

“Overview of Arbitration and Mediation in Kenya”; A Paper Presented at a Stakeholder’s Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011.

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Abstract

In this short paper, the writer critically examines arbitration, mediation and conciliation in the Kenyan context. These are dispute resolution methods that form part of what is known as Alternative Dispute Resolution (ADR) mechanisms. Dispute resolution mechanisms range from Negotiation, Conciliation, Facilitation, Mediation, Early Neutral Evaluation, Mini-trial, Fact-Finding, Arbitration and Litigation (in Courts and Administrative Tribunals)

The legal and institutional frameworks governing the three ADR Mechanisms are discussed. The advantaged of Arbitration and mediation are highlighted.

The writer also discusses the challenges facing arbitration, mediation and conciliation and the opportunities these dispute resolution mechanisms present. While appreciating that Alternative Dispute Resolution, of which the three are a part of, is gaining popularity owing to its many advantages, the paper also discusses the arguments that have been raised against ADR. Finally, the writer looks at the place of these Alternative Dispute Resolution Mechanisms within the various Labour laws.¹

CONCEPTUAL CLARIFICATIONS

Mediation

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¹ The Kenyan labour laws are; The Employment Act No. 11 of 07 (which repealed the old Employment Act), Work Injury Benefits Act No. 13 of 07 (Repealed the Workmens Compensation Act, Cap 236), Labour Relations Act No. 14 of 07, (Repealed the Trade Union Act and Trade Disputes Act), Labour Institutions Act No 12 of 07 (Repealed the Regulation of Wages and Conditions of Employment Act Cap 229) and the Occupational Health and Safety Act, No. 15 of 2007 (Repealed the Factories and Other Places of Work Act).

Mediation is a voluntary, non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated settlement which, when reduced into writing and signed by all the parties, becomes binding.² It is one of the dispute resolution mechanisms known as alternative dispute resolution (ADR), as opposed to the legal mechanisms, such as litigation and arbitration.³

Advantages of mediation

Mediation is voluntary and seeks to encourage parties to find solutions that are agreeable to all of them and, as such, yields a win for all parties and preserves the relationship between parties.⁴ The salient features of mediation are that it emphasises interests rather than (legal) rights and it is cost - effective, informal, private, flexible and easily accessible to parties to conflicts.

Arbitration

The Arbitration Act, 1995 defines arbitration to mean “any arbitration whether or not administered by a permanent arbitral institution.” This is not very elaborate and regard has to be had on other sources. According to Khan⁵, arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.

Who is an arbitrator?

Lord Justice Raymond provided a definition some 250 years ago which is still considered valid today:

“An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have arbitrary power; for if they observe the submission and keep within their due bonds, their sentences are definite from which there lies no appeal.”⁶

² P. Fenn, “Introduction to Civil and Commercial Mediation”, in Chartered Institute of Arbitrators, Workbook on Mediation, (CI Arb, London, 2002), p.10.

³ Farooq Khan, Alternative Dispute Resolution, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁴ J.G. Merrills, International Dispute Settlement, 4th edition. (Cambridge University Press, Cambridge, 2005), pg. 28.

⁵ Supra, note 2.

⁶ B. Totterdill, An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques. (Sweet & Maxwell, London, 2003), p. 21.

An arbitrator is also defined as a legal arbitrator; a person appointed by two parties to settle a conflict, arbitrate, and decide by arbitration, judge between two parties to a conflict (usually at the request of the two parties).⁷

Advantages of Arbitration

Being a practical mechanism of conflict resolution that has been tested over the years, arbitration has a number of advantages. It is confidential; Parties select an arbitrator privately and proceedings are held privately. The process also has flexibility of time, procedure, venue and is not expensive compared to litigation. Further, there is minimum emphasis on formality, which fact encourages expeditious disposal of matters. Arbitration also limits appeals against awards, a fact which impacts policy on expediency of the arbitral process.

