Alternative Dispute Resolution

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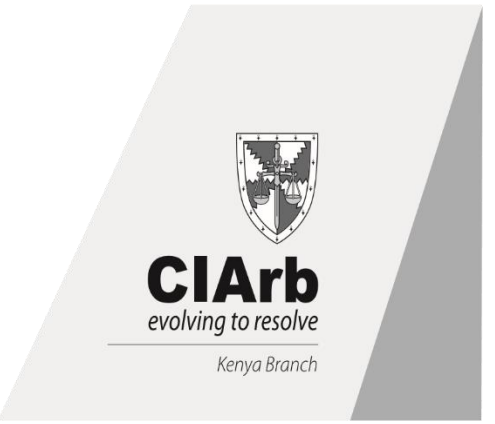

ALTERNATIVE DISPUTE RESOLUTION

Volume 9 Issue 3 2021

Non-Lawyer Representives in Arbitration: *My Humble Submissions*

By: ***Paul Ngotho****

A. Introduction

The involvement of non-lawyers like me in arbitration is one of my pet subjects. I have written elsewhere about non-lawyers as arbitrators, expert determination and expert witnesses. Those roles are quite obvious even though they are not expressly provided for in statute. The only non-lawyer role enjoying that benefit in many jurisdictions is party representation. Yet, quite ironically, that is the role which is once in a while challenged. I was reminded about that recently, when a non-lawyer friend told me he was preparing submissions in an arbitration.

In my case, Ms. Mary King [1] had changed counsel twice in the arbitration already. Her last lawyer, a respected senior counsel, had served the statement of claim by the time she fired her and appointed me. My notice of appointment did not attract any response from the Respondent.

Then I filed an application to amend the statement of claim by expanding the claim to include some aspects which had been left out. That was when the advocate on the other side mounted a vicious application for my disqualification. In addition, he filed a complaint at the Law Society of Kenya (LSK) accusing me of unlawful practice of law.

I fully appreciate that some learned counsel feels disoriented, like fish out of water, in arbitration generally. He or she wonder, how will I refer to his character? He is not an Advocate of the High Court of Kenya. I cannot refer him as a learned friend. I cannot wink at him when I need favours like an adjournment. What format is he going to use in his submissions? Well, it was not my role to answer those questions. My role was simply to cite the law and order to justify my client's appointment of a non-lawyer to represent her. I took that opportunity to advise the applicant that even his own client had the statutory right to fire him and replace him with a non-lawyer.

* ***HSC, FCIArb, Chartered Arbitrator, LLM (University of London), B.A. Land Econ. (University of Nairobi), Fellow of Institution of Surveyors of Kenya.***

[1] Imaginary name.

Below is a complete record of my submissions, complete with the footnotes and the authorities, in that application. I have reorganised a few paragraphs and deleted the paragraph numbering. The authorities which I cited were attached and duly highlighted.

Having considered the independent legal advice as well and the advantages and disadvantages of legal representation, Ms. King engaged me, a non-advocate to represent her in the arbitration.

She notified the changes to the Arbitral Tribunal and the Respondent, who apparently had no reason to complain about the development until 19th March 2014, soon after receiving the Claimant's Application of Leave to Amend the Statement of Claim.

For the avoidance of doubt, I am not an Advocate of the High Court of Kenya and have not claimed to be one in this or any other forum. I purposely avoid describing himself as an "advocate" even though it would be correct to do so as the word "advocate" is a generic English word with no legal connotations. He prefers the title or description of Party Representative because that has been technically defined by the International Bar Association. Refer to paragraph no. 64 below.

The Respondent has raised a Preliminary Objection (PO) or application objecting to me representing the Claimant in this arbitration primarily on the ground that my involvement amounted to "unlicensed and unauthorised practice of law", UPL.

C. The Act

Ideally, the PO should be dismissed summarily because it flies in the face of s.25. (5) of the Arbitration Act 1995, which states that,

> *"At any hearing or meeting of the arbitral tribunal of which notice is required to be given under subsection (3), or in any proceedings conducted on the basis of documents or other materials, the parties may appear or act in person or may be represented by <u>any other person</u> of <u>their choice</u>." (emphasis added)*

The phrase "a*ny other person*" is written in simple English. There is no ambiguity in it or in any of the 3 rather short words which make up the phrase. The entire clause is devoid of any hidden legal meaning requiring judicial interpretation. The section means

exactly what it says. The legislators would have had no difficulty wording the clause differently if they had a different intention.

There is no specific reference to "Advocates" in that clause. The omission is significant. It means that an Advocate of the High Court of Kenya can represent a party in arbitration not because he is an "Advocate" but because he is in the category of "any other person". There is no requirement under this Act for party representative to acquire any "licence" or "authority" from the Law Society of Kenya or from any authority.

