Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of U.K; Its Development and Lessons for Kenya[1]

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Abstract

In this paper the writer examines the key provisions of the Housing Grants, Construction and Regeneration Act of the United Kingdom, which is the statute that governs construction adjudication *inter alia* in the UK. The principles emerging from case law are identified and discussed. Kenya does not yet have an Act dealing with Construction Adjudication and parties rely on the Construction Adjudication Rules framed by the Chartered Institute of Arbitrators. The legal framework governing construction contracts in Kenya faces many challenges. The UK experience offers valuable lessons for Kenyans and the emerging principles can be used to inform the future Act of Parliament dealing with construction adjudication. These experiences are thus highlighted and briefly discussed. The paper, it is hoped, provides food for thought in the subject area and can add value to the Alternative Dispute Resolution (ADR) discourse.

1.0 Background

The Housing Grants, Construction, and Regeneration Act 1996(HGCR Act) is a UK Act passed by the parliament in July 1996 and came to force in 1 May 1998. It is admittedly 'a milestone in the history of English legislations' in that it is the first to recommend to contracting parties to include in their contracts provisions for adjudication of disputes as laid down in the Act. As per the Act, if a contract does not so provide, either party will still have the right to refer any dispute to adjudication in accordance with the provisions of the Act. This is to be done in accordance with the detailed procedures provided for in the Scheme for construction contracts (the Scheme).

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The Act was enacted to, *inter alia*, regulate matters touching on construction contracts and architectural work including dispute resolution in construction industry. In essence, the Act is landmark in that it restricts the common law principle of freedom of parties to contract. This reality was emphatically driven home in the 2000 case of **Christiani & Nelson Limited versus The Lowry Centre Development Co. Ltd** (unreported). In the case, it was held that parties to a contract could not contract out of the terms of the Act.

The objective of the HGCR Act was articulated in the case of **Macob Civil Engineering Ltd-v-Morrison Construction Ltd** by Dyson J. in the following passage:

> "The intention of the Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement."[3]

2.0 An Overview of Provisions of the HGCR Act on Adjudication

HGCR Act does not deal with matters to do with construction only. Rather, it is an omnibus Act, as its long title clearly indicates, and only part two of it contains the construction contract and adjudication provisions. In particular, Part II of the Act covers the following key areas:

(i) Definition of construction contract at ss. 104-107
(ii) The provision for adjudication at s. 108
(iii) Provisions concerning payments at ss. 109-113
(iv) Supplementary provisions at ss. 114-117

2.1 Definition of 'construction contract'

The act defines a 'construction contract' in s.104 to cover a wide range of contracts which relate to 'construction operations' as defined in the Act. This wide definition covers all construction contracts including main contracts, subcontracts, labour-only contracts and consultancy contracts. However, the Act excludes employment contracts and further provides that where a contract includes both construction and non-construction operations, then the Act only applies to the construction part of the contract.

[3] Macob Civil Engineering Limited-v-Morrisson Construction Limited [1999] Build. L.R. 93.

The Act, obviously, does not have retrospective application and only applies to contracts which were entered into after the commencement of part two of the Act, that is, 1st May, 1998. Section 104(6) (b) defines the Act to apply to construction operations in England, Wales or Scotland. In an unprecedented move, s.104 (7) provides that the Act is applicable to any contract whether or not the law of England and Wales or Scotland is otherwise the applicable law in relation to the contract in question. In a word, the Act is framed such that the party with the superior bargaining power cannot compel the other party to contract the Act's provisions away.

In the recent case of **Trustees of the Stratfield Saye Estate vs. AHL Construction Ltd** (unreported), the court considered the requirement that the terms of construction contract be in writing. The case clarified that only the express terms of a construction contract need be in writing or evidenced in writing to comply with s. 107 of HGCRA. Thus implied terms need not be in writing for a construction contract to fall under the provisions of the Act. However, in **Melville Dundas Ltd-v-Hotel Corporation of Edinburgh Ltd** (unreported), a written compromise was held not to suffice as a construction contract to the extent that it was independent of the underlying contract.

In the case of **Bennett (Electrical) Ltd v Inviron Ltd**,[4] a letter of intent did not satisfy the provisions of s.107. The written terms did not cover key obligations, and were incomplete as additional contractual terms had been agreed orally. Also, s.107 was not engaged where the written terms were complete but the works had been subject to significant variation.[5] In the case of **Total M and E Services Ltd v ABB Building Technologies[6]**, the court held that oral arrangements made by reference to a written contract, are within section 107(3) [7]and the contract is then made partly orally and in writing.[8] In the case of **Maymack Environment Ltd v Faraday Building Services Ltd 2000-1 CILL 1685**, the court decided that an agreement to adjudication

[4] (2007) EWHC 48 (TCC)

[5] (2007) 73 Arbitration 3, p.330

[6] (2002) CILL 1857

[7] S. 107(3) - a construction contract includes one "made otherwise than in writing by reference to terms which are in writing".