Conciliation

The Commission for Conciliation, Mediation and Arbitration (CCMA) defines a conciliation hearing as a process where a commissioner (or a panellist, in the case of a bargaining council or agency) meets with the parties in a dispute explores ways to settle the dispute by agreement.⁸

The advantage of conciliation is that it extends the negotiation process and allows for settlement between the parties: for example, where a procedure requires that conciliation be attempted before industrial action can be undertaken, time is allowed for both parties to “cool off”, for approach each other in a friendlier manner whilst seriously attempting to settle before engaging in industrial action which might eventually destroy the relationship.⁹

If the dispute is settled, the commissioner will draw-up a settlement agreement which both parties sign and then issue a certificate recording that the dispute is settled. A conciliation agreement is final and binding on both parties. If either party fails to uphold the agreement, it can be made an award and thereafter certified as an order of court.¹⁰

⁷ Oxford Advanced Learners Dictionary, 5th ed. (Oxford University Press, London, 1995), p. 51

⁸ The CCMA is a dispute resolution body established in terms of the Labour Relations Act, 66 of 1995 (LRA) of the Republic of South Africa.

⁹ Ibid.

¹⁰ Ibid.

If the dispute is not settled, there are two options available: Firstly, if the matter remains unresolved and relates to probation, the matter must continue as on Conciliation – Arbitration (CON-ARB) basis. If the matter relates to dismissal (conduct/incapacity) or unfair labour practice and the parties do not object to the process, the matter will continue on CON-ARB basis.¹¹ Secondly, the commissioner might issue a certificate of non-resolution and the applicant can then apply for arbitration.

Arguments against ADR mechanisms

Whereas the ADR mechanisms are lauded as having all the above advantages, there is still a school of thought that is completely against it. **Owen Fiss**¹² in forefront of criticising ADR mechanisms and the whole notion of it on the premises that;

- a) There is imbalance of power between the parties**
- b) There is absence of authority to consent (especially when dealing with aggrieved groups of people)**
- c) ADR presupposes the lack of a foundation for continuing judicial involvement.**
- d) Adjudication promotes justice rather than peace, which is a key goal in ADR.**

He thus argues that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation. Thus, when parties settle, society gets less than what appears and for a price it does not know; parties might settle while leaving justice undone.¹³

LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING MEDIATION IN KENYA.

Kenya does not as yet have a comprehensive and integrated legal framework to govern the application of mediation in the resolution of disputes. The mediation framework in existence has largely been derived from international law and practice and reduced into guidelines by institutions undertaking mediation in Kenya.¹⁴

¹¹ Ibid.

¹² Owen Fiss, “Against Settlement”, 93 Yale Law Journal 1073(1984).

¹³ Ibid.

¹⁴ See Dispute Resolution Centre, “A lawyer’s role in Alternative Dispute Resolution”, a one-day workshop, held on 16th September 2004, at Nairobi, Kenya. These include the Dispute Resolution Centre-Nairobi, the Chartered Institute of Arbitrators and Compliance Advisor/Ombudsman (CAO), which is the independent recourse mechanism for IFC

However ADR including mediation is now anchored in the constitution vide Article 159 (2) (c) which provides;

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)

The Rules Committee, which is a creature of Section 81 of the Civil Procedure Act,¹⁵ conducted a national exercise aimed at soliciting views from the members of the public on the steps required to bring about changes to the Civil Procedure Act and Rules incorporating mediation among other modes of ADR.¹⁶ With collaboration of other stakeholders in various professional organisations a draft of Court Mandated Mediation Rules was formulated.¹⁷ These rules were to be contained in a proposed Order 45A of the Civil Procedure Rules. There were also proposal to amend section 2 and 59 of the Civil Procedure Act to provide for conduct of mediation and other related issues. However, all those proposals never materialized and the only section that was amended was section 81 (2) of the Act. A new subsection¹⁸ was introduced and it provides that the Rules Committee shall have power to make rules relating to, inter alia, the selection of mediators and the hearing of matters referred to mediation under the Act.