The phrase "a*ny other person*" means an Advocate of the High Court of Kenya, a non-lawyer and anybody else including "every Tom, Dick and Harry". In this particular case, it means that Ms King could lawfully be represented in this arbitration, if she chooses, by her mother, house girl, hairdresser, butcher or pastor. Even by her watchman.

The above examples are not far-fetched or meant to be disrespectful. Posner, a US Court of Appeals Circuit Court judge[2] contemplated what an arbitrator would do if a party represented to be represented by a pit bull in an arbitration.

The Respondent has suggested that it would be unlawful for the Claimant's non-lawyer representative to prepare pleadings, examine witnesses, etc. The same section of the Arbitration Act which allows party representation by non-lawyers is the same one allowing representation by lawyers. The lawyer and non-lawyer enter the ring on equal terms. The Respondent has not cited any law or practice which stops the non-lawyer party representative from preparing pleadings, examining witnesses or carrying out any activity which a lawyer would do when representing a party in arbitration.

Arbitration is different from litigation. Here, unlike in court, all animals are equal and none are "more equal than others". Arbitration is a paradigm shift from the wigs, robes, intrigues, drama and rigidity which characterise litigation. Arbitration is not private litigation but a different ball game altogether. According to John H. M. Sims,

[2] *Sirotzky Vs NY Stock Exchange & Bernstein* at p. 43. https://caselaw.findlaw.com/us-7th-circuit/1227110.html

> *"There is a failure on the part of everyone concerned - and in this I include parties, lawyers, experts and arbitrators themselves and the Courts - to recognise that arbitration is, by its very nature, a wholly different method of dispute resolution from litigation, requiring a wholly different approach from the very onset."*[3]

If litigation is like an orchestra in which the players are robed and sing from a Latin song sheet or ballroom dancing in which every move is carefully measured, then arbitration is like *karaoke* or freestyle dancing where everything goes subject only to the minimal rules to ensure that no one steps on another's toes.

In arbitration there is a unique convergence of professions. It is a multi-disciplinary field in which various professionals, including Advocates of the High Court of Kenya do, or should, co-exist in harmony. *Counsel, you should live and let live.*

The Claimant's right to choose a representative of her choice is completely un-fettered. She is under no obligation to give reasons for her choice to the Respondent or to anybody else. S. 25. (5) is, in effect, a blank cheque and so it is not necessary for a party representative to submit his or her qualifications to the arbitrator or to the opposite side.

The above section also means that even the Respondent is at liberty to replace its representative and engage another Advocate or a non-advocate, instead.

C. Access to Justice

Allow me to stand on the shoulders of giants. Commenting on s.25. (5), Justice Steve Kairu is convinced that,

> *"The parties are at liberty to represent themselves or to be represented at the hearing, as they are indeed entitled to be represented at any stage of the proceedings, by a representative of their choice. While the object of safeguarding the right of parties to represent themselves or to be represented by persons of their choice, including representation by non-advocates, is noble*

[3] *The Way Ahead Adapting to Change*, The CIArb Arbitration Journal, p. 220, Nov 1990). Vol 56,, Issue 4

> *from the perspective of the broader principle of access to justice... "*[4] (Emphases added.)

Two concepts in the above quotation are worth further emphasis. Firstly, parties have a right, that is to say they are legally entitled to representation either by advocates or non-advocates.

Secondly, Justice Kairu links that right to the broader principle of access to justice, which is, of course a public policy issue. From this, it is fair to conclude that public policy in Kenya accepts representation of parties by non-lawyers in arbitration. It follows that barring non-lawyer representation in arbitration would be "repugnant to justice". This is, incidentally, also Derek A Denckla's conclusion in one of the authorities[5] submitted by the Respondent.

Justice Kairu is now a judge in the Court of Appeal. When he wrote the above, he was a part-time lecture of commercial law in the University of Nairobi and a full-time arbitrator, having closed down his law practice to concentrate on arbitration. In addition to understanding the law on party representation in arbitration, he must have seen many non-lawyers representing parties in arbitration when he was himself either the counsel representing the other side or the arbitrator. Few people in Kenya have Justice Kairu's experience in arbitration. If he does not know the law and practice of party representation in Kenya, then nobody does.

Githu Muigai, the Editor of that book, is, of course a professor of Commercial Law at the University of Nairobi. He has taken part in many arbitrations locally and internationally. He is also a Chartered Arbitrator and the Attorney General of Kenya. Being the Editor of the book, he presumably endorses Justice Kairu's views otherwise they would not have seen light of day.

D. Party Autonomy

Party autonomy is the hallmark of arbitration. The right of the parties to choose the procedure applicable in the arbitration is in s.20. (1) of the Arbitration Act. That proviso

[4] Arbitration Law & Practice in Kenya, Editor Prof. Githu Muigai. Law Africa, 2011. Chapter 4, pages 70 & 71.

[5] "Responses - Non-lawyers and the Unauthorised Practice of Law: An overview of the Legal and Ethical Parameters"

is a right, not an obligation. Parties in an ad hoc arbitration do not have to adopt any pre-set arbitration rules. They can make their own rules or grant the tribunal a blank cheque to conduct the arbitration in any "manner it considers appropriate" as stipulated in s. 20. (2) of the Act.

The parties adopted the Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules of 2012 (the "Rules") to govern this arbitration "by consent" during the Preliminary Meeting in which both of them were legally represented. I had no say in the choice of the rules as I had not been appointed at that point.

Rule 8. (1) is self-explanatory. I state that, *"Any party may be represented or assisted by persons of their choice in the arbitration..."* (emphases added).

The parties could have modified that particular rule, or even rejected all the Rules, if they had wished. They did not. Therefore, Rule 8. (1) remain applicable to these proceedings. Needless to say, the tribunal's award would be a candidate for setting aside

In addition, since the adoption of the Rules was "by consent", the has no jurisdiction to shift the rules of the game from those agreed by the parties.

E. The Advocates Act of Kenya

The Advocates Act s. 31. (1) stipulates that,

> *"Subject to* section 83*, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction." Emphasis added).*

Firstly, this provision refers to representation "in court". An arbitration tribunal is not a "court" because s. 2 of the same Act says that "Court means the High Court".

Secondly, preparing statements in arbitration or representing a party in arbitration do not amount to "practice of law", which would in any case be allowable so long as it is carried out within the limits expressly allowed by s.25. (5) of the Arbitration Act.

Most significantly, s. 31. (1) is subservient to s. 83 of the same Act which states, under a paragraph aptly titled "Saving other Laws", that,

"Nothing in this Act or any rules made thereunder shall affect the provisions of any other written law empowering any unqualified person to conduct, defend or otherwise act in relation to any legal proceedings."

S. 25. (5) of the Arbitration Act does exactly what s.83 of the Advocates Act anticipates: allowing the representation of parties by "un-qualified persons" or non-lawyers in arbitration. S. 83 of this Act most deliberately leaves room for an "unqualified person" to represent a party in an arbitration under the Arbitration Act.

The Respondent has suggested that the definition of "contentious matter" in the Advocates Remuneration Order, is proof that only lawyers are qualified to represent a party in a contentious arbitration. That reasoning does not withstand serious scrutiny. All arbitrations are contentious. Indeed, the presence of a dispute is a major prerequisite for an arbitration to take place, according to s. 6. (1)(b) of the Arbitration Act.

Furthermore, the simple reading of s.83 of the Advocates Act means that the rules (for example the Advocates Remuneration Order) made under Part 1X of the Advocates Act cannot stop non-advocates from representing a party where such representation is allowed by an Act of Parliament. Nothing in this arbitration turns on the definition of "contentious matter" contained under the Advocates Remuneration Order/Rules, which are obviously for fees payable to an advocate of the High Court of Kenya for acting in arbitration.

Commenting on s.83 of the Advocates Act, Justice Richard Mwongo of the High Court and seasoned Arbitrator has this to say,

> "*It is this provision, read with other statutes, that enables police prosecutor to undertake work in court. It also allows other special prosecutors from state departments and agencies to prosecute or to defend actions in court. Various statutes are in place to provide for this leeway"*[6]

The Arbitration Act is not the only act in Kenya allowing representation of parties by non-advocates. There are numerous other laws, for example, the Labour Relations Act, 2007 which has the following provisions:

[6] Khanjira v. Safaricom, http://kenyalaw.org/caselaw/cases/view/82675

"A trade dispute may only be referred to the ***Industrial Court*** *by the authorised representative of an employer, group of employers, employers' organisation or trade union"* - s. 73. (3)

*"In this Act, unless the context otherwise requires... "*authorised representative*" means...any person appointed in writing by an authorised representative to perform the functions of the authorised representative"* (s.2) (emphases added)

Justice James Rika of The Industrial Court has stated the court's position on party representation by non-lawyers in that court as follows:

"A Trade Union can appear in Court through its authorized representative, its General Secretary. It may appear through any person appointed in writing by the authorized representative, to perform the functions of the authorized representative..."[7]

The Labour Relations Act, like the Arbitration Act, allows non-advocate representation in the proceedings. An Advocate of the High Court of Kenya appearing for a party does so under the same legal authority as a non-lawyer trade union official. An advocate and a trade union official representing different parties in the Industrial Court are *at par:* neither is superior or inferior in the eyes of the Court.

F. Complaint to the Law Society of Kenya (LSK)

LSK declined, very wisely, in the Claimant's opinion, to descend into this arena when the Respondent's learned Counsel attempted to drag it into these proceedings. It could have, out of the Respondent's imagined great interest its objection would raise, applied to be enjoined to these proceedings as an *amicus curiae*. It did not. The most it did was ask for a copy of the arbitrator's decision on the issue. That request was probably made out of courtesy to its member and or out of curiosity. It would have sprung to action immediately if it shared the Respondent's view on non-lawyer representation in arbitration.