[8] (2002) 68 Arbitration 3, p.284

without reservation is a submission to jurisdiction and gave rise to estoppel by representation and convention.[9]

In the case of **RJT Consulting Engineers Ltd v DM (Northern Ireland) Ltd[10]**, the court decided that the terms of the agreement that must be "evidenced in writing" to comply with section 107[11] are the whole of that was agreed.[12] In the case of **Melville Dundas Ltd v Hotel Corporation of Edinburgh Ltd[13]**, the court held that a written compromise agreement was not a construction contract to the extent that it was independent of the underlying contract.

2.2 Definition of Construction Operations

Section 105(1) defines constructions operations liberally to cover almost anything imaginable that the phrase might be expected to cover. The only qualification to the generality is that an operation to be a construction operation must relate to work which form part of the land. In **Gibson Lea Retail Interiors Ltd-v-Makro Self Service Wholesalers Ltd (2001)**, it was held that shop fitting work is not construction operation unless the fittings are being attached to the land. However, where the contract provides for adjudication dispute resolution process, adjudication and provisions on adjudication will apply whether or not the work is a construction operation. If the contract does not provide for adjudication, the party wishing to refer the matter to arbitration must then check whether the contract is construction contract or is excluded under section 105 of HGCR Act.

Section 106 excludes from application of the Act construction contracts with a residential occupier. This, generally, covers any contract 'which principally relate to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence. The issue of whether or not a contract falls under this exception was considered in **Samuel Thomas Construction Ltd-v-Bick & Bick (aka J&B Developments) (2000)** where it was held that a dwelling which is approximately 65% occupied by the party is not excluded by section 106

[9] *Ibid*.

[10] Court of Appeal judgment March 8, 2002

[11] Section 107 basically provides that construction contracts must be in writing or at least evidenced in writing.

[12] (2002) 68 Arbitration 3, p.284

[13] (2006) B.L.R. 474 [OH (CS)], Pt 10, Lord Drummond Young, Sept 7, 2006.

exception. A construction contract for a residential occupier between the builder and a subcontractor is, however, covered by the Act.

2.3 The Provisions for Adjudication

Section 108(1) gives liberty to any party to a construction contract to refer any dispute arising under the contract to adjudication at any time in the life of the contract. Some clarifications are merited here. Firstly, reference to adjudication is a right, not an obligation and thus the Referring Party can decide whether to take the dispute to adjudication or use some other procedure which is permitted under the contract. The other party, however, has no option but to accede to adjudication if that is what the referring party chooses.

2.4 The Meaning of 'Dispute'

'Dispute' is defined to include 'any difference' but what a difference entails is not defined in the Act. The matter of what issue amounts to a dispute referable to adjudication has been considered by the Courts in **RG Carter Ltd v. Edmund Nuttall Ltd (2000)**. In **Collins (Contractors) Ltd v. Baltic Quay Management(1994) Ltd**, the issue was the relationship between s. 111 of HGRA and s. 9 of Arbitration Act 1996. It was held that a dispute could arise even where a claim was not admitted. In **Michael John Construction v. Golledge and Others** where the issue was the meaning of more than one dispute, it was held that a dispute does not cease to be a single dispute because it comprises several issues. In **Quietfield Ltd v. Vascroft Contractors Ltd**, it was held that where the contract allowed successive applications for extension of time, successive applications on different grounds can be made and referred to adjudication. If the grounds are the same as those in previous adjudications, then this will count as new dispute. In the case of **Gillies Ramsey Diamond v PJW Enterprises Ltd (2002) CILL 1901**, the court held that an agreement to administer a contract is a construction contract. Therefore, any dispute arising out of that agreement qualifies as a „dispute" under the act.[14]

In the case of **Watkinson Jones & Son v Lidl UK GmbH (2002) CILL 1834**, the court held that failure to admit a claim amounts to a dispute. It went ahead to state that once the adjudicator determines the question, the answer is binding and there is no possibility that an issue already adjudicated upon would be determined again.[15]This case influenced the holding in **Lovell**

[14] (2003) 69 Arbitration 1, p.35

[15] *Ibid*.

projects Ltd v Legg and Varver (2003) C.I.L.L 2019, where Judge Moseley Q.C held that three claims can constitute a single dispute. [16] In the case of **Midland Expressway Ltd and Secretary of State for Transport v Carillion Construction Ltd B.L.R at 325 (June 13, 2006)**, Jackson J. defined the term "Dispute" as there could be a dispute on a matter of principle –as to entitlement of payment for a charge-without there being a dispute as to quantum.[17] In the case of **William Verry (Glazing Systems) Ltd and Furlong Homes Ltd (2005) EWHC 138 (TCC)**, the court stated that a responding party is not debarred from raising a new claim by way of response, at least where the dispute referred to is wide enough to encompass it. [18]In the case of **Costain Ltd v Wescol Steel Ltd (2003) EWHC 312**, a dispute arose when a claim was not admitted or not paid or was disputed and not paid. The court held that, claims for extensions of time and payment due on a final account amounted to one dispute.[19]