Further, Order 45 was renamed Order 46 and a new rule, Rule 20, introduced. The rule provides that;

“(1) Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.

and Multilateral Investment Guarantee Agency (MIGA), the private sector lending arms of the World Bank Group. The CAO however only deals with disputes arising out of World Bank funded projects.

¹⁵ Chapter 21 of the Laws of Kenya (Revised edition, 2010).

¹⁶ A.V. Gichuhi, “Court Mandated Mediation: The final solution to expeditious disposal of cases” 1(2) The Law Society of Kenya Journal 106 (2005).

¹⁷ The ADR Taskforce included membership from the Law Society of Kenya, The International Commission of Jurists, The Dispute Resolution Centre, The University of Nairobi School of Law, Parklands, The International Federation of Women Lawyers (FIDA), and the Family Mediation Centre (FAMEC)

¹⁸ Subsection (ff).

(2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.

(3) Where a court mandated mediation adopted pursuant to this rule fails, the court shall forthwith set the matter down for hearing and determination in accordance with the Rules.

Apart from the above provisions and the few institutions mentioned under note 14, there is no structure for carrying out mediation within the Kenyan legal and institutional framework. Institutes such as the Chartered Institute of Arbitrators (CIArb (K)), Dispute Resolution Centre (DRC) and Mediation Training Institute (MTI) offer training for mediators.

The three institutions also offer mediation services. Chartered Institutes of Arbitrators also offers conciliation services. CIArb has panels of members who specialise in these areas. Appointments are made from this pool.

LEGAL AND INSTITUTIONAL FRAMEWORK GOVERNING ARBITRATION IN KENYA.

Arbitration in Kenya is recognized under and governed by the **Arbitration Act, 1995**, the **Civil Procedure Act (Cap. 21)** and the rules thereto. The Arbitration Act, 1995 was assented on 10th August, 1995 Act and came to force in on 2nd January, 1996. It repealed and replaced Chapter 49 Laws of Kenya, which had governed arbitration matters since 1968. The Act is based on the Model Arbitration Act of the United Nations Commission on Trade Law. Subsequently, the 1995 Act has been amended vide the Arbitration (Amendment) Act 2009 which was assented to on 1st January 2010.

An arbitration agreement or arbitration clause must be concluded in writing. An arbitration agreement is in writing if signed by parties or involves an exchange of letters, telex, telegram, facsimile, electronic mail or other telecommunication means providing a record of the agreement.¹⁹ An arbitration agreement by reference is also possible provided the contract making the reference is in writing and the reference makes the clause referred to part of that contract.²⁰ Where there is no binding agreement to arbitrate, parties to dispute willing to arbitrate usually enter into an “ad hoc” agreement to arbitrate the same.

¹⁹ Section 4 of the Act. See also Kariuki Muigua, The Arbitration Acts: A Review Of Arbitration Act, 1995 Of Kenya Vis-A-Viz Arbitration Act 1996 Of United Kingdom, Rev. March 2010, available at www.kmco.co.ke/articles.html

²⁰ Ibid.

The Act contains provisions relating to arbitral proceedings, recognition and enforcement of arbitral awards, irrespective of the state in which it was made subject to certain limitations.²¹

Section 3 (1) of the Arbitration Act defines “arbitration” to mean any arbitration whether or not administered by a permanent arbitral institution. Further, the section defines an “arbitral tribunal” as a sole arbitrator or a panel of arbitrators.

Section 59 of the **Civil Procedure Act** provides that;

“All references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.”

Order 46 of the **Civil Procedure Rules** provides, inter alia, that;

“1. Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.”

The Order goes further to provide for all matters pertaining to conducting an arbitral hearing up until the time the award is honoured. The Order is very comprehensive and complements the provisions in the Arbitration Act.

