

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

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Table of Contents

Abstract..... 3

1.0 Introduction 3

2.0 Access to Energy as a Human Right 5

3.0 Energy PPPs in Kenya: Prospects and Challenges..... 8

4.0 Energy PPPs and Dispute Management..... 12

5.0 Conclusion 14

References 15

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

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Abstract

This paper critically examines the role of PPPs in the energy sector in Kenya. The paper argues that PPPs play a crucial role in fostering access to energy in Kenya towards energy justice. The paper interrogates the regulatory framework governing energy PPPs in Kenya. It also explores some of the pertinent concerns in energy PPPs in Kenya including the likelihood of disputes between the public and private sectors. The paper further suggests reforms towards strengthening energy PPPs in Kenya including through utilising Alternative Dispute Resolution (ADR) processes to manage energy disputes in order to achieve the ideal of energy justice in Kenya.

1.0 Introduction

Public Private Partnerships (PPPs) refers to arrangements between a government or its entities on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time¹. PPPs have also been defined as long-term agreements in which a private company/party offers a service traditionally provided by a government entity². It has been noted that such service is performed based on the output specifications outlined by the public entity and any payments to the private party are based on the performance of the specified service³. In addition, risks and responsibilities are usually shared in PPPs and are in most cases assigned to the party that is best suited to handle them in the most cost- effective manner⁴.

PPPs have become necessary in ensuring efficient service delivery for citizens. It has been noted that the financial crisis of 2008 brought about renewed interest in PPPs in both

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¹ What is PPP?., Available at [https://www.pppinindia.gov.in/faqs#:~:text=Public%20Private%20Partnership%20\(PPP\)%20means,undertaken%20by%20the%20private%20sector](https://www.pppinindia.gov.in/faqs#:~:text=Public%20Private%20Partnership%20(PPP)%20means,undertaken%20by%20the%20private%20sector) (Accessed on 07/02/2025)

² PPP Directorate., 'What are Public Private Partnerships (PPPs)?' Available at <https://pppkenya.go.ke/faqs/#:~:text=The%20PPP%20Law%20in%20Kenya,project%20to%20the%20public%20party>. (Accessed on 07/02/2025)

³ Ibid

⁴ Ibid

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

developed and developing countries⁵. With governments in both developed and developing countries facing constraints on public resources and fiscal space, while recognizing the importance of investment in infrastructure to help their economies grow, they are increasingly turning to the private sector as an alternative additional source of funding to meet the funding gap and ensure economic growth⁶. The partnership between the public and private sectors has been described as essential in enhancing service delivery since the two can leverage each other's strengths and resources for more efficient, effective and sustainable outcomes⁷.

It has been noted that PPs are a vital tool in driving Sustainable Development all over the world⁸. These collaborations between government entities and private enterprises are instrumental in addressing critical infrastructure and socio-economic needs⁹. They are ideal in managing large scale projects in critical sectors such as health, energy, education, and transport¹⁰. The United Nation's *2030 Agenda for Sustainable Development*¹¹ recognises the importance of bringing together all sectors including governments and the private sector in mobilising all available resources towards Sustainable Development¹². Sustainable Development Goal (SDG) 17 seeks to encourage and promote effective PPPs for Sustainable Development¹³. At a national level, the *Public Private Partnerships Act of Kenya*¹⁴ seeks to provide for the participation of the private sector in the financing, construction, development, operation or maintenance of infrastructure or development

⁵ The World Bank ., 'Government Objectives: Benefits and Risks of PPPs' Available at <https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives> (Accessed on 07/02/2025)

⁶ Ibid

⁷ Ibid

⁸ Otundo. M., 'Leveraging Public-Private Partnerships for Sustainable Development: Examining the Role of Project Management and Educational Stakeholder Engagement in Donor- Funded Projects in Kenya's Coastal Region' Available at https://www.researchgate.net/publication/384243287_Leveraging_Public-Private_Partnerships_for_Sustainable_Development_Examining_the_Role_of_Project_Management_and_Educational_Stakeholder_Engagement_in_Donor-_Funded_Projects_in_Kenya's_Coastal_Region (Accessed on 07/02/2025)

⁹ Ibid

¹⁰ Ibid

¹¹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> (Accessed on 07/02/2025)

¹² Ibid

¹³ Ibid

¹⁴ Public Private Partnerships Act, Cap 430 Laws of Kenya., Government Printer, Nairobi

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

projects in Kenya through PPPs¹⁵. Leveraging on PPPs is therefore crucial towards Sustainable Development.

