Implementation of Article 159 bit by bit: a place for online dispute resolution in the Kenyan bar

Musau Evans Muthusi[1]*

[1]*Strathmore University Alumnus*

**evans.musau@strathmore.edu*

Abstract

The Constitution guarantees and promises all persons access justice, reasonably and the affordably. This rightly chimes with Article 159 of the Constitution giving all persons the right to exercise judicial authority through alternative dispute resolution mechanisms. Internationally, with the rise of innovation in e-commerce the use of e-dispute resolution (online dispute resolution (ODR)) as form of internet-based dispute resolution has been embraced. This paper in its simplest form seeks to pose the question, "Does ODR stand a chance with the bar? Does it break the traditions of the bar?" In analyzing these questions, the discussion will first look at, the position of the advocate in the Kenyan context of the Advocates Act and the evolving practice rules. Second, the paper will delve into the use of electronic dispute resolution, placing it in the context of other jurisdictions to observe the threshold and the scope in implementation of ODR rules with a mind to exploring the position of the advocate. Third, we will bring it closer home, presenting the case for e-dispute resolution and whether it is attainable in the standards of the Constitution and what role the Advocate can play. At the same time, we will ask ourselves. "Does the Advocate really have a role in e-dispute resolution?". Lastly, the discussion will be capped off with recommendations and possible reforms we may want to see the profession take in embracing ODR.

Introduction

Chapter 4 of the Constitution provides for rights and freedoms for its citizens. These are brought together in a collective rendition of provisions known as the Bill of Rights, chief among which is the promise under Article 48 that each Kenyan has a Right to Access justice.

This promise is further bolstered by several other rights, for example, Article 50 guarantees an accused the right to legal representation, Article 49 guarantees every citizen the right to fair Administrative action. In this paper however, our focus is captured in one form of access to justice cradled under Article 159(2)(c) which provides that the Courts in rendering justice to parties shall take into consideration:

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3) …

This provision is intended as a response to a judicial system mired with technicalities, delays and high costs which impeded access to justice for ordinary Kenyans (ICJ, 2002). Similarly,

the courts have taken brought forward for access to justice. Recent cases recognize the shortcomings of the Judicial system and its inconsistencies through and through as was elucidate in (Republic v Abdulahi Noor Mohamed, 2016).

In this clamour for judicial change, we are also faced with the proliferation of technological advancement especially in the frontier of the internet. In the recent past the cyber-scene has seen the widespread establishment of businesses, enterprises, services (both legal and illegal) and has played a host to social interactions between global citizens (Katsh, Rifkin, & Alan, E-Commerce, E-Disputes, and E-Dispute Resolution : In the Shadow of "eBay law", 2000). These advancements have brought about cases of disgruntled customers, false representations, frustrated obligations and infringement of rights.

According to (Katsh, ODR: A Look at History, 2012) at the beginning, the world wide web did not seem to have a very harmonious future in terms of everyone getting along. This brought about a need to regulate conduct and solve disputes in a free and accessible platform for the sake of business efficacy, increased efficiency and harmonization social interactions on the web. In a bid to correct itself the system has developed an electronic dispute resolution mechanism known as Online Dispute Resolution (ODR).

The Kenyan context however is a different case as ODR is yet to set root either in legislation or socially as a formal choice of alternative dispute resolution (ADR). Ngotho Kariuki considers this case by commenting that the lacuna in legislation places persons seeking redress in a state of limbo and furthermore defeats the regulation of ODR (Kariuki, 2017).

Despite this, the penetration of the internet in the course of daily life ODR is gaining ground and is becoming a reality. This is more so evident in the National Information & Communications Technology (ICT) Policy where the government endeavours to provide a platform for citizens to handle complaints and seeking redress online (Technology, 2016).

As the case for ODR is pushed by Article 159, along stand the bastions and the gatekeepers of dispute resolution- the advocates (or lawyers as they may be referred to). The duty of the advocate is set under common law tradition to advance the case of a client in an adversarial fashion (Hazard, Jr., & Dondi, 2006), hence the case of ADR and ODR coming into the picture would be unfathomable as neither of them have a place in each other's realm. In spite of these differences Article 159 brings together the bar face to fact with ODR.