Arbitration in Kenya is also governed by the Arbitration rules. In exercise of the powers under section 40 of the Arbitration Act, the arbitration rules 1997 were made on 6th May 1997. Further, there are arbitration rules formulated under the auspices of the Chartered Institute of Arbitrators to govern arbitral proceedings.²²

Generally as the Arbitration Act recognizes, arbitration can be conducted by institutions or individual arbitrators. **The Chartered Institute of Arbitrators (Kenya Branch)**, established in 1984, is the umbrella body that oversees, promotes and facilitates determination of disputes by Arbitration and other forms of Alternative Dispute Resolution (ADR). The Kenya Branch has about 300 registered members and maintains a register of knowledgeable and experienced Arbitrators and facilitates their appointment.²³ The institute relies on its membership to conduct the arbitrations whenever parties opt to source for an arbitrator through the institution.

²¹ Sections 36 and 37.

²² The Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 1998.

²³ Sourced from the institute’s website; www.ciarkkenya.org

Another institute that provides ADR services in the **Dispute Resolution Center**, a non profit organization founded in 1997. Through its founders and a selected Panel of Neutrals, DRC offers a wide range of ADR services appropriate to many different kinds of disputes. The institute also offers training for mediators.

ALTERNATIVE DISPUTE RESOLUTION AND THE LABOUR LAWS.

Section 47 of the Employment Act²⁴ provides for complaints of summary dismissal or unfair termination. It is provided under subsection 2 that;

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

Though not expressly stated, the practice alluded to therein is conciliation.

Section 12 (9) of the Labour Institutions Act²⁵ provides that;

“The Industrial Court may refuse to determine any dispute before it, other than an appeal or review, if the Industrial Court is not satisfied that an attempt has been made to resolve the dispute through **conciliation**.”

It can be seen that this Act encourages parties to conciliate their differences.

Section 58 of the Labour Relations Act²⁶ provides that;

“(1) An employer, group of employers or employers' organisation and a trade union may conclude a collective agreement providing for-

(a) the conciliation of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties; and

(b) the arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator appointed by the agreement between the parties.

(2)

²⁴ Act No. 11 of 2007.

²⁵ Act No. 12 of 2007.

²⁶ ACT No. 14 of 2007.

- (3) An award in an arbitration in terms of a collective agreement contemplated in subsection (1) is final and binding and -
- (a) is subject to appeal on points of law to any court;
 - (b) may be set aside by the Industrial Court on any ground recognised in law; or
 - (c) may be enforced by the Industrial Court.
- (4) An application to review an arbitration award shall be made to the Industrial Court within thirty days of the award.

Further the Act²⁷ provides that; “Within twenty-one days of a trade dispute being reported to the Minister as specified under section 62, the Minister shall appoint a conciliator to attempt to resolve the trade dispute...” Persons who may be appointed as conciliators include a public officer, any other person drawn from a panel of conciliators or a conciliator from the conciliation and mediation commission.²⁸

Section 67 of the Act provides for the conciliator’s powers to resolve a dispute. It provides in **subsection 2** that for the purposes of resolving any trade dispute, the conciliator or conciliation committee may –

- a) Mediate between the parties
- b) Conduct a fact finding exercise; and
- c) Make recommendations or proposals to the parties for settling the dispute.

The conciliator or conciliation committee shall have power to summon and question any person to attend a conciliation.²⁹

Section 68 of the Act provides that;

- “(1) If a trade dispute is settled in conciliation the terms of the agreement shall be -**
- (a) recorded in writing; and

²⁷ Under section 65 (1)

²⁸ See section 66 (1) of the Act.

²⁹ See section 67(3) of the Act.

(b) signed by the parties and the conciliator.

(2) A signed copy of the agreement shall be lodged with the Minister as soon as it is practicable.

Section 69 provides that a **trade dispute is deemed to be unresolved after conciliation** if the-

(a) conciliator issues a certificate that the dispute has not been resolved by conciliation; or

(b) thirty day period from the appointment of the conciliator, or any longer period agreed to by the parties, expires.

