

*“The Nairobi Centre for
International Arbitration and its
contribution to Rule of Law”*

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Nairobi Centre for International Arbitration

- ▶ **Established by Statute: Nairobi Centre for International Arbitration Act**
- ▶ **Governed by an independent Board of Directors, professionals from Kenya & Region.**
- ▶ **Secretariat managed by Registrar.**
- ▶ **Arbitral Court**
- ▶ **Primary mandate to promote international arbitration in Kenya**

Aristotle

‘the rule of law is better than that of any individual’.

CONCEPT OF *RULE OF LAW*

- ▶ *No other single political ideal has ever achieved global endorsement.*
- ▶ *'the rule of law is notoriously difficult to define and measure.*
- ▶ *Outcomes that the rule of law brings to societies –accountability, respect for fundamental rights, or access to justice*

UN Secretary General Kofi Annan

- **System of governance based on non-arbitrary rules**
- **a principle of justice**
- **the ideal of accountability and fairness**

World Justice Project

- ▶ *(1) Accountability under the law.*
- ▶ *(2) Predictability and certainty of laws.*
- ▶ *(3) Accessible, fair and efficient law making processes.*
- ▶ *(4) Timely resolution of disputes.*

Constitution of Kenya

- ▶ *Article 10 (2) (a)* of the Constitution of Kenya provides that

The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

CONTRIBUTION OF THE NAIROBI
CENTRE FOR INTERNATIONAL
ARBITRATION TO *RULE OF LAW*

ISSUE 1

***ACCESSIBLE, FAIR AND EFFICIENT LAW
MAKING PROCESSES***



Article 2 (5) and (6) Constitution of Kenya

- ▶ *(5) The general rules of international law shall form part of the law of Kenya*
- ▶ *(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.*

Article 159 (2) Constitution of Kenya

- ▶ *(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*
 - (a) justice shall be done to all, irrespective of status;*
 - (b) justice shall not be delayed;*
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*

- ▶ *(3) Traditional dispute resolution mechanisms shall not be used in a way that—*
 - (a) contravenes the Bill of Rights;*
 - (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or*
 - (c) is inconsistent with this Constitution or any written law.*

National ADR policy & laws

- ▶ the legislation incorporating alternative dispute resolution is scattered in several statutes taking a largely sector-wide approach
- ▶ a consensus on the need to harmonize the various provisions and maintain a uniform standard or some irreducible minimum requirements in certain overlapping principles



Section 5 (f) of the NCIA Act

- ▶ A function of the NCIA to:
‘coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation’.

National ADR policy & laws

- ▶ It is purposed that the national policy will infuse coherence and consistency in legislation on alternative dispute resolution.
- ▶ The broad participation involved in policy formulation will enhance access, promote fairness and generate acceptance of the legislative reforms which are an outcome of the process.

ISSUE 2

TIMELY RESOLUTION OF DISPUTES



Nyutu Agrovvet Limited vs. Airtel Networks Limited

- ▶ One of the fundamental principles in arbitration is the competence, ethics, and independence of arbitrators
- ▶ Challenge

‘it has been variously said that the reasons parties choose arbitration is to save time, money and resolve disputes in an “amicable” way. The jury may still be out on those reasons because some arbitration proceedings take long and cost colossal sums of money and many still find their way back into the courts the parties desired to avoid in the first place. But that is not the subject for the moment’.

Nyutu Agroviet Limited vs. Airtel Networks Limited

‘this is nonetheless debatable at present as arbitration is becoming more cumbersome, expensive and inefficacious as each day goes by’

Duty of Arbitrator: Arbitration Rules

- ▶ Proposed Nairobi Centre for International Arbitration Rules, 2015 *Rule 7 (1)* requires the following duty;

An arbitrator conducting arbitration under these Rules shall be impartial and independent of the parties and shall not act in the arbitration as advocate for any party.

Duty of party representatives: Arbitration Rules

- ▶ *Rule 20 (2)* imposes a duty of ethical conduct. It requires that

The conduct of a party's representative shall be in accordance with the code, standards or guidelines as the Centre may issue from time to time.

NCIA Act *Section 5*

- ▶ *(e) organize international conferences, seminars and training programs for arbitrators and scholars*
- ▶ *(g) maintain a proactive cooperation with other regional and international institutions in areas relevant to achieving the Centre's objectives.*
- ▶ *(h) in collaboration with other public bodies and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data.*

ISSUE 3

ACCOUNTABILITY & TRANSPARENCY UNDER THE LAW



NCIA Act *Section 5*

- ▶ Mandates the NCIA to;
 - (j) provide ad hoc arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties*
 - (k) provide advice and assistance for the enforcement and translation of arbitral awards*
 - (l) provide procedural and technical advice to disputants*
 - (n) educate the public on arbitration as well as other alternative dispute resolution mechanisms*

ISSUE 4

PREDICTABILITY AND CERTAINTY OF LAWS

Prof. Lawrence Gumbo & Anor vs. Honourable Mwai Kibaki & Others

“Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas as stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah State and could be isolated internationally.”

Nyutu Agroviet Limited vs. Airtel Networks Limited

- ▶ *“It is important therefore that nations like ours that mostly thrive on international trade, and which also seek to woo foreign investors to their countries recognise and observe such legislation with fidelity. This boosts investors’ confidence because they have faith in an internationally recognized system that will protect their investments in case disputes arise. They are also assured that an award resulting from such a system would be enforceable internationally.*”

The NCIA Act Section 5(f)

- ▶ ***Creating & sustaining linkages***
‘coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation’.

John Locke

‘Where law ends tyranny begins’



Thank You