This paper is thus tasked with trying to answer the question, "Can *we fulfill the Article 159 through ODR in the midst of an adversarial bar?*" Our hypothesis in this paper is that there is need to harmonise ODR and the Kenya Bar to see the fulfillment of Article 159.

In carrying out this discussion the paper will first look at, the position of the advocate in the Kenyan context of the Advocates Act and the evolving practice rules. Second, the paper will delve into the use of electronic ODR, placing it in the context of other jurisdictions to observe the threshold and the scope in implementation of e-Dispute resolution rules with a mind to exploring the position of the advocate.

Third, we will bring it closer home, presenting the case for e-dispute resolution and whether it is attainable in the standards of the Constitution and what role the Advocate can play. At the same time, we will ask ourselves. "Does the Advocate really have a role in e-dispute

resolution?". Lastly, the discussion will be capped off with recommendations and possible reforms we may want to see the profession take in embracing e-dispute resolution.

The Traditional Role of The Advocate

"An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others…" (Ulemen, 1996)

This quote sums up the case brought before the courts by Lord Brougham during the Trail of Queen Caroline's Divorce in the late 18th Century. To put these words in context, the thought of Lord Brougham defending Queen Caroline in a what would seem as an attack to King George was unheard of and was a ghastly affair to say the least. The place of the advocate at this point in time was tied to the courage, zeal and chivalry displayed by advocate in the presence of the courts and therefore could explain Lord Brougham's fervor in defending his client. Ulemen,1996 puts it clearly Lord Brougham is setting out the tenets of advocacy by stating clearly the duty of the advocate towards his client.

In analyzing Lord Brougham's words, the advocate has a primal duty to the client to bring him/her to the corridors of justice for redress in the best form possible. This means the advocate has three major roles. First, he is a facilitator of access to justice, second, he must obtain fair recourse in the courts for his client and lastly, he must safeguard the interests of the client. In so far as the client has no other person to lean on, the advocate must take up this role in determining and ensuring that the client is protected from the onslaught of litigation. This is the basis of the advocate client relationship (Teitelbaum, 1976).

In as much as the advocate has a clear role to play it must be noted that the advocate has a greater duty, a duty towards the court. In the case of (Rondel v Worsley , 1967) the courts were clear that the advocate was a minister of justice on two fronts. First is that he has the duty to take up the case of a client and defend it with veracity and fervor. This means that the advocate has no choice other than to ensure that he discharges this responsibility without fail. Second was to present a strong case expedited to meet the ends of justice.

The same has been repeated in several accounts in the courts as was in the case of (Giannarelli V Wraith , 1988) . This precedent goes on to point out the case for a bar that should be cognizant of its duty of care in discharging the case of a client. The judges in this case brought to task the state of the bar in discharging a tort case in the United States of America. Notwithstanding matters of jurisdiction and procedure the judges brought to light the state of standard and duty of care an advocate must discharge to meet the ends of justice.

Lastly, the case of (Polk County V. Dodson, 1981) also provides the same standpoint as that in the common law courts. The Court was clear-cut that a public defender, when performing in a lawyer's traditional role, must act "*under colour of state law*" to ensure justice is met.

Through our discussion the role of the advocate is one that requires him to place the ends of justice as the primal target and also safeguard the interest of his client. These tenets have been carried over to practice in the Kenyan Bar. The Law Society of Kenya (LSK) is established under the Law Society of Kenya Act Chapter 18 to provide administrative support and organization to the Kenyan Bar.

The establishing legislation gives LSK an avenue to set down practice rules that ensure the smooth running of the profession. In this case the Code of Standards of Professional Practice and Ethical Conduct (SOPPEC)is the set guideline laid out for professional conduct in Kenya. It must be noted that these standards rehash the traditional values and the doctrines passed down under common law.