This paper critically examines the role of PPPs in the energy sector in Kenya. The paper argues that PPPs play a crucial role in fostering access to energy in Kenya towards energy justice. The paper interrogates the regulatory framework governing energy PPPs in Kenya. It also explores some of the pertinent concerns in energy PPPs in Kenya including the likelihood of disputes between the public and private sectors. The paper further suggests reforms towards strengthening energy PPPs in Kenya including through utilising Alternative Dispute Resolution (ADR) processes to manage energy disputes in order to achieve the ideal of energy justice in Kenya.

2.0 Access to Energy as a Human Right

Access to energy is a core human right¹⁶. Energy is a fundamental human need that has been described as a basic factor necessary to sustain life.¹⁷ It is a basic human need that has been equated to food, air and water¹⁸. It has been noted that access to energy in general or to electricity in particular can be equated to other human rights¹⁹. Access to energy is vital in enhancing human needs²⁰. For instance, energy has the potential of accelerating the attainment of socio-economic rights such as the right to food, the right to education, the right to health, the right to water among others²¹. As a result, it has been pointed out that energy plays a critical role in economic growth and development, and future economic growth in all countries is largely hinged on the long-term availability of energy which is to be derived from sources that are affordable, accessible and environmentally friendly²².

¹⁵ Ibid, Preamble

¹⁶ Muigua. K., 'Access to Energy as a Constitutional Right in Kenya', available at <http://kmco.co.ke/wp-content/uploads/2018/08/Access-to-Energy-as-a-Constitutional-Right-inKenya-NOVEMBER-2013.pdf> (Accessed on 07/02/2025)

¹⁷ Goldthau. A & Sovacool. B., 'The Uniqueness of the Energy Security, Justice and Governance Problem' *Energy Policy*, 41 (2012) 232-240

¹⁸ Ibid

¹⁹ Lofquist. L., 'Is there a universal human right to electricity?' Available at <https://www.tandfonline.com/doi/full/10.1080/13642987.2019.1671355#abstract> (Accessed on 07/02/2025)

²⁰ Ibid

²¹The World Bank, 'Sustainable Development Goal on Energy (SDG7) and the World Bank Group, available at <https://www.worldbank.org/en/topic/energy/brief/sustainable-development-goal-onenergy-sdg7-and-the-world-bank-group> (Accessed on 07/02/2025)

²² Muigua. K., Wamukoya. D & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

Energy is at the heart of Sustainable Development. Energy has the potential to stimulate development by connecting the SDGs and unlocking sustainable economic growth²³. On this basis, it has been argued that Sustainable Development will not be achieved without the realization of the right of access to energy²⁴. SDG 7 seeks to ensure access to affordable, reliable, sustainable and modern energy for all in order to spur Sustainable Development²⁵.

Despite being a fundamental human right and playing a crucial role in Sustainable Development, access to affordable, reliable, sustainable and modern energy continues to be an elusive dream for millions of people globally especially in Africa. The International Energy Agency (IEA) estimates that approximately 600 million people in Africa lack access to electricity, most of them who live in sub-Saharan Africa²⁶. According to the World Bank, millions of people in Sub-Saharan Africa lack access to electricity and clean cooking sources²⁷. It has been observed that the Sub-Saharan region has the lowest rate of access to electricity with just nearly half of the population having access to electricity compared to the global access rate of nearly 90 per cent²⁸. In addition, bio-energy sources such as charcoal, wood fuel and dung remain the most common source of energy for cooking in Africa especially among the rural population²⁹. However use of these sources is associated with environmental challenges such as air and soil pollution and environmental degradation through deforestation³⁰. The use of such sources of energy in

²³ Goldthau. A & Sovacool. B., 'The Uniqueness of the Energy Security, Justice and Governance Problem' Op Cit

²⁴ Muigua. K., 'Access to Energy as a Constitutional Right in Kenya' Op Cit

²⁵ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

²⁶ International Energy Agency., 'Africa Energy Outlook 2022' Available at <https://www.iea.org/reports/africa-energy-outlook-2022/key-findings> (Accessed on 07/02/2025)

