated system just like in civil litigation was worked out for determining jurisdiction depending on the value of the subject-matter. If anything, the costs of litigation in High Court are higher compared to those of litigation in the lower courts and the High Court is not always in the vicinity of the parties except for those in the urban areas.

7.0 CONCLUSION

As a conclusion, it suffices to quote fragments of the joint judgement of their Lordships the Judges of the Court of Appeal (Omolo, JA, Waki, JA and Onyango-Otieno, JA) in ***Kenya Shell Limited v Kobil Petroleum Limited*** (supra) which sums the ideal policy for courts in intervening in Arbitration in Kenya:

> **"Arbitration is one of several dispute resolution methods that parties may choose to adopt outside the courts in this country. The parties may either opt for it in the course of litigation under *Order XLV* of the *Civil Procedure Rules* or provide for it in contractual obligations in which event the *Arbitration Act*, *Act no. 4* of *1995* (the "*Act*") would apply and the courts take a back seat. …The [Arbitration] Act, which came into operation on 2nd**

January, 1996, and the rules thereunder, repealed and replaced *Chapter 49* Laws of Kenya, and the rules thereunder, which had governed arbitration matters since 1968. A comparison of the two pieces of legislation underscores an important message introduced by the latter Act: the finality of disputes and a severe limitation of access to the courts. *Sections 6, 10, 12, 15, 17, 18, 28, 35* and *39* of the Act are particularly relevant in that regard. The message, we think, is a pointer to the public policy the country takes at this stage in its development. …We think, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings … underscores that policy.