LSK has embraced arbitration. For example, according to information available on its website, it has a course on ADR in Nairobi on 31st October 2014 to educate its members

[7] Kenya National Private Security Workers Union v. Total Security Surveillance Ltd. http://kenyalaw.org/caselaw/cases/view/94436

on the various ADR procedures including arbitration. The need to teach lawyers arbitration law is informed by the fact that you can't play golf with hockey sticks, or hockey with golf clubs. Arbitration is not litigation.

Furthermore, it is public knowledge that LSK intends to start an arbitration centre in Nairobi. It must allow non-lawyers to represent parties in arbitrations held there since that is the law of the land. It follows that even the proposed Nairobi Centre for International Arbitration (NCIA)[8] must allow party representation by non-lawyers.

G. Custom in Arbitration

Arbitration has always been the domain of traders, craftsmen, merchants etc. They drew arbitrators as well as party representatives from their lot. It is the custom and practice in Kenya for architects, quantity surveyors, accountants etc to act as arbitrators or party representatives. Anyone who has been involved in arbitration in Kenya at any level knows this.

Such custom would not be lawful if it breached the law, but as shown above the practice is legal.

H. The Law and Practice of Arbitration under the English Arbitration Act, 1996

The English Arbitration Act 1996 has been referred as "the Bentley" of arbitration acts. It deals with the issue of representation in s. 36,

> "*Unless otherwise agreed by the parties, a party to arbitral proceedings may be represented in the proceedings by a lawyer or other person chosen by him."*

That short, single sentence is so simple. The hallmark of excellent draftsmanship. It allows non-lawyers to represent parties in arbitration. That also means that English cases and scholarly articles on non-lawyer representation are relevant to Kenya, where little has been written on the local arbitration legislation.

[8] Subsequently the NCIA Arbitration Rules 2015 were issued. Rule 21.(1) stipulates that, "A party may be represented by a legal practitioner or any other representative." https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019.pdf

That anyone can represent a party in arbitration is in fact presumed, as in the following article,

> *"Where both parties are represented by lawyers the conduct of the hearing is a fairly straightforward matter. Where both parties are represented by non-legal or lay representation ... In the event of legal representation on one side but not the other ..."*[9]

The above article emphasises the place of the non-legal representation in arbitration under the English Act. English courts have taken the same position,

> *"By reference to recent extra-judicial opinions of two members of the English Court of Appeal, in English private commercial arbitration proceedings anyone could appear as advocate."*[10]

As Potter J has aptly put it,

"There is no statutory or other restrictions on the right of a party to be represented in an arbitration by the advocate of his choice, or, indeed, to employ a lay, qualified or unqualified person to represent him in the arbitration and to progress it generally."[11]

Let the Queen's Counsel (QCs) speak for themselves,

"There is no restriction upon who may appear as an advocate..." Para 2-701

> *"The Lay Advocate: Lawyers do not have the divine right, and far less a divine gift, of advocacy. Someone who is not a lawyer may act as an advocate in arbitration if a party wishes him to." para 2-706*

"In some types of cases it is wholly sensible to be represented by a lay advocate..." para 2-707.

[9] Colin S. Archibald, *Round and About* 1984.
[10] *What is an Advocate?* Arbitration Journal, May 1989.
[11] Piper Double Glazing Ltd. Vs DC Contracts 91992) Ltd. – [1994] 1 All ER 177.

The three quotations above are from *Handbook of Arbitration Practice, Sweet & Maxwell.* This particular section of the book was authored by for eminent English barristers and arbitrator: Ronald Bernstein Q.C., F.C.I.Arb, Derek Wood C.B.E., Q.C., F.C.I.Arb., John Tackaberrry Q.C. F.C.I.Arb., and Arthur L. Marriott, Q.C, F.C.I.Arb. This book is a respected authority on arbitration law and is used by CIArb as the standard text in teaching its Module 3 Arbitration Course worldwide.

Russell[12] goes a step further and states that the exclusion of the representative of a party choice without good reason when their presence is desired by a party then the award "may be the subject of challenge". It quotes an English case in which an arbitration award was set aside by court because the arbitrator had refused to allow the attendance of a party's son and shorthand writer.

I. Elsewhere in the Commonwealth

The law on non-lawyer representation in arbitration is universal in the commonwealth. An example from Nigeria will suffice:

"6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Nigeria and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Nigeria?

> *... By virtue of sections 2 and 7 of the Legal Practitioners Act Cap. L11 Laws of the Federation of Nigeria 2004, a person is only entitled to practise as a barrister and solicitor in Nigeria if he has been called to the Nigerian Bar, or he is admitted by warrant of the Chief Justice on special circumstances or if he is exercising the functions of the office of the Attorney General, Solicitor General or Director of Public Prosecutions or such civil service office specified by the Attorney General.*
>
> *The above restrictions do not strictly apply to the representation of parties in an arbitration. Under the ACA*, parties need not be represented by lawyers or legal practitioners. Article 4 of the Arbitration Rules provides that the parties may be represented or assisted by legal practitioners of their choice. The wording of Article 4 and the use of the word "may" places no jurisdictional restrictions on persons appearing on behalf of parties before an arbitral tribunal. Further the*

[12] Rusell on Arbitration, Sutton & Gill, Sweet and Maxwell, 22nd Edition, 2003.