In **Edmund Nuttall v. R.G Carter Ltd,[20]** the court held that a party can refine its arguments and abandon points without fundamentally altering the dispute. If it abandons the wholesale facts previously relied on or arguments previously advanced, the dispute is not the same as that referred.[21] In the case of **Sindall v Soland and Ors[22]**, the matter that arose was whether the dispute had arisen before the adjudication notice. The employer had purported to determine the contractor's employment under the contract, and the decision on that issue involved the adjudicator considering questions of extensions of time. Judge Lloyd held that, the question of extensions of time had been properly considered and was part of the dispute, and had arisen before the adjudication.[23]

The Act refers to disputes 'arising under the contract'. The vexing question is whether disputes which are 'in connection with' the given contract are also covered. This is relevant given that dispute clauses in most standard form contracts include a wider range, such as disputes 'under or

[16] (2004) 70 Arbitration 1, p.55

[17] (2004) 70 Arbitration 1, p.55

[18] (2005) 71 Arbitration 3, p. 264

[19] (2004) 70 Arbitration 1, p.55

[20] H.H. Judge Bowsher Q.C judgment April 18, 2002

[21] (2003) 69 Arbitration 1, p.285

[22] (Judgment June 15, 2001)

[23] (2002) 68 Arbitration 3, p.158

in connection with the contract'. It seems adjudication provisions are restricted to only disputes under the contract.

2.5 Procedure of Adjudication under HGCR Act

Section 108(2), (3) and (4) provides for optional stipulations on adjudication which parties may contract out of. In particular, the parties are at liberty to give notice at any time to refer a dispute to adjudication. An adjudicator is, in default, to commence adjudication upon 7 days of referral of the dispute and to reach his/her decision within 28 days of referral or upon such extension as agreed by the parties. The Adjudicator is allowed to extend this 28 days period by up to 14 days with consent of the party by whom the dispute is referred. The adjudicator is put under a duty to act impartially. The adjudicator may, however, take initiative in ascertaining the facts and the law.

In the case of **Connex South Eastern Ltd v M.J. Building Services Group plc[24],** the court decided that there is no time limit for adjudication though the expiry of the relevant limitation period may debar any remedy.[25]

2.6 Natural Justice and Adjudication

Under the HGRC, the Adjudicator is enjoined to uphold natural justice. Generally, natural justice as conceived under the Act has two limbs, namely, tribunal's duty to act impartially[26] and tribunal's duty to act fairly as between the parties.[27] This latter limb entail's the tribunal's duty to accord all the parties reasonable opportunity to ventilate their case and deal with that of the opponent. In adjudication, natural justice entails the duty to act impartially but whether or not lack of impartiality invalidate the adjudicator's decision is not clear. The second limb clearly includes procedural error. But an adjudicator's decision cannot be invalidated by reason of procedural error only.[28]

[24] (2005) EWCA Civ 193, March 1, 2005.

[25] (2005) 71 Arbitration 3, p.264

[26] The *nemo judex in causa sua* rule

[27] The *audi alteram* rule

[28] See generally Peter Sheridan and Dominic Helps, "Construction Act Review" 18(3) Construction Law Journal p. 233 (2002); See also Macobs Case, *Supra*_Note 1

In the case of **RSL (South West) Ltd v Stansell Ltd (2003) C.L.L. 2012**, the court held that the use of the expert's report by the adjudicator, which the parties had not seen nor had they commented on, amounted to a breach of natural justice. [29]In the case of **Dean & Dyball Construction Ltd v Kenneth Grubb Associates Ltd (2002) T.T.C.**, the court held that, the Adjudicator did not act fairly in conducting separate interviews with the parties, despite the fact that the adjudication rules permitted such a method as a way of taking evidence. However, on review it was held that the adjudicator did in fact act fairly, since both parties were given notice of the interviews and given the opportunity to deal with each others evidence. [30] In the case of **Specialist Ceiling Services Northern Ltd v ZVI Construction (UK) Ltd Leeds TTC, [31]** the court developed a test to determine bias in adjudications.[32] It stated that, the proper test would be for the adjudicator to first ascertain all the circumstances and then ask himself whether a fair-minded and informed observer would conclude that there was a real possibility of bias.

In the case of **All in one Building and Refurbishments Ltd v Makers UK Ltd (2005) EWHC 2943 (TTC),** Judge Wilcox stated that there is no breach of natural justice where parties had proper chance to address issues of evidence.[33] In the case of **Cantillon Ltd v Urvasco Ltd (2008) EWHC 282 (TCC)[34]**, it was argued that the adjudicator had failed to give Urvasco the opportunity to submit its case. The court held that, it was up to the parties to put forward their evidence and also deal with the other party's evidence. In the case of **McAlpine PPS Pipeline Systems Ltd v Transco Plc TCC, (2004)**, the court held that new evidence filed late(even though with the adjudicator's agreement) led to procedural unfairness and prejudice.[35]In the case of **Balfour Beatty Construction Ltd v The Mayor of the London Borough of Lambeth** H.H. Judge Bowsher Q.C Judgment April 18, 2002 held that, an adjudicator may take the initiative in ascertaining the law and the facts but must not construct a party's case for it. Whatever facts or materials the adjudicator assembles must be placed before the parties so they have a fair

[29] (2004) 70 Arbitration 1, p.55

[30] (2004) 70 Arbitration 2, p.138

[31] Judgment of H.H.J. Grenfell, February 27 2004

[32] (2005) 71 Arbitration 1, p.88

[33] (2006) 72 Arbitration 2, p.160

[34] *Ibid*.

[35] (2005) 71 Arbitration 1, p.83

opportunity to deal with it. He added further that, to do otherwise is a potentially serious breach of the requirements of impartiality and fairness.[36]

2.7 Finality of Adjudicator's Decision under the Act

The HGCR Act, also, stipulates that the decision of the adjudicator remain binding until a final determination of the dispute by legal proceedings, arbitration or agreement. In addition, the adjudicator is exonerated from liability for any action or omission during his/her tenure except where the same is done or omitted to be done in bad faith. The employees and/or agents of the adjudicator are equally covered by the immunity. The Act leaves it to the parties to make more detailed provisions for adjudication provided the same caters for the basic requirements for adjudication in the Act. As per section 108(5), where a construction contract does not provide for the foregoing stipulations, the adjudication provisions of the Scheme will apply. The Scheme is a detailed procedure for adjudication referred to at section 114 of the Act. Section 114(4) states that:

> "Where any provisions of the scheme for Construction Contracts apply by virtue of this Part in default of contractual provisions agreed by the parties, they have effect as implied terms of the contract concerned."

In the case of **HG Construction Ltd v Ashwell Homes (East Anglia) Ltd**, it was held that it was not open to the parties to seek an adjudicator's decision on an issue already decided in a previous adjudication. On the facts, where the first adjudicator decided that a liquidated damages provision was enforceable, the decision of a second adjudicator that damages should be repaid could not stand.[37]

2.8 Adjudication Costs/Adjudicator's fees.

A good written decision should expressly state who shall pay the costs for the adjudication. That is, the costs for the matter to be brought before the adjudicator (party costs) and the adjudicator's costs. In most instances it is the loser who pays the adjudication costs while both parties pay for the adjudicator's costs. The parties may even agree that the loser pays the costs for the adjudication and also pays the adjudicator's costs. It is up to the parties to decide as to the mechanism of paying costs. In the case of **Amber Construction Services Ltd v London**

[36] (2002) 68 Arbitration 3, p.283

[37] (2007) 73 Arbitration 3,p.333

Interspace HG Ltd (2007) EWHC 3042 (TCC), the court exercised its discretion to allow costs in excess of fixed costs where the defendant refused to pay the adjudicator's award but instead raised a potential defence. The claimant had followed the court rules and the TCC Guide and it would have been unfair to limit the recoverable costs to fixed costs.[38]

An adjudicator can also **award damages**. This mainly depends with what the parties have agreed on in the construction contract. If the parties agree on the award of damages, then the adjudicator will award the same. But if the contract expressly forbids the award of damages, then such an award would not be issued. However, s. 108(1) of the U.K HGCR Act provides, *inter alia*, that a party to a construction contract has the right to refer a dispute arising under the contract for adjudication. Therefore, this means that a claim for damages can be referred by the parties to adjudication.

Are costs of adjudication recoverable as damages for breach of contract? This question was asked and answered in the negative in the case of **Total M and E Services Ltd v ABB Building Technologies (2002) CILL 1857.** The statutory scheme applied to the adjudication proceedings, and this envisages that both parties will bear their own costs and meet the adjudicator's fees as may be decided. The court held that to allow the recovery of costs "through the back door" would be to "subvert the statutory Scheme under the HGCRA".[39]

With reference to **adjudicator's fees**, the court held that the adjudicator's fees were not susceptible to challenge, unless in assessing them the adjudicator has acted in "bad faith". The task of assessment of fees and expenses falls within the immunity granted in section 108 (4) of the HGCR Act. These were the findings in made in **Stubbs Rich Architect's v W H Tolley & Son Limited** (judgment August 8, 2001.[40]

2.9 Adjudicator's Appointment.

The HGCR Act and the CIArb (K) rules provide that the parties would agree on the procedure for appointing an adjudicator as would have been stated in the construction contract. The adjudicator's source of authority is the construction contract. Therefore, an adjudicator who does not meet the requirements as provided in the construction agreement has no mandate to conduct

[38] *Ibid 9.*

[39] (2002) 68 Arbitration 3, p.285

[40] (2002) 68 Arbitration 2, p.155

the adjudication process. At the same time, a notice on the appointment of an adjudicator has to be served on the other party. According to the CIArb (K) rules, the notice must be served within seven days of the appointment date. In the case of **RG Carter Ltd v Edmund Nuttall Ltd(unreported)** the court held that it had no need to order removal of the adjudicator for, until the referral notice was served, he had no duty to do anything. Further the referring party had no obligation to proceed with the reference.

3.0 The CIArb (K) Adjudication Rules

There is no statutory law providing for adjudication in Kenya. The Chartered Institute Arbitrators (Kenya Branch) Adjudication Rules provide for the basic procedure of adjudication. Invariably, the parties seek to detail matters of procedure in the construction contract. In case a matter is not covered by the Rules, the provisions of the contract in question are to apply.

3.1 Scope of the Adjudication Rules.

The Adjudication Rules cover the principles applicable in adjudication, the conduct of adjudication, the adjudicator's decision and termination of the adjudication process. The Rules also provide for post adjudication process including reference to arbitration and litigation. The Rules are applicable to construction industry only and are to be interpreted as per the Kenyan laws.[41] However, for the CIArb (K) adjudication Rules to apply to a given adjudication under any contract, the parties must have specifically provided in the adjudication clause of the contract that disputes be referred to adjudication under the Rules.[42]

3.2 Definition and Preliminary.

Adjudication is defined under the Rules as the dispute resolution mechanism whereby an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.[43] To guarantee impartiality and neutrality of the adjudicator, the Rules provide that s/he must not be involved in implementation or administration of the contract under which the dispute arises.[44] In order to be able to deliver an expeditious decision, the adjudicator is required to be knowledgeable and experienced in the

[41] Adjudication Rules, Rule 2.1

[42] *Ibid*., Rule 6

[43] Adjudication Rules, Rule 2.1

[44] *Ibid.* Rule 2.2

matter in dispute, preferably a construction expert. In addition to technical expertise, an adjudicator must be well-versed in dispute resolution procedures.[45]

3.3 The Principles of Adjudication.

The party wishing to refer the dispute to adjudication is at liberty to do so at any time subject to time limits, rights and obligations of the parties as stipulated under the contract.[46] The adjudicator is enjoined to ascertain at the beginning whether or not the reference is time barred and the true position as to the rights and obligations of the parties on the matter referred to adjudication.[47]

As per the Adjudication Rules, the mandate of the adjudicator entails, *inter alia,* conforming to the rules of natural justice, acting within the procedure agreed to by the parties and giving a written decision within 28 days of reference or within such time as agreed to by the parties.[48] The adjudicator must also act impartially and make his/her decision in accordance with such procedure as preferred by the parties. To be specific, the adjudicator must act and be seen to act with impartiality and integrity and in accordance with principles of natural justice.[49] In that regard, the adjudicator must not be an employee of any of the parties. Indeed, every adjudicator is required to declare any interest in the matter before commencement of the reference.[50]

3.4 Commencing Adjudication.

The Rules oblige the Referring party (the party wishing to refer a dispute to adjudication) to give a Notice of Adjudication to the other party (referred to as 'Responding Party) and the adjudicator (where named in the contract). The Notice of Adjudication contains details of the contract, the issues for reference, the nature and extent of redress sought and period of the notice. The Notice of Adjudication must also, have a statement to the effect that the Referring Party has complied with the stipulated procedures for dispute referral under the subject contract.[51] The notice of

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[45] Ibid.

[46] *Ibid. Rule 2.3*

[47] *Ibid. Rule 3*

[48] *Ibid.Rule 6*

[49] *Ibid. Rule 11*

[50] *Ibid. Rule 7*

[51] *Adjudication Rules, rule 13.1*

Adjudication should be in writing and delivered to the address stated in the contract for service of notices or, as the case may be, delivered to the principal place of business or registered office.[52]

In some instances, the subject contract may specify the acting adjudicator. Upon a dispute arising, all the Referring Party needs to do is to get the adjudicator to confirm his/her ability to act. In default of such confirmation or where the contract is silent as to the adjudicator, the referring party is obliged to petition the appointing institution as per the contract to undertake the appointment. The Rules provide that such petition be in writing and accompanied by the requisite fee for appointment.[53] Where no institution has been designated for purposes of appointing the adjudicator, the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) is the default body.

The rules also allow parties to appoint the adjudicator by agreement. Ideally, the appointment of the arbitrator and referral of the dispute should not take more than a fortnight.[54] In any case, the adjudicator must enter reference within 7 days of appointment. In the event the adjudicator is unable to act or deliver an effective decision, either party may request the appointing body to nominate a replacement within 7 days of request.[55]

3.5 Submission in Adjudication.

The Rules require the Referring Party to send a full statement of his/her case to the adjudicator within three days of the latter's appointment. The statement must be accompanied by the Notice of Adjudication, a copy of contract and documents in support of the statement of case.[56] The timelines stipulated under the Rules do not commence lapsing until after receipt of the above documents.[57] On receipt of the documents, the adjudicator is entitled to seek clarification of the statement of case. In such instance, the clarification sought is to be submitted to the adjudicator and copied to the other party within three days of request.[58]

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[52] *Ibid. Rule 13.1*

[53] *Ibid.Rule 14.1*

[54] *Ibid.*

[55] *Ibid. Rule 14.2*

[56] *Adjudication Rules, Rule 15.1*

[57] *Ibid. Rule 15.3*

[58] *Ibid. Rule 15.*

On the other hand, the Responding Party may submit a response within ten days of being served with the statement of case. However, this period of response may be extended by agreement of the parties together with the adjudicator.[59] In any case, all the parties to adjudication are bound to comply with all requests and directions of the adjudicator.[60]

3.6 Procedure at Adjudication.

The adjudicator is master of procedure in that s/he has complete discretion as to how to conduct the adjudication. As such, an adjudicator has the sole responsibility of determining the procedure and timetable of adjudication subject to such limitations as are laid down in the contract.[61] The adjudicator is also not bound to adhere to any established rules of evidence, procedure of any court or tribunal.[62]

In particular, the adjudicator is entitled to request production of documents or attendance of people useful to the resolution process. S/he may, also, visit the site of dispute, meet and query the parties and their representatives, take initiative in establishing facts and law, set time limits for routine processes in the adjudication as well as give directions to the parties on any matter of his/her choice. In addition, the adjudicator may proceed with adjudication and reach a decision even in default of attendance by a party or failure to comply with his/her direction or request.[63] The adjudicator is also at liberty to seek legal and technical advice at the cost of the parties upon giving appropriate notice to the parties provided any written advice obtained is availed to the parties.[64]

A party may at any time apply to join third parties to the adjudication. However, any such joinder is subject to agreement between the adjudicator, the existing parties and the additional parties. Needless to say, such additional party possesses the same rights and obligations in the

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[59] *Ibid. Rule 16*

[60] *Ibid. Rule 17*

[61] *Ibid. Rule 18.1*

[62] *Ibid. Rule 18.2*

[63] *Ibid. Rule 18.*

[64] *Ibid. Rule 19*

adjudication as the other parties. However, the rights of such additional party may be limited by agreement by the Adjudicator and the Parties.[65]

3.7 Decision in Adjudication.

The adjudicator is enjoined to make a determination on all matters set out in the Notice of Adjudication. In addition, the adjudicator is to decide on any other matter s/he and the parties agree to be included in the scope of the Adjudication in accordance with the contract and the applicable laws.[66]

The adjudicator may, also, unless the parties agree otherwise, reach a decision(s) on the various aspects of the dispute at different times. However, the entire decision must be delivered within the stipulated time of four weeks. In failure of a failure to meet the stipulated timeline, either party is entitled to give a seven days' notice and thereafter refer the dispute to another adjudicator.[67]Nonetheless, a delayed decision is effective where the same is notified to the parties before the matter has been referred to the designated replacement. Where the adjudicator fails to reach an effective decision, s/he is not entitled to any fees or expenses.[68]

The decision of the adjudicator is binding as against the parties until, and unless, it is set aside by agreement of the parties, arbitration or litigation as per the relevant contract.[69] The Rules cloth all Adjudication decision, subject to agreement by the parties, with enforceability whether or not it is subsequently referred to arbitration or litigation.[70] In other words, subject to contrary agreement of the parties, the adjudicator's decision is enforceable and operational whether or not it is subsequently referred to arbitration or litigation.

[65] *Ibid. Rule 21*

[66] *Adjudication Rules, Rule 20*

[67] *Ibid. Rule 23.2*

[68] *Ibid. Rule 23.3*

[69] *Ibid. Rule 8*

[70] *Ibid. Rule 10*

The Rules require the parties to implement the decision without delay.[71] In that regard, the party entitled to enforcement may seek summary enforcement irrespective of whether or not the dispute is subsequent to adjudication referred to arbitration or litigation.[72]

With regards to the **validity of a decision**, it was held by the court in the case of **Oakley and Another v Airclear Environmental Ltd and Another** judgment October 4, 2001, that errors on matters within the adjudicator's jurisdiction do not invalidate the decision.