²⁷ World Bank Group., 'Energy Access in Eastern and Southern Africa' Available at <https://www.worldbank.org/en/region/afr/brief/afe-energy> (Accessed on 07/02/2025)

²⁸ United Nations Conference on Trade and Development., 'Commodities at a Glance: Special Issue on Access to Energy in Sub-Saharan Africa.' Available at Available at <https://unctad.org/publication/commodities-glance-special-issue-access-energy-sub-saharan-africa#:~:text=Access%20to%20energy%20is%20defined,be%20scaled%20up%20over%20time> (Accessed on 07/02/2025)

²⁹ Muchiri. L., 'Gender and Equity in Bioenergy Access and Delivery in Kenya' Practical Action East Africa, 2008, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiy2P29z6PnAhUEiFwKHQlyCLOQFjAAegQIBRAB&url=http%3A%2F%2Fwww.cas.ed.ac.uk%2F_d ata%2Fassets%2Fword_doc%2F0007%2F24793%2FGender_and_Equity_in_Bio_energy_Access_and_Deliv ery_in_Kenya_final.doc&usq=AOvVaw2AKp1mvTSC9tafkIKJ-36 (Accessed on 23/11/2023)

³⁰ Muigua. K., 'Towards Energy Justice in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2020/02/Towards-Energy-Justice-in-Kenya-00000005.pdf> (Accessed on 07/02/2025)

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

cooking has also been linked to more than 500,000 annual deaths associated with indoor pollution³¹.

Several factors also hinder access to energy in Kenya. It has been noted that despite the strides made towards enhancing access to electricity in Kenya, there exists a wide disparity in electrification between urban and rural areas with a majority of the rural population not having electricity connection³². Energy affordability also remains a challenge in most sub-Saharan African Countries including Kenya due to the high cost of power relative to income making energy sources such as electricity out of the reach of most people³³. Consequently, bio-energy sources such as charcoal, wood fuel and dung remain the most common source of energy in Kenya especially among the rural population in Kenya³⁴.

In light of the foregoing challenges, fostering energy justice has become an urgent priority in Kenya and the rest of Africa. The concept of energy justice aims to recognise and rectify existing systemic injustices in the energy system, and ensure that the benefits and burdens associated with the consumption, production, and distribution of energy are equitably shared³⁵. It evaluates where injustices in the energy sector emerge, which sections of the society are affected and ignored, and which processes exist for their remediation in order to reveal, and reduce injustices in the energy sector³⁶. According to the United Nations, energy justice seeks to ensure universal access to safe, affordable and sustainable energy for all individuals, across all areas and to protect individuals from the disproportionate share of costs or negative impacts relating to building, operating, maintaining, generating, transmission, and distribution of energy and to ensure equitable access to benefits from each system³⁷. The ideal of energy justice therefore seeks to

³¹ United Nations., 'Advancing SDG 7 in Africa.' Available at Available at <https://sdgs.un.org/sites/default/files/2023-06/2023%20Advancing%20SDG7%20in%20the%20Africa-062923.pdf> (Accessed on 07/02/2025)

³² Moner-Girona. M et al, 'Decentralized Rural Electrification in Kenya: Speeding Up Universal Energy Access' *Energy for Sustainable Development*, Volume 52, October 2019, p 128-146.

³³ Ibid

³⁴ Muchiri. L., 'Gender and Equity in Bioenergy Access and Delivery in Kenya' *Practical Action East Africa*, 2008.' Op Cit

³⁵ Energy Justice., Available at <https://studentenergy.org/influencer/energy-justice/> (Accessed on 07/02/2025)

³⁶ Jenkins. K et al., 'Energy Justice: A conceptual Review.' *Energy Research & Social Science.*, Volume 11, 2016, pp 174-182

³⁷ United Nations., 'In Quest of an Energy Justice Framework for Bangladesh.' Available at <https://www.un.org/en/chronicle/article/quest-energy-justice-framework-bangladesh> (Accessed on 07/02/2025)

achieve equity, affordability, accessibility and participation in energy systems and the energy transition³⁸.