> *restriction in the Legal Practitioners Act seems clearly to be limited to appearance in "Court" and since an arbitral proceeding is not a Court proceeding, the restriction is not applicable to foreign legal practitioners appearing before an arbitral tribunal in Nigeria*."[13] (Emphases added). Authors: Anthony Idigbe, SAN** and Omone Foy-Yamah.

*ACA means Arbitration and Conciliation Act, Chapter 19, Laws of the Federation of Nigeria 1990.

**SAN stands for Senior Advocate of Nigeria, same as Senior Counsel in Kenya.

The position is the same in Kenya. Restriction against unlawful practice of law do not stop the representation of parties by non-lawyers in arbitration.

Lawyers do not and never had monopoly of representing parties in arbitration. Many of them routinely represent parties before non-lawyer arbitrators.

J. International Arbitration Standards and Practice

The International Bar Association (IBA) boasts to be "The Global Voice of the Legal Profession" because it has over 50,000 lawyers from 170 jurisdictions and 206 bar associations and law societies. Apparently, LSK and some Kenyan lawyers are members of IBA.

According to the IBA, website, the organisation was established in 1947 and is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world.

The IBA Guidelines on Party Representation in International Arbitration which were adopted on 25th May 2013 contain the following definition:

> *'Party Representative' or 'Representative' means any person, including a Party's employee, who appears in an arbitration on behalf of a Party and makes submissions, arguments or representations to the Arbitral Tribunal on behalf of*

[13] http://www.punuka.com/uploads/arbitration_agreements.pdf

such Party, other than in the capacity as a Witness or Expert, and whether or not legally qualified or admitted to a Domestic Bar"[14] (Emphasis added.)

An interesting article is found in the Frequently Asked Questions (FAQs) section of the London Maritime Arbitration Association website,

> ***"Question:** Does a party have to be represented by a lawyer in a London maritime arbitration?*
>
> ***Answer:** No.... LMAA arbitrators are entirely accustomed to dealing with parties who are not represented by English lawyers and there is no detriment to parties who fall into this category. The reasonable charges of representatives of a party who is successful in arbitration will normally be recoverable, whether that representative is a lawyer or not..."*[15]

Incidentally, s. 25. (5) of the Kenyan Arbitration Act 1995 also applies in all international arbitrations in which Kenya is the designated *seat*, whether the arbitrations are actually held in Kenya or elsewhere, because the Act governs both domestic and international arbitrations according to s. 2 of the Act.

The arbitration rules of various international arbitration bodies allow non-lawyer representation of parties. As an example, according to the Kigali International Arbitration Centre Rules (KIAC) provide that,

> **"***Any party may be represented by legal practitioners or any other representatives. .."* [16]

Non-lawyer representation is allowed in the US and internationally,

> *"as a matter of New York law and professional ethics, parties to international or interstate arbitration proceedings conducted in New York my be represented in*

[14] http://www.ibanet.org
[15] http://www.lmaa.org.uk/faq.aspx? pkFaqCatID=96642705-2081-4f6f-a6d4-68517454d2ec accessed on 11th April 2014.
[16] KIAC Rules Article 24, http://www.kiac.org.rw/IMG/pdf/kiac_arbitration_rules_print.pdf

such arbitration proceedings by persons of their own choosing..."[17]

K. Kenyan Case Law

There is a notable paucity of case law in Kenya or England on non-lawyer representation of parties in commercial arbitration. This is hardly surprising because, as noted above, the law is so clear that nobody, absolutely nobody, has attempted, nay dared, to go to court for interpretation.

L. Unauthorised Practice of Law (UPL)

The Claimant submits that it is not necessary for the arbitrator to establish whether or not the Claimant's Representative is involved in UPL since the non-lawyer representation is specifically authorised in the Arbitration Act.

The Claimant contends that it is in fact irrelevant whether or not the act of representation constitutes UPL. Courts in the United States[18] have not shown much interest in splitting hairs on whether non-lawyer representation constitutes UPL. It is noteworthy that even when a court found that non-lawyer representation constituted a technical violation of the UPL, the court still allowed such representation[19].