3.8 Recourse against an Adjudicator's Decision.

The Rules afford a party dissatisfied with adjudication the opportunity to refer the matter adjudicated upon to arbitration or litigation as per the terms of the contract. In the event of such reference, the arbitrator or the court is at liberty to decide the matter as if the same was never adjudicated. However, an adjudicator cannot be appointed as Arbitrator in any matter under the contract the subject matter of the adjudication. Similarly, an adjudicator is not a competent witness in any arbitration or legal proceeding concerning the subject of the adjudication. The rules also extend immunity to the adjudicator and his/her employees and/or agents for any act or omission done during the adjudication except where done in bad faith. The adjudicator is thus entitled to indemnification for third party claims by the parties.

4.0 Comparison between HGCR ACT and the Adjudication Rules.

There is no denying that the CIArb-K Adjudication Rules are more comprehensive compared to the HGCR Act. It is in the nature of statutes to merely provide for the skeleton and to leave it to administrative machinery of the state to fill the same with meat in form of administrative regulations. In the case of HGCR Act, the meat comes in the way of the Scheme which has been already alluded to above. The adjudication provisions of the Scheme generally apply as implied terms where the terms and conditions of the contract between the parties are not comprehensive as to cover all aspects of adjudication. On the other hand, the adjudication rules are rather detailed and comprehensive. The similarity is that the Adjudication Rules borrow much from the provisions of the HGCR Act and especially the provisions of section 108 thereof.

[71] *Ibid*. *Rule 9*

[72] *Ibid*. *Rule 27*

5.0 Is there Need to Codify Adjudication Procedure in Kenya?

At present, for adjudication to be applicable, the subject construction contract must have an adjudication clause. This is because at present, adjudication cannot be imposed by the law even where the contract in question is ideal for it. Secondly, given the recent nature of adjudication and its un-codified application in Kenya, there is no case law to regulate its application as is available under the HGRC Act in the United Kingdom. The courts are thus wont to take an ambivalent and inconsistent approach whenever adjudicators' decisions are challenged in court.

A case in point is the **Kenya Wildlife Services-v-Associated Construction Co. Ltd**.[73] The court there applied the adjudication clause strictly to the conclusion that once the time stipulated for adjudication passed, the matter could not be adjudicated. The upshot is that the matter remains unresolved to date. However, it is not in doubt that if the referring party had opted for litigation, it would have obtained court's audience in spite of the adjudication clause. In any case, given that adjudication is not legislated for in Kenya, there is no provision for stay of proceedings for parties to undertake adjudication as provided for in the case of arbitration under the Arbitration Act 1995. The effect is that whether or not a dispute will be referred to adjudication in Kenya presently depends on the parties' willingness to participate in the process. This reality has hindered the application and attainment of full potential of adjudication as a mechanism for dispute resolution in Kenya. Like in the Kenya Wildlife Service Case, the aggrieved contractor may still lodge a civil suit. However, the utility and rationale of adjudication has already been in lost in that a quick and expedient decision has not been arrived at.

5.1 Challenges facing Adjudication in Kenya: Lessons for Kenya.

The main legal challenge facing the application of adjudication in dispute resolution in Kenya is the fact that the same operates in a statutory vacuum. There is thus need to consider incorporating minimal statutory provisions for adjudication.

There were proposed amendments by the Rules Committee of the High Court of Kenya to introduce Court-Annexed ADR in civil proceedings. These proposals however were not passed by parliament and the only amendment that found its way to the Civil Procedure Act is that to section

[73] HCCC NO. 247 0f 2001

81(2) (i)[74]. Unfortunately, the amendment do not as proposed cater for court-annexed adjudication or even for adjudication at all.

However, it is important to note that on 4th August 2010 Kenya promulgated its new Constitution. Article 159 (2) (c) enjoins the courts and other tribunals to in exercising their judicial authority to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The reference to 'alternative forms of dispute resolution' necessarily encompasses adjudication. But that is as far as it goes.

Adjudication is one of the key ADR mechanisms for expedient resolution of disputes. Hence there is need to expand the scope of the Civil Procedure Act and entrench adjudication as a means of dispute resolution. There is also need for a constitutional provision on court ordered adjudication to avoid a situation where attempts to order adjudication by court are thwarted by constitutional references. That way, the proposed adjudication will also be afforded a wide scope so that any willing parties, even in non-construction contracts, are afforded the opportunity to use adjudication as the preferred mode of dispute resolution. Also, such entrenchment would eliminate the necessity of having to insert adjudication clause in every standard construction and engineering contract in Kenya as is the case now.