Section 70 of the Act provides that the minister may appoint a conciliator or conciliation committee in public interest to prevent the dispute from arising or to resolve a dispute. The minister may also appoint a committee of inquiry to investigate any trade dispute and report to the minister.³⁰

CHALLENGES AND OPPORTUNITIES FOR ADR MECHANISMS IN LABOUR ISSUES.

The adoption of ADR mechanisms in labour issues is faced with some practical challenges. The following are a few of those concerns and the writer opines that if ADR is to be useful in labour matters, those concerns ought to be addressed. These include;

- a) **Mediator, Conciliator and Arbitrator training** – with a population of over 30 million and a labour force of about 17.94 million people³¹, our alternative dispute resolvers are overwhelmed and cannot possibly deal with all the matters suggested by the labour laws to be handled using ADR mechanisms.

Further to the above, there are only 3 institutions mentioned earlier that train ADR practitioners in the entire country. These institutions cannot possibly meet the needs for training and therefore, more institutions ought to take up the training of ADR practitioner, more so the several middle level university colleges spread all over the country.

³⁰ Under section 71 of the Labour Relations Act.

³¹ According to estimates by United States of America's Central Intelligence Agency (CIA) in 2010.

- b) **Ethics** – there is going to be a flood of mediators, arbitrators and conciliators if training efforts are revamped. This is against a backdrop of the fact that there is no code of ethics in place for any of these practitioners, apart from the provisions in the Arbitration Act providing for removal or disqualification of an arbitrator.

- c) **Acceptance by the society** – our community is still a believer in getting their day in court. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce, rather than a negotiated agreement that is wholly dependent of parties' goodwill. Even where the law has put in place enforcement mechanisms for negotiated settlements, people still desire the coercive nature of courts and other tribunals, as opposed to all the cordial talks that are ADR.

- d) **Institutional capacity**- there is a need to enhance the capacity of various labour institutions to meet the demands for ADR mechanisms introduced by the various labour laws. **There is mention of a mediation and conciliation commission** in the Labour Relations Act.³² The capacity of such a commission should be enhanced.

- e) **The changing face of arbitration** – the major selling point of the ADR approaches of dispute resolution is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court. When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings.

This challenge also brings in the other factor that is changing the face of arbitration; interference by courts. Ordinarily, courts are not supposed to delve into the arena of the arbitral proceedings, even where the same are court mandated. Courts are entertaining all manner of applications by parties' intent on derailing the arbitral proceedings and thus delaying justice for all concerned.

This means then that parties are slowly losing confidence in the arbitral process at it makes no sense to engage in arbitration for years only for the dispute to end up in courts of law for determination.

³² Section 66 (1) (c).

CONCLUSION

Structured mediation is a fairly new phenomenon in Kenya but Arbitration has been widely practised for years. This has mostly been in arrears of commercial contracting and these ADR methods are just being introduced into the various laws that govern labour matters. They have worked fairly well in commercial matters and it is hoped that they shall equally be useful in the labour sector. Their positive attributes outweigh the negative ones and it is possible that labour disputes and matters incidental thereto can be resolved more expeditiously if the above discussed ADR mechanisms are fully exploited.

It is noteworthy that matters labour have a Constitutional backing as far as the legal and institutional arrangements are concerned. **Article 162** of the Constitution provides that;

(2) “Parliament shall establish courts with the status of the high court to hear and determine disputes relating to –

(a) employment and labour relations; and...

(4) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Parliament had already enacted the compendium of labour laws and these laws are saved by **Clause 7 (1) of the Sixth Schedule** of the Constitution which states that;

“All law in force immediately before the effective date continues in force and shall be construed with all the necessary alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.”

The direct inclusion, as opposed to inference, of ADR mechanisms as part of the means of dispute resolution in the Constitution³³ and in an Act of Parliament is a bold ground breaking move. However, there is need for caution so that this effort is not defeated by capacity challenges, some of which are discussed above.

³³ Article 159