3.0 Energy PPPs in Kenya: Prospects and Challenges

With many governments globally struggling to foster the right to energy, PPPs have become a powerful tool towards enhancing universal access to affordable, reliable, sustainable and modern energy for all in the quest towards energy justice³⁹. Despite access to electricity being vital for economic growth, it has been noted that power sector projects especially the development of power generation and transmission infrastructure is very capital intensive⁴⁰. This situation is particularly evident in developing countries where demand for electricity is rapidly growing due to population and economic growth and the potential infrastructure gap to meet this demand is very large⁴¹. For instance, it has been noted that financing Africa's energy transition in Africa remains a challenge due to limited access to capital and high political and regulatory barriers⁴². Energy PPPs therefore offer an alternative strategy that can help African governments to navigate the energy transition effectively⁴³.

According to the World Bank, energy PPPs provide a useful tool which, if properly implemented, can provide governments with access to private sector capital, technology and expertise towards enhancing access to energy⁴⁴. Energy PPPs can also leverage private capital and expertise to support the development of renewable energy projects towards fostering universal access to affordable, reliable, sustainable and modern energy for all⁴⁵. Further, it has been noted that energy PPPs can achieve long-term value by transferring risk to the private sector throughout the project's lifespan, from design and

³⁸ Nel. L., & Basajjasubi. A., 'An Energy Justice Framework should be applied to Energy Planning' Available at <https://naturaljustice.org/an-energy-justice-framework-should-be-applied-to-energy-planning/> (Accessed on 07/02/2025)

³⁹ The World Bank Group., 'Energy and Power PPPs' Available at <https://ppp.worldbank.org/public-private-partnership/sector/energy> (Accessed on 07/02/2025)

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ronge. A., Shastry. V., & Kamau. A., 'Public-Private Partnerships in the African Energy Sector' Available at <https://www.energypolicy.columbia.edu/publications/public-private-partnerships-in-the-african-energy-sector/> (Accessed on 07/02/2025)

⁴³ Ibid

⁴⁴ The World Bank Group., 'Energy and Power PPPs' Op Cit

⁴⁵ The World Bank Group., 'Renewable Energy' Available at <https://ppp.worldbank.org/public-private-partnership/energy-and-power/renewable-energy> (Accessed on 07/02/2025)

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

construction to operations and maintenance⁴⁶. They can also foster skill transfer between the private sector and state-owned enterprises and governments, increasing the competitiveness of national entities thus improving service delivery⁴⁷.

The importance of energy PPPs has been recognised in Kenya. For instance, the *Energy Act*⁴⁸ mandates the Nuclear Power and Energy Agency to put in place mechanisms to attract private sector funding in research and human resource development for matters relating to energy⁴⁹. Further, the Ministry of Energy and Petroleum's *Strategic Plan 2023-2027*⁵⁰ seeks to engage the private sector through PPPs in order to realise the technical and financial resources required to achieve energy transition in Kenya⁵¹. The Strategic Plan also seeks to promote the participation of the private sector in the development of renewable energy initiatives in the country⁵². The Strategic Plan acknowledges that implementation of energy projects under the PPPs framework can accelerate energy transition in the country⁵³.

Energy PPPs are governed under the Public Private Partnerships Act⁵⁴. The Act establishes the Public Private Partnership Committee which is responsible for formulating policies on PPPs, overseeing the implementation of PPPs contracts, approving feasibility studies, and approving negotiated contract terms, the cancellation of procurements or termination of project agreements, and the variation of project agreements⁵⁵. Under the Act a contracting authority intending to finance, operate, equip or maintain an infrastructure facility or provide a public service may enter into a project agreement with a qualified private party for the financing, construction, operation, equipping or maintenance of the infrastructure facility or provision of the public service⁵⁶. The Act further limits the term of PPPs to thirty years⁵⁷. Energy PPPs in Kenya are therefore limited to a period of thirty years as envisaged under the Public Private Partnerships Act. Before entering into a PPP, the contracting authority is mandated to

⁴⁶ Ronge. A., Shastry. V., & Kamau. A., 'Public-Private Partnerships in the African Energy Sector' Op Cit

⁴⁷ Ibid

⁴⁸ Energy Act, Cap 314, Government Printer, Nairobi

⁴⁹ Ibid, S 56 (2) (k)

⁵⁰ Republic of Kenya., Ministry of Energy and Petroleum: Strategic Plan 2023-2027., Available at <https://www.energy.go.ke/sites/default/files/KAWI/strategicplan/Final%20Draft%20Strategic%20Plan%20with%20sig.pdf> (Accessed on 07/02/2025)

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Public Private Partnerships Act, Op Cit

⁵⁵ Ibid, s 6 & 8

⁵⁶ Ibid, s 20

⁵⁷ Ibid, s 21 (2)