Our prime focus will be on the advocate's role in representing the client. This is captured under SOPPEC Rule 8 which states:

The Advocate is an officer of the court and therefore the Advocate shall discharge his/her duty to represent the client in adversarial proceedings and non-contentious proceedings by fair and honourable means and without illegality or subversion of the due processes of the law.

This principle bases its enforcement on two provisions, namely Section 55 of the Advocates Act which identifies the advocate as an officer of the court and Rule 8 of the Advocates (Practice) Rules which provides the rules in conducting of adversarial proceedings. The general outlook of this principle is placed on the premise that the advocate should have the interest of the court and the client in perfect balance and also at the same time ensure that justice is duly served in a legal and fair manner.

It may therefore be interpreted as the advocate being in full realization must explore all legal measures to ensure that the ends of justice are reached. This brings up a case for Alternative Dispute Resolution and as a case of finding out as to whether the bar has any role to play in it in as much as ADR is a party driven process through and through.

Kovach considers the whole discussion of the role of the advocates as a matter of new wine requiring new wineskins (Nolan-Haley, Jr., Huber, & Kovach, 2001). I concur with this statement as it espouses the difficulty of the bar coming to grips with a new system of dispute resolution in an adversarial system. Kovach realizes that the approach of ADR in the American system left the advocates feeling left out of the process.

In spite of this sense of desertion, the advocate can find a way to fit into the picture as the brought out by (Intrater & Gann, 2001) where advocates may formulate new ways and methods of prosecuting their cases in an ADR setting. Additionally, Intrater considers that the lawyers are seen as pivotal anchors in the workings of the ADR process being key defenders and facilitating in the process.

Bringing the role closer home Muigua believes the advocate can take up a role as a mediator, negotiator and peacemaker in the ADR process in order to meet the ends of justice (Muigua, 2015). The advocate plays this part on the premise that he has a dual role set out in favour of his client and in the interest of justice. In this case he is fulfilling the role intended under his

traditional practice and as such ADR is not defeating the advocate but rather placing him in a pivotal role as a changemaker and influencer.

A Case for ODR on the International Scene

Since its inception in the late 1990s ODR grew with the widespread formulation of a vibrant e-commerce culture. In this case the United States of America and the United Kingdom come into mind as the leading countries to embrace the internet and the technologies around it. The former has a robust tradition in ODR with the case presented by various platforms such as eBay, Amazon and many other online e-commerce websites providing their own home-grown ODR mechanisms. The latter jurisdiction is an example of behemoth adapting and changing to the nuances of technology. In discussing these two countries, our focus is to consider the steps the bar has taken in embracing ODR and the advantages in each of these jurisdictions. As we conclude we aim to see a place that has been hewn for ODR in the bar.

United States of America

The United States of America saw the development of the first peer to per network connection through a TCP/IP connection in 1983 established by the Advanced Research Projects Agency Network ARPANET (Leiner, 1997). The connection saw the sharing of information in a peer to peer format with the widespread use of an independent network under private hands. From then on, the internet grew internationally connecting countries, businesses and homes to each other.

In light of this advancement the process of getting systems to run smoothly took a period of time as teething problems in the system were still prevalent. Despite these challenges the use case for the internet was growing and the applications were endless. As this continued the wheels of ODR were grinding slowly with the first initiative being spearheaded in 1995 introducing the "*Virtual Magistrate (VMAG)"* (Nenstiel, 2006) to assist in dispute resolution over the internet. The project was supported by the National Center for Automated Information (NCAIR) and was expected to provide an online arbitration platform to assist in online dispute resolutions. The main aim of the Project was to show that disputes can be solved online and that the internet can be used to the advantage of e-commerce dispute settlement. The platform would bring together the arbitrator and disputing parties to the forefront and assist in the proceeding.

Despite these food intentions, scholars such as (Nenstiel, 2006) and (Shah, 2004)consider this project to have been a failure. It was unsuccessful because many complaints were not within the jurisdiction of VMAG. This flaw in jurisdiction was influenced by the difference in laws and procedures in different states and countries. Additionally, the failure was also hinged on the fact that enforcement was not possible as many awards could not be enforced against persons in other jurisdictions (Shah, 2004).

