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*Confidentiality in Arbitration: Evaluating Legal and Ethical Dilemmas*

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## A. Introduction

One aspect that has been a selling point of arbitration as an Alternative Dispute Resolution (ADR) mechanism is the ability to have disputes resolved in confined forums.<sup>1</sup> That statement is true as unlike law reports, repositories of disputes that have been resolved through arbitration are non-existent.<sup>2</sup> On the other hand, the veracity of that statement is anecdotal as there is a trajectory of disputes settled through arbitration spilling into the limelight during the application for recognition and enforcement through the domestic courts.<sup>3</sup>

In those law reports, there exist numerous pronouncements of the courts on challenges to both preliminary and substantial issues in arbitration. Some of the decisions, while seeking to determine the rights, obligations and remedies of the parties involved act as a ‘tell-it-all’ of the facts of those disputes. That way, parties lose their intended privacy and confidentiality.

The importance of private and confidential dispute resolution proceedings cannot be understated. In commercial settings, such breach accrues the loss of goodwill of long-established brands of goods and services. In the social setting, the stigma associated with disputes playing out in the full glare of the public is as prominent as it is in litigation. It is this paradox that informs this presentation.

This article will address the legal, ethical, and practical dilemmas that a party or an arbitrator may find themselves in during the proceedings before an arbitral tribunal. It will seek to establish the extent of parties’ or arbitrators’ participation in court proceedings, *vis-à-vis* the need for cooperation with the courts to achieve the right to access to justice. Noteworthy, is the twin role that courts

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<sup>1</sup> Muigua, Kariuki, *Settling Disputes Through Arbitration in Kenya*. 4<sup>th</sup> Ed. Nairobi, Glenwood Publishers, March 2022, page 3.

<sup>2</sup> This is except for cases settled under the Investor-State Dispute Settlement System (ISDS), for example through the International Centre for the Settlement of Investor Disputes. A probable explanation to this would be the public interest issues associated with those disputes.

<sup>3</sup> See for example: Joseph Wangui, *Court rejects arbitration for Sh29m varsity debt dispute*, *Business Daily*, 31<sup>st</sup> August 2021. The publication is available on <https://www.businessdailyafrica.com/bd/economy/court-rejects-arbitration-sh29m-varsity-debt-dispute-3531904> (accessed on 19th August 2022); George Bodo, *Arbitration Awards need some firm economic merits*, *Business Daily*, 8<sup>th</sup> March 2022. The publication is available on <https://www.businessdailyafrica.com/bd/opinion/columnists/arbitration-awards-require-some-firm-economic-merits-3741270> (accessed on 19th August 2022).

play in arbitration proceedings of supervision and assistance. Where should a party or an arbitrator stop to fully oblige to the confidentiality or privacy requirements? Should they waive part of their rights?

On an objective analysis of Kenyan law, rules of organizations offering arbitration services in Kenya and pronouncements of Kenyan courts, this article seeks to identify possible solutions to the dilemma. The recommendation will come in handy for parties and arbitrators who find themselves at crossroads once they are presented with difficult circumstances during arbitral proceedings.

### **B. Privacy and confidentiality in arbitration: A differentiation**

The terms private and confidential are used, almost interchangeably. The Black's Law Dictionary defines the 'right to privacy' as the right to be let alone; the right of a person to be free from unwarranted publicity; and the right to live without unwarranted interference by the public in matters with which the public is not necessarily concerned."<sup>4</sup>

On the other hand, confidentiality is defined as the ethical duty of persons who by nature of their engagements, come across information that is crucial to their provision of goods or services, are required to solely use it for that purpose.<sup>5</sup> The definitions above give the inference that privacy is meant to exclude the entire public from arbitral proceedings while confidentiality is meant to bind the parties, counsels and representatives, arbitral institutions, arbitrators, and their staff from disclosing issues related to those proceedings.

### **C. Privacy in arbitration: An accessory to an affront to justice?**

In an Op-ed piece on the *New York Times*,<sup>6</sup> the authors referred to arbitration as private judicial proceedings that are an epitome of violation of the tenets of justice.<sup>7</sup> Much reference in that piece is made to the unsuccessful nature of

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<sup>4</sup>The Dictionary is available on <https://moorish-american-instrumental-licensing.net/bl4thed.pdf> (accessed on 23<sup>rd</sup> August 2022).

<sup>5</sup>*Ibid.*

<sup>6</sup> Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, *The New York Times*, 31<sup>st</sup> October 2015. The Article is available on <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?smid=wa-share> (accessed on 23<sup>rd</sup> August 2022).

<sup>7</sup> *Ibid.*

arbitration in class action suits against Multi-National Companies (MNCs) in the United States of America (USA). The disputes, as per the authors, are mostly consumer related and the low success of arbitration in class suits is the asymmetry of information between the parties and the exclusion nature of the clause on arbitration in the contractual provisions.