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

determine that the private party has the financial capacity to undertake the project, relevant experience in undertaking projects of a similar nature, relevant expertise to undertake the project, and satisfied the legal, social and environmental due diligence parameters as stipulated by law⁵⁸. The Act further requires a contracting authority to undertake feasibility study in order to determine the viability of the project to be submitted to a PPP⁵⁹. While undertaking the feasibility study, key considerations include the technical requirements of the project, the social, economic and environmental impact of the project, and the affordability and value for money proposition in the project⁶⁰. Energy PPPs in Kenya are therefore subjected to rigorous requirements stipulated under the Public Private Partnerships Act.

Energy PPPs are playing a crucial role in fostering access to energy in Kenya. It has been noted that the construction, operation and maintenance of infrastructure in Kenya in critical sectors such as energy is a capital intensive undertaking that requires collaboration between the public and private actors⁶¹. PPPs therefore provide an avenue for the government to partner with the private sector to pool more resources, innovation and efficiencies for the faster development of the country⁶². The energy sector including power generation has been identified as a key focus for PPPs in Kenya⁶³. It has been noted that the PPPs framework has over the years enabled the Government of Kenya to implement high quality infrastructure projects especially in the energy and roads sectors⁶⁴. For instance, in the energy sector, the Kenya Electricity Transmission Company Limited (KETRACO), is engaging with private parties in the development and operation of transmission lines projects in the country⁶⁵. This process is geared towards bridging the finance gap and ensure timely development of the needed transmission infrastructure mainly for increased adequacy, improved system stability and security of supply⁶⁶. KETRACO acknowledges that Kenya is grappling with aging transmission infrastructure

⁵⁸ Ibid, s 27

⁵⁹ Ibid, s 32

⁶⁰ Ibid

⁶¹ PPP Directorate., Op Cit

⁶² Ibid

⁶³ Ibid

⁶⁴ Republic of Kenya., The National Treasury & Economic Planning., 'Directorate of Public Private Partnerships' Available at <https://www.treasury.go.ke/directorate-public-private-partnerships/> (Accessed on 08/02/2025)

⁶⁵ Kenya Electricity Transmission Company Limited., 'Statement on Privately Initiated Transmission Proposals (PIPs) and Public Private Partnership Energy Sector Projects' Available at <https://www.ketraco.co.ke/information-center/media-center/news/statement-privately-initiated-transmission-proposals-pips-and> (Accessed on 08/02/2025)

⁶⁶ Ibid

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

and insufficient investment in power transmission a situation that has resulted in frequent power blackouts that have taken a toll on the economy⁶⁷. Energy PPPs are therefore a suitable tool in ensuring security of energy supply in Kenya.

Energy PPPs are also an appropriate model of harnessing Kenya's vast renewable energy potential towards ensuring universal access to affordable, reliable, sustainable and modern energy for all⁶⁸. Renewable energy sources have become increasingly important as the world faces the challenge of mitigating the negative impacts of climate change and reducing the dependence on finite and polluting fossil fuels⁶⁹. These sources of energy are environmentally-friendly and readily available⁷⁰. The 2030 Agenda for Sustainable Development urges all countries to adopt renewable sources of energy towards enhancing energy access and fostering sustainability⁷¹. Kenya is endowed with renewable sources of energy including wind, solar, hydropower, geothermal and tidal energy which are readily available in the country⁷². PPPs have become a suitable tool in enabling Kenya to harness its vast renewable energy potential towards energy justice. It has been noted that Kenya has made significant strides in promoting the use of renewable sources of energy including solar, wind and geothermal power by attracting private investments for renewables projects⁷³. PPPs are ideal in leveraging private capital and expertise to support the development of renewable energy projects throughout the country⁷⁴. Kenya is currently utilising PPPs to harness key renewable sources of energy such as geothermal, wind, and hydro power⁷⁵.