The Respondent has submitted various authorities from Florida Bar on UPL. The Claimant's response is that,

"*As for the question of who may represent a party in arbitration, existing precedent and commentary indicates that arbitration is not considered unauthorised practice of law*"[20]

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[17] Committee On the Unauthorised Practice of Law New Jersey Supreme Court. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi0_djxm_bxAhXt1uAKHZriAoUQFjABegQIBBAD&url=https%3A%2F%2Fwww.njbarexams.org%2Fopinion-14-pdf&usg=AOvVaw0lCKjjBWfS6hszHcQeqz3B

[18] Committee on UPL and ABA Standing Committee on Clients Protection. https://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonclientprotection/

[19] R.I Supreme Court Hold Non-Lawyers May Represent Parties in Labor Arbitrations. *In The News*

[20] Committee On The Unauthorised Practice of Law, New Jersey Supreme Court. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiv98mMnfbxAhWKkxQKHdd9A4kQFjACegQIBhAD&url=https%3A%2F%2Fwww.njbarexams.org%2Fopinion-14-pdf&usg=AOvVaw0lCKjjBWfS6hszHcQeqz3B
Similar view is expressed by the American Bar Association.

The Florida Supreme Court barred Mr Sperry, a non-lawyer representative from pursuing patent work in Florida. Reversing that decision, the U S Supreme Court said,

> "*did not question Florida bar's determination that Sperry's activities constituted the practice of law in Florida"* and *"The Court rules that a supremacy clause of the US Constitution prevented states from prohibiting a non-lawyer registered patent agent from engaging in activities authorized by the Commissioner of Patents."*[21]

Florida State laws and the Florida Bar later clearly softened their stance on non-lawyer representation in administrative bodies since the days of the two Florida bar cases (1962 and 1980), which were submitted by the Respondent. In 2005, the Bar's UPL Committee[22] dismissed all UPL charges, which had been raised by 4 Florida attorneys, against Mrs Rangel-Diaz for representing parties in an administrative body.

The Respondent's apparent obsession with what constitutes "practice of law" is misplaced, irrelevant and, at best, diversionary.

The English law on non-lawyer representation is the same as in the US, even though the English rather predictably, approach the issue from the angle of "acting as a solicitor". Reference is made to Piper Vs DC which has been cited above.

The Respondent has submitted as an authority *Representation of Parties in Arbitration by Non-Attorneys* by Constance N. Kartsoris. The views expressed in that article are not of general commercial arbitrations but within the narrow context of statutory arbitrations under subsidiary legislation. Obviously, subsidiary legislation cannot supersede statutory provisions in the US or in Kenya. In Kenya, non-lawyer representation is specifically permitted in an Act of Parliament.

Theuri v. Republic, which was presented by the Respondent, is irrelevant to this matter. Theuri had tried the short-cut of being appointed by parties under powers of attorney.

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[21] Unauthorised Practice of Law: Supreme Court Holds States Cannot Restrict authorised Activities on Non-Lawyer Patent Office Practitioner. https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1905&context=dlj

[22] A Tale of Two Advocates: State Bar Issues New Decision on Unauthorised Practice of Law. https://www.wrightslaw.com/news/05/diaz.upl.0307.htm

The judges in that case note that the phrase "recognised agent" is defined in the Civil Procedure Rules, which is not applicable in these proceedings. The meaning of party representative as given in the Arbitration Act is different and has not been addressed in that case. In any case, Civil Procedure Rules are subsidiary legislation which cannot ban non-lawyer representation in arbitration as that has been expressly allowed in an Act.

M. Response to the Respondent's Other Submissions

The Respondent has speculated that the Claimant might have difficulties in the High Court if she was represented by a non-advocate in the enforcement proceedings.

The Claimant has three submissions on this. First, the advice is unsolicited. It is none of the Respondent's business how the Claimant would approach the Court. Second, enforcement proceedings are completely separate from arbitral proceedings. The Claimant will cross the bridge at the opportune time. The Respondent should not jump the gun or attempt to give unsolicited advice to the Claimant indirectly.

Third, the High Court can look after itself during the enforcement proceedings, which the Respondent seems to suggest are likely to follow this arbitration in spite of the assumption that,

> *"Parties to an arbitration agreement impliedly promise to perform a valid award."* (Njoroge Regeru on *Recognition and Enforcement of Arbitral Award*, Chapter 7, *Arbitration Law & Practice in Kenya*, Editor Prof. Githu Muigai. Law Africa, 2011. Appendix O.

As the Respondent stated, The Constitution of Kenya 2010 Article 159. (3) stipulates that,

> "*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."* (Emphasis added)

The Respondent claimed that s. 159. (3) contained principals of judicial authority. It definitely does not. The universal principles are contained in s. 159. (2), which in its preamble says that,

> *"In exercising judicial authority, the courts and tribunals shall be guided by the following principles..."*

Back to Article. 159.(3). The provision is specifically about "traditional dispute resolution mechanisms", which the Claimant submits do not include arbitration under the Arbitration Act. Therefore, the Respondent's citation of that article is completely irrelevant to the matter at hand. If anything, it is the barring of non-lawyers from representing parties in arbitration which would be "repugnant to justice" as discussed elsewhere above.