In light of this failure, the case for ODR was still carried forward with other initiatives such as the Online Ombudsman Office which provided for mediation services in the case of e-

commerce business transactions. This project commenced in 1996 under the care of the Center for Information Technology and Dispute Resolution at the University of Massachusetts. Just like VMAG the project was aimed at providing ODR for the internet.

Fast-forward to later years, this trend continued to grow with the introduction of other platforms such as *Squaretrade* which was founded in 1999 to provide mediation services for e-commerce spaces. The platform was considered a success entering into various partnerships with eBay, PayPal and Veridesogn to ensure that the stage was set for ODR (Heuvel, 2000).

Lastly, is *cybersettle.com*. This platform focused on ODR for insurance claims. Conflicting parties would settle insurance claims in a confidential, protected and legally recognized system with the promise of enforcement of awards and quick payouts (Cybersettle.com, 2018).

The growing feeling at this stage was that the advocate would be sidelined and lose ground especially in cross-border ODR. Robert Ambrosia considered this plight in the following quote:

"Yet even where ODR is expanding, it does not involve lawyers. From eBay to the more-recent ODR initiatives, the programs that do well are those that help individuals resolve disputes without lawyers." (Ambrogi, 2016)

This notion has been repeated severally in the United States as concerns the role of advocates in ODR and that the two can not mix well.

Despite this assertion against the bar, the case has been brought for the advocate to redeem himself in ODR. This was clearly brought out by Roger Smith alluding to the case that in as much as ODR is a self-serving platform many parties are not willing to represent themselves and therefore still resort to the traditional lawyer for expertise (Smith, 2018). This goes to the fact that the general populace is cautious of their limited knowledge while resolving a dispute. This brings the first case for the lawyer in the American context in the realm of ODR- expertise.

The American Bar Association furthers the argument by stating that a lawyer can still gain the trust of the ODR community by expressing his expertise to sustain himself in the field. This was well captured in an article by Jeff Aresty where he states:

"The lawyer who is familiar with online tools and techniques that can be deployed for the benefit of his or her clients will be able to offer more services to more clients, which in turn will engender more referrals and more business." (Aretsy, Rainey, & West, 2015).

The place for the advocate in ODR is flexible and is one where he/she needs to be aggressive and decisive in their approach. (Aretsy, Rainey, & West, 2015)further alludes to the advocate using ODR in various areas of practice and not leaving it only to litigation. He provides examples such as family law, real estate and commercial law. Furthermore, the lawyer can use his knowledge of ODR at and advisory level to help his client consider the options, risks and give general counsel in cases of micro-commerce and e-commerce transactions.

The acceptance of ODR is slow, however the appreciation for the results it brings out are immense. (Ambrogi, 2016), in exploring the use of ODR in tax cases and claims engaged

Colin Rule, the designer of the eBay ODR system, noted that ODR as a platform, more specifically to tax claims, can be accepted and used widely if lawyers were open-mined about the technology.

The United Kingdom (U.K.)

The United Kingdom, like Kenya, is a common law jurisdiction and has nurtured a distinguished system that shaped law, policy and regulatory standards in many jurisdictions hence a perfect example to emulate from.

The UK in its approach to ODR has chiefly been led by the Judiciary rather than the internet and the circumstances therein. The Courts have embraced an alternative to dispute settlement by using the internet as a widespread resource available to the public. This has been greatly analysed by Thomson Reuters in their report on the impact of ODR in the UK (Reuters, 2016).

The report focused on the various aspects of ODR in the legal system and reaction of the public and sector players to the proliferation of ODR. In one instance the Report considers the option of focusing of resources efficiently in ODR. This means that the system provides for accessibility and availability of judges, professionals and expert witnesses in a dispute. This is a key win for ODR against traditional methods. The inclusion of the judiciary in ODR has provided comfort to litigants and disputing parties alike as the courts are readily available.

This fervent push for ODR was further espoused by Lord Justice Briggs in his Report stating that the UK civil system needs an online court (Briggs, 2016). Justice Briggs presents a case for an online court due to the benefits of ODR chiefly: presence of efficiency, lowered cost and ease of access to the public. In this Report Lord Brigg proposes that this form of ODR should be applied for claims worth £25,000 with a view to covering only monetary claims.