Energy PPPs are therefore crucial in fostering access to energy in Kenya. However, there are various risks and challenges associated with energy PPPs. For instance, it has been noted that energy PPP projects can incur higher capital costs due to private investors'

⁶⁷ Ibid

⁶⁸ The World Bank Group., 'Renewable Energy' Op Cit

⁶⁹ Verma. A., 'The Role of Renewable Energy Technologies in Sustainable Development.' Available at <https://timesofindia.indiatimes.com/blogs/voices/the-role-of-renewable-energy-technologies-in-sustainable-development/> (Accessed on 08/02/2025)

⁷⁰ Ibid

⁷¹ United Nations General Assembly., 'Transforming Our World: the 2030 Agenda for Sustainable Development.' 21 October 2015, A/RES/70/1., Op Cit

⁷² Muigua. K., 'Adopting Green Energy for a Bright Tomorrow.' Available at Available at <http://kmco.co.ke/wp-content/uploads/2023/06/Adopting-Green-Energy-for-a-Bright-Tomorrow.pdf> (Accessed on 08/02/2025)

⁷³ ExpoGroup., 'Kenya Power and Energy Market Analysis 2024.' Available at https://www.expogr.com/kenyaenergy/market_info.php (Accessed on 08/02/2025)

⁷⁴ The World Bank Group., 'Renewable Energy' Op Cit

⁷⁵ Ibid

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

limited access to low-cost financing and risk mitigation tools⁷⁶. Further, these projects can be costly since the projects are expected to generate a return on investment with such costs being covered by end-customers or through government guarantees⁷⁷. Disputes are also a common feature in energy PPPs⁷⁸. It has been noted that interpretations of PPP contractual provisions, adjustments of contractual terms and obligations, or requests to renegotiate or terminate the PPP contract can be amicable or contentious⁷⁹. It has been noted that unilateral changes to conditions of PPP contracts by the contractual authority especially governments have resulted in many disputes in the energy sector globally⁸⁰. Effective management of these disputes is key towards actualising the terms of the PPPs and fostering access to energy.

4.0 Energy PPPs and Dispute Management

Energy PPPs are a vital tool in fostering access to energy towards energy justice. They have been embraced in Kenya as envisaged under the Public Private Partnerships Act⁸¹. Energy PPPs are playing a key role in enhancing access to energy in Kenya by improving stability and security of energy supply and enabling the country harness its vast renewable sources of energy including geothermal, wind, and hydro power⁸². However there are several fiscal risks arising from energy PPPs⁸³. Further, disputes are a common occurrence in energy PPPs⁸⁴. Failure to effectively manage such disputes can affect energy projects and hinder universal access to energy⁸⁵.

It is imperative to enhance the efficiency of energy PPPs. Governments should effectively monitor and identify risks stemming from energy PPPs and provide support and

⁷⁶ Ronge. A., Shastry. V., & Kamau. A., 'Public-Private Partnerships in the African Energy Sector' Op Cit

⁷⁷ Ibid

⁷⁸ The World Bank Group., 'Renegotiation, Government Step-in rights, Termination, and Dispute Resolution' Available at <https://ppp.worldbank.org/public-private-partnership/renegotiation-government-step-rights-termination-and-dispute-resolution#:~:text=The%20accelerating%20availability%20of%20disruptive,in%20the%a0energy%20sector%20globally.> (Accessed on 08/02/2025)

⁷⁹ Ibid

⁸⁰ Ibid

⁸¹ Public Private Partnerships Act, Op Cit

⁸² The World Bank Group., 'Renewable Energy' Op Cit

⁸³ Ronge. A., Shastry. V., & Kamau. A., 'Public-Private Partnerships in the African Energy Sector' Op Cit

⁸⁴ The World Bank Group., 'Renegotiation, Government Step-in rights, Termination, and Dispute Resolution' Op Cit

⁸⁵ Ibid

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

guarantees to private entities transacting in public investment projects including those in the energy sector⁸⁶. Monitoring of projects is also critical in ensuring the success of PPPs⁸⁷.

It is also necessary to embrace effective management of disputes in order to ensure the viability and success of energy PPPs. Conflict management procedures should be invoked at the earliest instance after a conflict arises, before it becomes a real dispute or impedes the project⁸⁸. Collaboration among all stakeholders including the government and private sector during a project's life cycle is important in maintaining an ongoing relationship between the parties and preventing conflicts⁸⁹. Disputes flowing from energy PPPs in Kenya are managed through Public Private Partnerships Petition Committee established under the Public Private Partnerships Act⁹⁰. However, the Committee is a quasi-judicial body and can be associated with several challenges in managing disputes flowing from energy PPPs. Use of litigation in managing energy disputes can result in delays, costs and damaging of relationships which is an undesirable situation especially in long term energy projects⁹¹.