In essence, it is proposed that the entrenching of such a provision in the Civil Procedure Act will highlight the right of every party to a construction contract to refer the same to adjudication. The clause should also enjoin the court to encourage adjudication of disputes especially in construction industry.

Also, a provision for court-ordered adjudication is necessary where the matter in question is appropriate for adjudication and has been taken to court without first having recourse to adjudication process. This will no doubt help stem backlog of construction related cases in court. Importantly, providing for court-annexed adjudication will go further than HGCR Act in that adjudication in construction cases will be made an obligation rather than a mere right. This must be done while at the same guaranteeing the right of parties in ordinary cases to opt for adjudication as a matter of choice and agreement. Such court-ordered adjudication will differ

[74] A new subsection (ii) provides for the selection of mediators and the hearing of matters referred to mediation under the Act.

from arbitration in that it will be limited to experts in the technical area involved and the decision arrived at will be binding and enforceable in the interim, subject to a court decision overturning it.

In order to facilitate court-ordered adjudication, there is need to put in place basic guidelines for adjudication, training of adjudicators, the framework for court monitoring, court rules for reference and adoption of adjudication decisions in court. There is also need to have an adjudication registrar and an adjudication committee under the auspices of the judiciary. Such adjudication committee must be inclusive and ideally composed of key stakeholders in the adjudication, construction and dispute resolution industry in Kenya. Indeed, the Architectural Association of Kenya and Chartered Institute of Arbitrators (Kenya Branch) should be widely consulted in instituting court-annexed adjudication and represented in adjudication committee. The adjudication committee is proposed to be in charge of adjudicator training and licensing, enforcing adjudicator ethics and guidelines, setting and reviewing adjudication fees and advising the government and the judiciary on adjudication and legal reform issues.

As for the guidelines for court-ordered adjudication, there is need to ensure that the proposed adjudication framework embodies the principles of natural justice, fairness, provides for matters such as party attendances in adjudication, nature and procedure of submission, adjudicators requests and directions and stipulations on timelines to ensure that the adjudication process is expeditious. In fact, it is recommended that the CIArb-K Adjudication Rules serve as the guideline in promulgation of the court-annexed guidelines. That way, a continuation of the best practice in adjudication today will be guaranteed and, therefore, help ease the process of adoption of court-annexed adjudication by construction and dispute resolution industry in Kenya.

The ball is on the court of the Rules committee of the High Court of Kenya to incorporate measures institutionalizing court-annexed adjudication. Adopting and revising the relevant provisions of the HGCR Act on Adjudication to suit the Kenyan adjudication scene is a good starting point. However, any measure to legislate adjudication and/or court-annexed adjudication will be doomed to fail unless the input of stakeholders in construction industry in Kenya is taken into account. But it suffices to say that it is time Kenya legislated on adjudication as the adjudication process guarantees efficient and expedient dispute resolution in the construction industry, which can go a long way in promoting achievement of the Vision 2030 on Housing and Infrastructure Development.

5.2 Incorporating Emerging Principles into the Kenyan Legal Framework.

If Kenya were to enact an Act similar to the Housing Grants, Construction and Regeneration Act or come up with a law governing Adjudication, then the emerging principles as expounded in case law above would have to be incorporated therein.

The new Construction adjudication law would have to make provisions for procedural fairness, natural justice, courts procedures, jurisdiction of the arbitrators, definition of construction adjudication, scope of the adjudicator's powers, timeframe and extension of time, enforcement of adjudication awards, stay of court proceedings pending adjudication, appointment of adjudicators, misconduct of adjudicator's and other ethical issues, adjudication fees per scale or as agreed by the parties, recognition of adjudication awards, correction of slips or errors, points of law, extent of court intervention, failure to adjudicate and adjudication agreement.

It would have to take into account the existing law and provisions of the Constitution of Kenya as regards individual rights and freedoms, application of the Rules of Natural Justice and the powers of the High Court to intervene and inquire whether powers have been exercised lawfully.[75]

The law governing construction adjudication would have to be customized to meet the needs of all the players in the field of construction including Quantity Surveyors, Architects, Project proponents', developers, planning authorities, Environmental management authorities, the ordinary person and also the Government.

Construction adjudication is to be expedient so as to minimize losses on the part of all the parties. The proposed law governing the same should aid this expediency and not hamper it. Law should not make a straight forward, time and cost saving process more complicated than it should be.

Codification is not proposed as the panacea to any challenges the construction adjudication process may be facing. It is rather viewed as the final product of a thorough and widely consultative process that untimely represents a consensus by all, after taking into consideration their views and also customs of the construction industry and the need for expeditious access to justice for the sake of a better Kenya.

[75] See Chapter 4 of the Kenyan Constitution and s. 22 on enforcement of the Bill of Rights.