The Respondent suggested that party representation had to be restricted to lawyers because the work involved advising parties on their legal rights. Wrong again. If that were so, even arbitrators, who actually decide on the legal rights and obligations would have to be lawyers. It is a matter of public notoriety that many arbitrators are not lawyers.

The Respondent suggested, during the hearing on 16th May 2014, that the PO was important in determining how UPL in arbitrations would be handled in future. Nothing could be further from the truth. Arbitration awards do not create legal precedents and are, in any case, confidential.

Questions of law arising from domestic are not appealable in court without party agreement (s.39) which is absent in this case. Furthermore, whichever way the Arbitrator decides on this Application, s. 10 of the Arbitration Act prohibits courts from entertaining a challenge of that decision by providing that,

> *"Except as provided in this Act, no court shall intervene in matters governed by this Act. "*

Thus this Application has absolutely no chance of making legal precedent, except in the context of dismissed court applications.

O. Breach of Confidentiality

The Arbitration Rules provide that,

> *"Unless otherwise determined by consent of the parties, the proceedings of the arbitration shall be confidential and private, and in particular no disclosure shall be made at any time, other than to the parties, of the pleadings, contents of the document bundles, witness statements (whether of fact or of opinion) records of meetings and hearings and of the award; and parties and their representatives and members of the Arbitral Tribunal and advisors and witnesses of fact and opinion and observers admitted by agreement of the parties, owe an equal duty of confidentiality and privacy to the parties."* (Emphases added). Arbitration Rule 8.3.

Arbitration proceedings are confidential. Parties do not like to wash their dirty linen in public. Confidentiality remains one of the primary reasons for parties to prefer arbitration over litigation, especially because with passage of time cost savings and simplicity of procedure are rarely available in arbitration.

The Respondent's learned advocate's letter of 2nd April 2014 to LSK states that,

> *"We have enclosed copies of the documents drawn and prepared by the said Paul Ngotho and filed with the arbitrator..."*

LSK is a stranger to these proceedings. The Claimant submits that it was a breach of the confidentiality duty and in any case disrespectful for the Respondent to contact LSK and to give LSK confidential documents without the Claimant's prior consent.

The Respondent's learned advocate did not even have the courtesy to inform the Claimant's representative of the charges against him at LSK so that he could defend himself.

Furthermore, the Respondent's "query" to the LSK would have been complete even without the attachment of any documents, which have been described adequately in the letter as follows:

> *"Paul Ngotho...has drawn and prepared documents and pleadings for the*

> *Claimant describing himself as her representative ... qualified to act for, draw, prepare documents and pleadings and represent the Claimant in the arbitration in light of Section 31 of the Advocates Act"*

The Claimant seeks a declaration that the Respondent and its learned advocate breached the duty of confidentiality by submitting confidential documents to LSK without the Claimant's consent.

P. Costs

The Claimant considers the Application vexatious, raised purely to harass the Claimant and delay the proceedings. She also considers the Application frivolous because it is manifestly insufficient and futile, based on absurd legal theories, which as far as she can see from her research, no one in the history of arbitration has considered worth serious attention. Suggesting that non-lawyer representation is not allowed in arbitration in Kenya is indeed "an absurd legal theory".

All the same, the Claimant has to defend herself, and has spent a considerable amount of time and costs preparing this submission and carrying out the necessary research locally and internationally. She requests to be awarded costs she has incurred defending herself.

Costs follow the event in arbitration, as in litigation. Choices have consequences. The Claimant submits that she is entitled to costs and that costs incurred by the Respondent in raising such an objection should be non-recoverable in any event.

In addition to compensating the Claimant for the costs, a timely award of costs would deter the Respondent from engaging the Arbitrator and the Claimant further in non-productive activities which add work for everybody without adding value.

The Respondent cannot feign ignorance of the Arbitration Act, the Advocates Act and the applicable Arbitration Rules. Since laymen cannot use ignorance of the law as a defence even when they are not legally represented, how much less so when the laymen have counsel.

Q. Closing Remarks

The unequivocal statutory authorisation of non-lawyer representation in arbitration in Kenya, a sovereign state, by the Arbitration Act is final and would be valid regardless of the statutes and case law from other jurisdictions.

Most significantly, Justice Kairu and Prof Muigai, by association, who are obviously conversant with both the legislations do not anywhere in the authority cited earlier suggest that non-lawyer representation in arbitration as allowed in the Arbitration Act breaches the provisions of the Advocates Act.

The Application and lengthy submissions are speculative, untenable, diversionary and destined to fail from the beginning because the law of arbitration in Kenya expressly allows the representation of parties in arbitration by non-lawyers. The Claimant submits that the Application was made purely to delay the proceedings and to harass her representative.

The Claimant requests the Arbitrator to be vigilant to ensure that the Respondent does not further abuse the arbitral process by employing more of what Dr. Guinther Horvath[23] and Dr. Fabian Ajogwu[24] refer to as *guerrilla tactics*.