Additionally, (Susskind, 2016), in his response to Lord Brigg's Report lauding the efforts of the judge chimed into the discussion stating that the approach to the Online Court should be an evolutionary process providing a space for the Courts in the system and allocating case in the courts on a gradual scale until the Courts become more of an occurrence rather than the exception.

The Report additionally considered the plight as to whether the lawyer has any part to play in ODR. Justice Briggs opines that the advocate, with his intellect and knowledge, also has a role to play in the Online Court but should be at equal footing with the public when accessing these courts (Briggs, 2016). He envisages a structure where the bar is included to help the court in finding the truth and settling matters expediently and effectively (Briggs, 2016).

This statement by Lord Briggs has been bolstered and also made as a call to action by Richard Susskind where he states:

On the face of it, ODR offers the promise of robust and yet radically less costly dispute resolution. And while today's lawyers and policymakers may find it alien or outlandish, few of them belong to the Internet generation. Tomorrow's citizens, for whom working and

socializing online is second nature, are likely to regard ODR as a wholly natural facility, much more so perhaps than conventional courts (Richard Susskind , 2016)

The British Bar Council, in response to this statement, has been skeptical of the inclusion of ODR to the reformed structure for the Courts to pursue. The British Bar Council claims that the use of ODR may be too oversimplified making it very hard to handle complex matters (Susskind, 2016).

To cap this section off the United Kingdom has seen resistance from the bar, however the case has been presented by the Judiciary for a system to incorporate the bar in ODR and also popularize the system to make it wholesome approachable and efficient.

As we draw the lessons learnt from the United States of American and the United Kingdom, what case can we therefore make for Kenya and its active Bar?

A case for the Kenyan Bar and ODR

In this section we will attempt to marry the role of the Kenyan advocate and ODR as they both trying to progress Article 159. From our discussion we have seen the ever-present advocate in the corridors of justice advocating for the case of the client. As Lord Brougham stated that the advocate must represent the client zealously (Ulemen, 1996), however in that zealousness the Advocate under Article 159 has to think about ADR as a viable source of dispute resolution.

The question we ask then is, "*Does ODR have a place with the Kenyan bar*?" This question is made in light of the apparent diminishing position of the lawyer in the whole scenario. As we have seen, ODR has placed itself in a niche position in the USA and the UK. In the former it has placed itself within the e-commerce space delving into cross border resolution and also attempting to penetrate tax matters in some circumstances. In the latter it has been seen as a saving grace by the judiciary, having a special place in a visionary reform of the courts and its structures. In all these cases a common factor has been that the advocate has a place and part to play in the grand scheme of things. It is a light at the end of the tunnel for ODR having a place with the Bar in light of the hostility (Susskind, 2016).

It must be noted that the manner in which ODR is supported is admirable and justified. The case for adoption of ODR has been vouched for by the United Nations as highlighted by Avnita Lakhani where she focused on the United Nations conference in Liverpool setting down protocols of communication in dispute resolution (Lakhani, 2014). As the importance of this trend increases and is further recognized, more and more countries will be forced to adopt ODR as a standard rather than an option (Krause, 2007).

Therefore, in considering its place in ODR, the Kenyan bar should be alive to the two key aspects of ODR that will ensure the implementation of Article 159:

Cost Savings and Convenience

ODR bases its use case on the fact that it provides a platform that is widespread, easily accessible and easy to use. ODR as we know may take various forms such as cyber mediation, video conferencing arbitration and online claims settlement. These forms provide a cheap and easy way to distribute, institute and the resolve a claim. In cases where a disputing party engages a lawyer in another justification, ODR allows for the disputant to cut down costs in arranging travel for the lawyer and also the other party by carrying out sessions through video conferencing and real-time messaging.

Furthermore, it provides for convenience especially where the dispute is carried out in two different countries in different time zones. It allows for parties to quickly get on the network, negotiate, discuss and conclude matters without the hassle of arranging physical meetings. (Goodmann, 2003) looks at this advantage more so in the scope of e-commerce where transactional disputes may eat up on the profits of disputing parties and any inconvenience caused may result in the loss of revenue on both parties.

Evidence Presentation and Accessibility

The issue in traditional cases is that there is the matter of relevance and admissibility of evidence in trial. This means that in cases brought to court the judge must first be convinced that the evidence presented can prove a fact in issue and whether it is legal. Under ODR the parties are able to easily trace evidence in cases where the matter is done online. Moreover, all evidence that is needed is presented before-hand and equally to all parties in the dispute. The lawyers in this case are at an advantage as they are not faced with a situation of ambush from the adverse party.

ADR and ODR seek to ensure that the parties reach a win-win situation and that the truth comes out. The procedural advantage of evidence presentation brings this to light and gives a chance for ODR to work.

Recommendations

From the foregoing we therefore consider the following recommendations to enable the marriage of the bar and ODR:

Institutional Implementation

First, we shall consider institutional implementation from the point of view of the Law Society of Kenya. The Society has been in the forefront of regulating and supervising the profession through standard setting and regulation. Therefore, with this mandate the Society, in consideration of the advantages of ODR, should be alive to adopting ODR standards, regulations and guidelines for advocates under SOPPEC. This ensures that the advocate has a place in ODR and is informed of the role to be played in a dispute.

In formulating the regulations and guidelines, the Society should however be cognizant of the fact that ADR and ODR are party led mechanisms. This means that the rules and guidelines should not enforce the heavy hand of the advocate but rather provide for a supportive role in the process. This avoids the process form being slow, adversarial, technical and costly in the name just fitting in the advocate.

Education and Awareness

This recommendation stems from the point of view of understanding the nuances of ODR. The Council of Legal Education in 2007 provided a robust curriculum involving the study of ADR under the civil litigation course offered at the Kenya School of Law. Despite this addition under the adoption of ADR training has been slow and unsuccessful. There is therefore a need to consider continuous training for advocate on ADR and more so ODR with a keen interest in its implementation and the role of the Advocate.

It is prudent to note that the Advocates (Continuing Legal Education) Rules 2014 were implemented for the training of advocates in emerging legal trends in Kenya. The rules provide that all advocates in Kenya must complete a set number of course points in a year to qualify for practice in the next year. This is a good starting point for training of advocates to understand ODR and to implement ODR positively.

Judicial Integration of ODR

Borrowing a leaf from the UK, the judiciary being at the pinnacle of the legal fraternity is best suited for implementation of ODR. This has been carried out before with the Kenyan judiciary embracing the court-annexed mediation project, which provides for mandatory mediation screening for certain cases brought to court. The effectiveness of court-annexed mediation has been felt throughout the civil court system and has influenced the expediency and efficiency of dispute resolution.

With this experience the same can be pushed for ODR. In proposing this recommendation, it copies the framework brought out in the UK where it provided for an online court and an online judge, arbitrator or mediator. Furthermore, the Kenyan system would benefit from screening process for cases that may go into ODR and those that can be dispensed with through online negotiation and settlement. In bringing the judiciary on board we also bring the bar on board as they will be forced to consider and use ODR.

Conclusion

In conclusion, we have considered our hypothesis in-depth and we have seen that the implementation of Article 159 in a technologically advancing society can be done with the help of the Bar. The comparisons drawn out from USA and the UK show that there is a place for ODR in the bar albeit there being a hostile relationship between the two. The UK Bar Council has been clear-cut with its response and has publicly expressed its reservations, however, with time I believe the adoption of ODR will be felt.

As we therefore advance the discussion from these two jurisdictions down to Kenya, we see a case of implementation and an expected rivalry. We have seen that the Advocate's role despite anything must be discharged. Therefore, in the interest of justice and Article 159 the Kenyan bar may adopt a three-recommendation approach, namely: instructional implementation, education & awareness and judicial integration of ODR. These are the starting blocks in implementing Article 159 bit by bit in a technological Kenya.

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