Review of the Alternative Dispute Resolution Journal, 9th Volume, 4th Issue (October 2021)

The fourth (4th) issue of the Ninth (9th) volume of the Alternative Dispute Resolution Journal, the official Journal of Chartered Institute of Arbitrators (Kenya Branch), has been published in mid-October ahead of schedule. Edited by the Africa CIArb Trustee Dr. Kariuki Muigua (Editor in Chief) and a team comprising Dr. Wilfred Mutubwa (Chair, Branch Committee) and Ms. Jacqueline Waihenya (Branch Committee Vice Chaor) as Associate Editors, ADR Journal is the most authoritative publication in the area in the entire East and Central Africa. As a scholarly publication, it has a reputation of focusing on key and emerging themes in Alternative Dispute Resolution (ADR) and other related fields of knowledge.

The current issue serves a sample of the intense debate across a wide range of ADR mechanisms including arbitration, mediation, traditional justice systems, construction adjudication and Online Dispute Resolution (ODR) in a dozen articles addressing the most current issues, research and scholarship on ADR in Africa with a strong focus on mediation and resolution of construction disputes. The Journal Editorial team succeeds in attracting very well-written papers from leading ADR practitioners and scholars from across Africa. The issue also sustains the growing tradition started in the previous issue hosting papers by ADR Practitioners from beyond the Kenyan jurisdiction

Dr. Francis Kariuki in "A critique of the Alternative Justice Systems (AJS) Policy Framework in Kenya," offers a critique of the AJS policy launched last year and shows that it does not offer an appropriate framework for promoting Traditional Dispute Resolution Mechanisms (TDRMs). Further, he illustrates how the formulation of the policy as a whole, placed TDRMs (which are informal justice mechanisms) at the hands of state-led/formal institutions. He argues that such a formalistic and top-down approach is a continuation of colonial and postcolonial state policies aimed at suppressing and destroying customary governance frameworks and may end up subverting processes relied upon in accessing justice by millions of Kenyans.

Dr. Kariuki Muigua in the article "Nurturing International Commercial Arbitration in Kenya," offers a critical examination of the extent to which international commercial arbitration has taken root in Kenya. He looks at the

legal framework governing arbitration and identifies the challenges hindering the prosperity of international commercial arbitration in Kenya and the opportunities inherent in the practice of international commercial arbitration in Kenya and the need to nurture them. He identifies the main issues facing international commercial arbitration including interference by national courts and the measures necessary to make it flourish and take root in the country.

Bwalya Lumbwe in "The Bangalore Principles of Judicial Conduct: Judges as Arbitrators," explores whether sitting judges are permitted or not, to act as arbitrators and under what regulations. He explores the Union of India's case law which provides reasoning why judges should not be permitted to act as arbitrators while holding judicial office. He argues that India is a model that should be emulated by other jurisdictions and so should the propriety principles under the Bangalore Principles. He concludes that there is a need for further awareness of the Bangalore Principles as well as the Union of India's position on the issue of judges practicing as arbitrators and to "prevent" active Judicial officers sitting as arbitrators.

Dr. Wilfred Mutubwa undertakes a review of the case of Newcastle United Football Company Limited vs The Football Association Premier League Limited & 3 Others which revisited the Arbitrators' Duty to Disclose. In particular, the court dealt with the vexing question of whether a party appointed arbitrator is expected to be independent, or just impartial and objective. According to him, the English High Court gives clarity to the duty of the arbitrator to disclose, in repeat appointments and affirms the High Court of Kenya decision in Vinayak Builders v S&M Properties (2021) eKLR which underscored the arbitrator's duty to disclose any matter that would potentially reflect conflict even where it may not affect his objectivity.

In "Court Annexed Mediation (CAM) in Kenya: An Expository Analysis of Its Efficacy", Dr. Kenneth Wyne Mutuma analyses whether CAM has achieved/is achieving the objectives for which it was institutionalized in enhancing access to justice. He contextualizes the concept of CAM, its parameters, legal framework, and how the CAM implementation was undertaken and then proceeds to analyze the challenges facing CAM, among them, the mandatory nature of the process, the challenge of funding, acceptability of the process by disputants and their advocates, as well as challenges that the mediators

face. Lastly, he makes recommendations to enhancing the legal framework of CAM in Kenya and enhance access to justice.

Jacqueline Waihenya, in the article "Navigating Emerging Trends to Craft an Enforceable Mediation Settlement Agreement," considers the primacy of the Mediation Settlement Agreement as the logical output of the mediation process. The article deconstructs the mediation process vis-à-vis the mediation settlement agreement, the instrument itself not only being a written summary of the parties' agreement but a tool for enforcement of the same. She also highlights emergent trends that have had an impact on mediation settlement agreements on the domestic as well as international planes. She concludes there is need to consider what makes a mediation settlement agreement enforceable and ensure it is in place.

Hazron Maira in "Dispute Resolution in Construction: Why Arbitration Lost the First Port of Call Status in Many Standard Forms of Contracts to Adjudication," explains how adjudication came to be adopted as the first tier procedure in contracts with multi-tiered dispute resolution clauses. He attributes it to the adverse effects of the slowness of the arbitral process aggravated by withholding of payments by employers to contractors was causing cash flow difficulties to both contractors and the contractual chain. He shows that adjudication guarantees sums due to a contractor are enforceable without lengthy or complicated dispute resolution procedure hence its preference as the first port of call in construction.

In "Reflections on the Use of Mediation for Access to in Kenya: Maximizing on the Benefits of Mediation," Dr. Kariuki Muigua makes his contribution to the ongoing efforts to enhance the place of mediation in Kenya as a choice mechanism for access to justice across various sectors by offering some thoughts on some viable ways through which the efficiency of mediation can be promoted and realized. He explores the relevant law as well as attitude issues that may affect the effectiveness of mediation as a tool for access to justice. He concludes that mediation as a dispute resolution mechanism in Kenya is no longer on trial and has come of age and proven its capacity to resolve conflicts in the Kenyan context.

Alex Kamau in "Arbitration for Construction Disputes in Kenya. Kind Master or Errant Servant?" traces the journey of arbitration in becoming the preferred construction dispute resolution mechanism in Kenya and proposes

possible interventions to enhance its effectiveness in resolution of construction disputes. He argues that while arbitration is the most effective consensual mechanism that delivers final and binding decisions and is capable of enforcement by courts across in different jurisdictions, the onerous duties it imposes on parties such as the need to observe and respect party autonomy and uphold rules of natural justice and public policy should be checked to mitigate real or perceived inefficiencies and bottlenecks.

Suzanne Rattray, an adjudicator, arbitrator and senior engineer with professional experience in Zambia, Tanzania, Mozambique, DR Congo, Chad and Israel, in "The Implication of Disclosure Obligations of Arbitrators for Arbitration Practice in Zambia," shows the legal framework in Zambia has linked the disclosure obligations with public policy, thereby bringing this into the realm of setting aside of any award rendered in a matter in which the requisite disclosure is found not to have occurred and making it an easy way to delay arbitration. She argues this was not the intent of the Model Law and the provision of the Arbitration Act of Zambia (2000), creates a real and present danger for arbitration practice in Zambia.

Alex Asenga Githara, in the article "Embracing Technology-Powered Alternative Dispute Resolution (ADR) in a Post Pandemic Africa; A Catalyst for Change in the E-Commerce, Trade and Justice Sectors," discusses the rise of Online Dispute Resolution and how it is taking the place of the traditional physical ADR systems. He explores the impact of this technology-powered ADR has scaled up e-commerce, trade and justice systems. He also discusses the challenges facing the use of Online Dispute Resolution (ODR) in Africa and makes recommendations on best practices that need to be adopted to mitigate the and keys for growth of ODR as a new concept in the Africa.

Finally, Dr. Wilfred Mutubwa, in a case note on "Express Connections Limited v Easy Properties Limited (2021) eKLR" analyses the ruling of Mativo J. in which the High Court of Kenya reaffirmed the finality of the Arbitral Awards. It entailed to two applications arising from the same arbitral proceedings with one application seeking to have the award recognized, adopted and enforced as a judgment of the court while the second application sought, among others, an order that the said awards be set aside in their entirety. The court held there were no grounds to set aside the arbitral award and recognized and adopt the Arbitral Award and the order as to costs as if they were judgment of the court.