The Claimant requests the Arbitrator to kindly revisit para 2.2 in Order for Directions No. 1 on Etiquette of the Tribunal which states,

> *'The Arbitrator will be addressed as "Sir" or "Mr. Arbitrator" and the Advocates will address each other as "my learned friend" or "Counsel".'*

The order was, of course, absolutely orderly when the Claimant was being represented by an Advocate of the High Court but it would now be awkward for all in view of the change in the Claimant's Representation.

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[23] The Role of Arbitral Tribunals In Combating Guerrilla Tactics in International Arbitration. Dr Gunther J.
Horvath of Freshfields Bruckhaus Deringer LLP.

[24] Dealing with Guerrilla Tactics in International Arbitration: Which Tools for Counsel and Arbitrators? Dr Fabian Ajogwu, SAN. https://kennapartners.com/wp-content/uploads/2019/08/Dealing-with-Guerilla-Tactics-in-International-Arbitration-which-tools-for-Counsel-and-Arbitrators_.pdf

The Claimant's Representative would be happy to refer to the Respondent's advocate as "The Respondent's Learned Counsel", but humbly requests the be addressed as "The Claimant's Representative".

The Claimant's representative would, most respectfully, have the Respondent's Learned Counsel know that he is a CIArb Accredited Tutor for Introduction to Arbitration, Module 1 and Module 2 (Law of Arbitration) and that over 90% of the students in recent arbitration classes are lawyers, magistrates and judges.

The Claimant requests the Arbitrator to dismiss the Respondent's Preliminary Objection forthwith and with costs.

Thank you. End of submissions.

I won, and my client was awarded costs. The applicant was ordered to send a copy of the award to LSK as that was one of the orders which I had sought. His learned counsel did not, as far as I know, send the award to LSK. I did not pursue the issue as it was neither here nor there.

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Legislation

Advocates Act s. 31. (1) and s. 83

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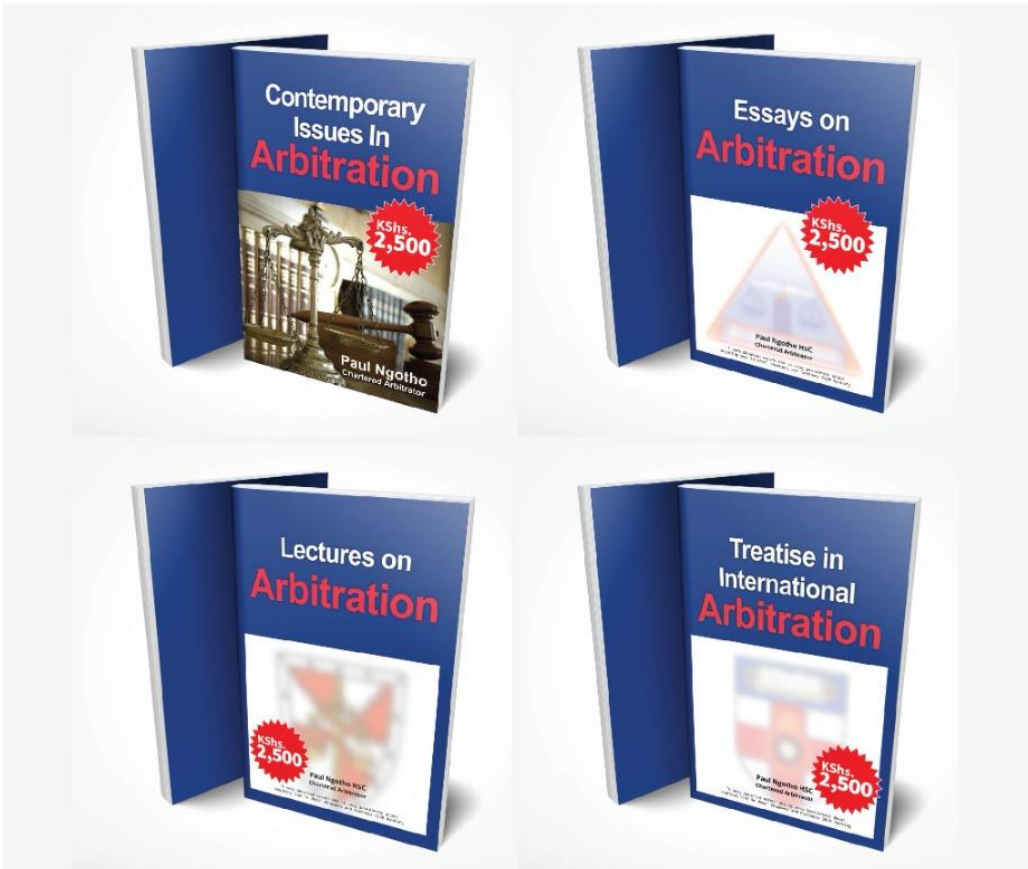

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