There is room to utilise more appropriate tools including ADR mechanisms to manage disputes in energy PPPs⁹². For instance, arbitration has been identified as a suitable approach in managing disputes. It has been noted that foreign investors prefer arbitration in managing disputes in the energy sector due to its flexibility, the ability to provide for confidentiality, the ability to enlist specialist, commercial-minded arbitrators to determine the dispute, and its ability to provide for a neutral forum in complex energy disputes involving international parties, particularly when compared to litigation before domestic courts⁹³. It has been noted that the principal goal in utilising arbitration in

⁸⁶ Republic of Kenya., The National Treasury & Economic Planning., 'Fiscal Risks Arising from Public Private Partnerships' Available at <https://www.treasury.go.ke/wp-content/uploads/2021/09/Kenya-PPP-Fiscal-Risk-Disclosure-28Sept2021.pdf> (Accessed on 08/02/2025)

⁸⁷ Ibid

⁸⁸ The World Bank Group., 'Renegotiation, Government Step-in rights, Termination, and Dispute Resolution' Op Cit

⁸⁹ Ibid

⁹⁰ Public Private Partnerships Act, s 75

⁹¹ Bird & Bird., 'A Need for Speed? The Possible Use of Expedited Dispute Resolution Procedures in the Energy Sector.' Available at <https://www.twobirds.com/en/insights/2016/uk/a-need-for-speed-the-possible-use-of-expedited-dispute-resolution-procedures> (Accessed on 08/02/2025)

⁹² Muigua. K., 'Managing Energy Disputes in Africa' Available at <https://kmco.co.ke/wp-content/uploads/2023/12/Managing-Energy-Disputes-in-Africa.pdf> (Accessed on 08/02/2025)

⁹³ Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR'), Available at Resolving Energy Disputes in Africa Through Arbitration and Alternative Dispute Resolution ('ADR').' Available at <https://content.clearygartlieb.com/regions/africa-outlook/resolving-energy->

Energy PPPs in Kenya: Examining the Regulatory Framework and Efficacy of Dispute Resolution and ADR

energy disputes is to avoid a dependence on the national courts if the relationship is with a host state or its agent such as a national energy company, and if the relationship is with a private party, to achieve the efficiency and confidentiality benefits of arbitration as opposed to litigation⁹⁴.

Other ADR techniques such as mediation and negotiation are also ideal in managing energy disputes⁹⁵. For instance, it has been observed that commercial relationships in the energy sector are often long term and frequently operate across projects, borders and cultures⁹⁶. This creates incentives for players in the energy sector including energy companies to look at alternatives to more formal dispute resolution mechanisms such as litigation or arbitration⁹⁷. Mediation and negotiation are suitable in preserving relationship, addressing the root causes of conflicts and enhancing collaboration among parties and are therefore ideal in managing disputes in the energy sector⁹⁸.

Further, it has been noted that utilising ADR processes including the use of dispute review boards in energy PPPs can be a powerful tool to prevent and resolve conflicts at an early stage⁹⁹. The Public Private Partnerships Act urges parties to PPPs to embrace arbitration or any other amicable dispute resolution mechanism towards effective management of disputes¹⁰⁰. It is therefore necessary to utilise ADR for sound management of disputes in energy PPPs.

5.0 Conclusion

Energy PPPs hold great potential to accelerate access to energy in Kenya for energy justice and Sustainable Development. However, it is vital to enhance their viability including through enhancing their efficiency, mitigating fiscal risks, and fostering effective management of disputes through ADR in order to achieve this dream.

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⁹⁴ Peter. C., 'International arbitration and energy disputes' Available at https://discovery.dundee.ac.uk/ws/portalfiles/portal/99500417/GELS_ARTICLE_CAMERON_141120_22_FINAL.pdf (Accessed on 08/02/2025)

⁹⁵ Muigua. K., 'Managing Energy Disputes in Africa' Op Cit

⁹⁶ Ashurst., 'Managing and Resolving Cross-Border Disputes in the Energy Sector.' Available at <https://www.ashurst.com/en/insights/managing-and-resolving-cross-border-disputes-in-the-energy-sector/> (Accessed on 08/02/2025)

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ The World Bank Group., 'Renegotiation, Government Step-in rights, Termination, and Dispute Resolution' Op Cit

¹⁰⁰ Public Private Partnerships Act, s 71 (2)

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