The assumption is debatable as first, in most States across the World, including USA (and many African jurisdictions), awards arising from arbitration undergo a recognition and enforcement phase at the municipal courts.<sup>8</sup> These institutions, being the guardians of public morals, will certainly disallow the enforcement of awards rendered by arbitrators that are against the country's public policy. Second, with proof of vitiating factors in the execution of the arbitral agreement, or bias on the part of the arbitrator, the resulting award may be set aside.<sup>9</sup>

Third, there exist enforceable codes of conduct for arbitrators, as a form of regulation through their primary professions or through the Codes of Conduct of various arbitral institutions.<sup>10</sup> They are meant to guide the conduct of arbitrators in acceptance of appointments and conduct of proceedings. Lastly, the professionals involved in such proceedings, and the arbitral institutions are up in competition for the small space of arbitration by maintaining high ethical, moral, and professional standards in the conduct of the proceedings.

To say that arbitration is an avenue for miscarriage of justice is therefore an unfair analysis whose line of argument cannot stand. The statement is only qualified by the reference to class action suits as by dint of the nature of arbitral proceedings, it is impossible to enjoin and entertain many claimants, all at the same time.

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<sup>8</sup> See for example Section 35 of the Arbitration Act (No. 4 of 1995), Laws of Kenya; The Decision in Pearl Residence Limited v William John Oluande [2021] eKLR

<sup>9</sup> *Supra*, note 3.

<sup>10</sup> See for example, the International Bar Association Guidelines on Conflicts of Interest in International Arbitration 2014; Rule 8 of the Advocates (Practice) Rules of the Law Society of Kenya.

#### D. Access to information

As a preliminary, before accepting appointments, arbitrators are required to disclose to the parties any matters that in their view, could lead to conflict of interest.<sup>11</sup> This presents the parties with the opportunity to assess all the engagements and the real or perceived interest that they may have. Disclosure, in this case, acts as a shield to the arbitrator as the chances of a challenge on the resulting award are minimized. This position is further supported by the doctrine of waiver, as enunciated under the Kenyan Act.<sup>12</sup>

A party who, upon the arbitrator's disclosure, does not challenge the appointment, waives their right to institute a challenge on either the award or the appointment of the arbitrator on those same grounds. This then presents the question, are parties and their representatives obliged to keep these disclosures confidential?

Second, as a way of achieving equal treatment of the parties, arbitrators have a statutory duty to share information disclosed by one party with the other party.<sup>13</sup> Under procedural discovery, and to reach an enriched award, the arbitrator should ensure that all evidence tendered by a party is availed for interrogation by the other party. This raises the question as to whether documents made by the arbitrator (such as notes, time sheets) are subject to such disclosures.

To address the two concerns above, one would be invited to assess the pronouncement of the court in *Paragon Electronics Limited v Njeri Kariuki*.<sup>14</sup> The brief facts of the case are that the petitioner was a party to an arbitration where the Respondent was a sole arbitrator. During the arbitral proceedings, the petitioner fell out with its advocates on legal fees and instituted a civil suit against them at the High Court in Nairobi.

During the pendency of the civil suit, the Petitioner sought to rely on some documents that were in the possession of the Respondent, by dint of her

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<sup>11</sup> Rule 8, NCIA Arbitration Rules, 2015; and Section 13 of the Arbitration Act (No. 4 of 1995).

<sup>12</sup> Section 5, Arbitration Act, No. 4 of 1995.

<sup>13</sup> *Ibid*, Section 19.

<sup>14</sup> [2021] eKLR.

position as the arbitrator in the initial proceedings. Upon request, the Respondent declined to avail the documents, hence the Constitutional Petition. The issues before the court were two-fold:

- a) Whether the petition was properly before the court in the absence of a resolution of the petitioner's Board of Directors; and
- b) Whether the respondent was justified in not granting the Petitioner's request for documents.

It was the Petitioner's submission that by virtue of Article 35 (1) of the Constitution of Kenya, it had a right to information held by the Respondent. The information was meant to prosecute the arbitration proceedings and the civil suit before the High Court. Section 6 of the Access to Information Act<sup>15</sup> is meant to enforce the limitation of human rights as contemplated under Article 24 of the Constitution. Among the grounds for limitations to the right to access information is if the request is meant to infringe professional confidentiality as recognized in law or by the rule of a registered association of a profession.

In this context, the disposition of the court on the second issue matters. In dismissing the petition, the court arrived at the following findings:

- a) The Petitioner had not exhausted all measures contemplated under Section 14 of the *Access to Information Act*;<sup>16</sup>
- b) Granting the orders sought by the Petitioner would have heavily undermined the outcome of the civil suit and violate the rights of the initial advocates of the Petitioner to legal fees;<sup>17</sup>
- c) The Petitioners had not fully demonstrated to the court that the limitation would affect their right of access to justice and warrant a limitation under Article 24 of the Constitution.

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<sup>15</sup>No. 31 of 2016. This position has been upheld by the Constitution of Kenya in Presidential Election Petition No. 4 of 2017, Njonjo Mue & Another -vs- Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR.

<sup>16</sup>No. 31 of 2016

<sup>17</sup>Par. 61

## E. Conclusion

It is important for parties and arbitrators to exhaust all resolution mechanisms enunciated under statute. Whereas there are exceptions to that rule,<sup>18</sup> they are hard to achieve. Second, information sought by a party should be solely for use in those arbitral proceedings. Parties cannot seek information accessed in arbitral proceedings to achieve other objectives. This ring fences the idea of keeping arbitral proceedings confidential.

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<sup>18</sup>See the court's disposition in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR*