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Jux Position of Arbitration in Tanzania and England

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ABSTRACT

Most jurisdictions do not use arbitration in family matters but only apply it in commercial disputes. There has recently been a shift to a situation where more and more countries refer family disputes to arbitration for resolution.

The practicality of arbitration and the rising case backlog in courts in Tanzania as well as the success of arbitration in family courts in other jurisdictions calls for a reconsideration of policy issues that bar the adoption of arbitration in family courts and the wording of national civil codes will be instrumental in this respect.

Whereas it is important to consider non-court approaches in all disputes, as a way of promoting harmony the scope of family arbitration could be restricted to aspects of family matters with financial impacts and family property disputes. Overall, the study finds that in countries where arbitration is permissible in family disputes, issues such as the dissolution of marriage are among the least controversial being at the heart of the arbitration procedure and substance.

The study concludes that a series of recommendations including legal, personnel, and institutional changes geared towards using family arbitration mechanisms to complement the existing models of family dispute settlement, by considering the fundamental role the family unit plays in society.

Keywords: *Jux Position, Tanzania, England, Arbitration.*

I. INTRODUCTION

The comparison of family arbitration laws in England and family dispute settlement laws in Tanzania reveals significant differences in structure, process, and legal frameworks. Below is an overview based on the study findings and general appraisal of the legal systems in both countries.

By definition, a family consists of a group of closely related people, known by a common name made up of a man and his wife or wives and children and in some cases other near relations to the couple.² According to Tanzanian law, the concept of family is closely linked to marriage

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² Morgan, Lewis Henry. *Systems of consanguinity and affinity of the human family*. No. 218. Smithsonian Institution, 1871.

and this is the reason why family law in Tanzania fundamentally deals with marriage institution. A Marriage may be monogamous whereby a man and a woman enter into a voluntary union to the exclusion of all others until death pulls them apart or polygamous which may be defined as a voluntary union for the life of one man with several wives according to the law to which they are subject.

Disagreements arise between members of the family due to differences over matters and this may lead to a form of disharmony often labeled as family disputes³. Family disputes also may be caused by disagreements over the duties, rights, and liabilities of each member of the family. It may be caused by bad interpersonal relationships between members of the family and such disputes may also be as a result of custody of children and maintenance of a spouse in the case of a dissolute marriage.

Family disputes are settled using several methods; the major mechanism many parties use is a method of negotiation which requires the parties to settle the disputes among themselves and create a middle-ground, at times an elder is called to mediate and aid in the dispute settlement process. However, since human beings are dynamic, the need for a revolution in the dispute resolution mechanisms being used became paramount as negotiation was not working well anymore in most instances. This requirement for changes led to the application of litigation in settling family disputes.

The law allows spouses to choose litigation as a way of settling disputes between them which is done in Court, especially by initiating legal proceedings through a petition in court⁴. Over the years litigation has been proven to be very time-consuming due to a huge number of court cases that are not confidential because the courtroom is open to members of the public litigation is also quite expensive because of the repetitive appearance fees to be paid to lawyers each time they are to appear in court.

Some disputes among family members even take several years to resolve due to the shortfalls of litigation. The inadequacies of litigation in settling disputes led to the introduction of Alternative Dispute Resolution (ADR) mechanisms which encouraged settlement of disputes out of court. The ADR mechanisms include Negotiation, Mediation, facilitation, and conciliation.

Arbitration is a private arrangement of a dispute, resolution by an independent third party. Arbitration sometimes involves the use of an individual arbitrator or a tribunal. A tribunal will

³ Canary, Heather, and Daniel Canary. *Family conflict: Managing the unexpected*. John Wiley & Sons, 2013.

⁴ Spier, Kathryn E. "Litigation." *Handbook of law and economics* 1 (2007): 259-342.

normally consist of several Arbitrators, mostly sitting in odd numbers to avoid a tie.

In most instances, Arbitrators are either one or three in a tribunal. Arbitration is a substitute for litigation and is generally ideal because it has finality and is binding, unlike other forms of Alternative Dispute Resolution Mechanisms. Arbitration can be said to be an elemental form of dispute resolution; because it has always been in existence since prehistoric times. For instance, arbitration and mediation were the main dispute settlement methods used in the ancient Benin Empire with the family head or the city head principally functioning as the Arbitrator.

This has also been evident in so many ancient parts of Africa. It became the regional law and then some nations also adopted it by creating a law to regulate its practice. Due to the growing importance of arbitration in Tanzania, an updated and comprehensive law on arbitration was enacted which is the Arbitration Act, of 1995. It is generally believed in Tanzania that arbitration can only be used to settle commercial disputes because such disputes require quick resolution, privacy, and confidentiality.

Nevertheless, disputes among family members require more confidentiality and quick settlement. This is the main reason that led the ancient societies to resolve family disputes discretely by family heads, therefore even in modern times before family disputes get to the public, it has been evident that there would have been failed attempts to settle such disputes discretely and without drawing public attention.

Litigation has however not been able to protect the secrecy family disputes require. This is because the courtroom is open to members of the public and the media as well except in very few cases where matters are heard in camera; even the files for such cases are still readily available to the public who can access them upon making a request. Other ADR Mechanisms other than arbitration for instance mediation, conciliation, and negotiation endeavor to protect the confidentiality of the family disputes but due to their non-binding nature, some of the so-decided cases still end up in court. This is unexpected in the case of arbitration being adopted; it is final and binding in its outcome.

Many scholars while considering arbitration as a dispute settlement mechanism, said the practice of arbitration therefore, comes, naturally to primitive bodies of law, and after courts have been established by the state and recourse to them has become the natural method of settling disputes, the practice continues because the parties to a dispute want to settle them with less formality and expense than is involved in recourse to the courts.

Parties to family disputes prefer to employ arbitration as the mechanism to settle disputes compared to other mechanisms for the avoidance of many formalities and technicalities that

may delay settlement⁵. Arbitration as a template for family dispute settlement does not come without demerits such as high expenses but it is in the long run considering its benefits which outweigh its shortcomings a better-recommended family dispute settlement mechanism.

(A) Issues

- i. What are the different methods of settling family disputes in England and Tanzania apart from the use of arbitration?
- ii. How does the application of arbitration to family disputes stand out as opposed to litigation?

(B) Methodology

The methodology used in this study is comparative study. This involved making use of secondary sources and information obtained from the books and Internet to gain critical insight and critically examine the suitability of arbitration in resolving family disputes. The materials were largely composed of written sources by various authors such as textbooks, journals, articles, and dictionaries on the subject of study.

Data analysis analysed the legal reasoning of the English arbitration law contrasting it with Tanzanian law and applied the identified legal rules to the facts. Look for analogies, distinctions, and contrary arguments⁶.

II. LEGAL FRAMEWORK AND SCOPE OF THE ENGLISH ARBITRATION ACT, 1996

Family arbitration in England is governed by this Act, which provides a framework for arbitration proceedings. The Institute of Family Law Arbitrators (IFLA) administers specific rules for family arbitration cases that are referred to her by the respective parties⁷.

There are different types of types of Disputes and the IFLA scheme only covers financial and property disputes arising from marriage breakdown, civil partnerships, cohabitation, and custody issues related to children. It does not apply to disputes regarding the liberty of individuals or the status of relationships.

Voluntary Agreements are a common part of family dispute resolution where parties must agree to resolve their disputes through arbitration. They appoint a qualified arbitrator, and the arbitrator's decision is binding.

⁵ Sander, Frank EA. "Alternative methods of dispute resolution: an overview." *U. Fla. L. Rev.* 37 (1985): 1.

⁶ Peat, Daniel. *Comparative reasoning in international courts and tribunals*. Vol. 145. Cambridge University Press, 2019.

⁷ Sheridan, Dennis, and Suzanne Kingston. "Family Law Arbitration." (2022): 1-344.

Confidentiality levels in the arbitration process are high thereby ensuring that private and sensitive family matters are not exposed to the public court and the proceedings remain secret between those involved in the dispute.

A key feature noted in the process has been flexibility and speed: The arbitration process is generally quicker than court proceedings, allowing parties to tailor the process to their needs, including choosing the arbitrator and setting the timetable. Parties can select an arbitrator with specialized expertise in family law.

The English arbitration model is cost-effective. although parties pay the arbitrator's fees, the overall costs can be lower than lengthy court battles⁸.

III. LEGAL FRAMEWORK FOR FAMILY DISPUTE SETTLEMENT IN TANZANIA

Tanzania applies both statutory family laws and Customary Laws in resolving family disputes resolution in Tanzania is influenced by a combination of statutory law and customary practices. The primary laws include the Law of Marriage Act, of 1971, and various customary laws that vary by the various regions that make up the union.

Family law in Tanzania addresses issues such as marriage, divorce, child custody, and property distribution where customary laws may govern marriage and divorce in many communities in the country, and court processes are also employed in family disputes are then resolved through the court system, which can be lengthy and formal. Mediation is also encouraged, but arbitration is not as commonly utilized as it is done England.

Cultural Influence plays a very big role in settling family disputes in Tanzania and is regarded as a significant source of family law dispute resolution, often prioritizing community and family involvement over formal legal processes. Many individuals face barriers to accessing formal legal systems, including costs, lack of legal representation, and geographical distance to courts.

Gender Inequities are prevalent because cultural norms can disadvantage women in family law matters, particularly regarding property rights and custody issues but the development in law and human rights campaigns have undercut the scope of such unfair customary practices.

IV. THE PRACTICAL ASPECTS OF FAMILY DISPUTE ARBITRATION

The process of litigation is becoming more time-consuming, expensive, and disruptive to the affairs of the parties to the case. It is often also accused of being too technical and needlessly cumbersome due to the economic, social, and political development in the country that gave

⁸ Moza, Amit, and Virendra Kumar Paul. "Review of the effectiveness of arbitration." *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 9.1 (2017): 03716002.

rise to a case backlog in the courts⁹.

Many cases are pending in court because of various court deficiencies in litigation and these pending cases including cases family cases that border on family disputes. Parties in these family law disputes get unsatisfied, and some of them lose interest in ever getting justice all because of the length of time and technicalities involved in applying litigation to these cases. Most family disputes are sensitive and confidential so parties would wish to settle them in private rather than in public proceedings to safeguard sensitive information and their reputations¹⁰.

Most couples desire that their disputes be settled away from the prying eyes of the members of the public because of the nature and sanctity of marriage and they want this done fast. As a result of the deficiencies in litigation, alternative dispute resolution mechanisms were introduced to help in settling disputes faster. These Alternative Dispute Resolution Mechanisms such as Negotiation, mediation, conciliation, etc. were always finalized with persuasive decisions rather than binding decisions. These alternative dispute resolution other ADR mechanisms are being used for family dispute settlement as well; but because they do not give final and binding decisions to disputes, many of such cases end up in litigation and the settlement process starts all over again leading to double costs and time wastage on the dispute.

Arbitration is the only Alternative Dispute Resolution mechanism that is finalized with a binding decision made by the Arbitrator. This mechanism if applied to family disputes will be more satisfactory to disputants who are involved in such family disputes. However, in countries like Tanzania arbitration mechanism is only applicable to commercial disputes and thus parties do not have its availability as an option for family dispute resolution. Arbitration as a family dispute settlement mechanism is acknowledged for its confidentiality, bindingness of decisions and time-saving characteristics and because family disputes need to be settled not only urgently but also finally, arbitration should be introduced as a family dispute settlement mechanism. None of the parties to family disputes want the matters that have been settled to be revisited; this can be curbed by applying arbitration as a family dispute settlement method.

Parties to family disputes because of their complexity prefer to have their disputes resolved by persons who are knowledgeable, unbiased, and patient and have a proper understanding of the subject matter (in this case family law); these are the main requirements of an arbitrator.

⁹ Gamage, A. N. K. K., and Suresh Kumar. "Review of Alternative Dispute Resolution Methods in Construction Projects." *Saudi Journal of Engineering and Technology* 9.2 (2024): 75-87.

¹⁰ Weisberg, D. Kelly, and Courtney G. Joslin. *modern Family Law: cases and materials*. Aspen Publishing, 2024.

Therefore, if arbitration is permissible as a mechanism for resolving family disputes, the public will easily subscribe to its application knowing fully well that they would get the decisions of experienced persons in their family disputes. The establishment of family arbitration will also require countries to enact a Family Arbitration Act that will act as a guide for family arbitration create awareness for it and assure people of its legality.

V. FAMILY AS FOUNDATION OF THE SOCIETY

Carter and McGoldrick¹¹ defined a family as comprising people who have a common history and a shared future. They include the entire emotional systems at least three generations, and frequently now four or even five generations bound together by blood, legal, or historical ties. This definition can be helpful of the African traditional understanding of a family. Family is seen as a continuous unit in the African traditional systems. The possibility of a nuclear family was considered vague until recent times did such a family became acceptable. In ancient times the African family consisted of like three to four generations living together as one with the oldest member being the head of the family.

In major conference in the late 1970s, was organized by the then-American President Jimmy Carter in what came to be known as the White House Conference of Families, a question was raised on what was considered a family. At the conference, a general view was embraced that a family was primarily about men and women marrying and having children. This view cannot be termed as wrong as it is widely thought that marriage is the foundation of the family which in turn is the basis of society in the words of Lord Westbury in *Shaw v. Gould*¹² wherein it was stated that marriage is a key foundation of civilized society, and no part of the institutional and legal framework of a country can be of a more vital position to its subject than those which control the manner of dissolving, the marriage contract. The family is often defined as the fundamental unit of the society.

The family was the first social unit established by God, for this reason, for many fundamentalist Christian churches for instance The Roman Catholic Church, family is created out of a recognized order and is seen as one of the essential sacraments of religious worship. For this purpose, it is believed that marriage should be for life and hence Christians forbid divorce this stands as the major difference between statutory marriage and church marriage because while statutory marriage recognizes divorce and makes adequate provisions for it, church marriage does not envisage it.

¹¹ McGoldrick, Monica, and Kenneth V. Hardy, eds. *Re-visioning family therapy*. Guilford Publications, 2019.

¹² (1868) LR 3HL55

VI. THE INEVITABILITY OF FAMILY DISPUTES AND UNDERLYING CAUSES

In defining family disputes, there is a need to give a good definition of disputes. Disputes are conflicts or disagreements. As a verb, the term dispute can also mean to quarrel or engage in an argument¹³. Disputes as defined by Burton as short-term disagreements that are easy to resolve. Following Burton's definition, disputes involve negotiable interests. Having defined family as a foundation of civil society and a good definition of disputes, one can go ahead to define family disputes.

According to Roberts Marian¹⁴, Domestic disputes or family disputes are disagreements that are likely to arise within the home. A domestic dispute is generally any disagreement, which may or may not include violence, within a family or between members of the same household. From these definitions of family and disputes and in line with Malek's definition it is safe to say that a family dispute is any conflict that occurs within a family; between husbands and wives, parents and children, between siblings, or with extended families.

According to Lauri Ravilla¹⁵ the four main causes of family disputes include; child discipline, in-laws and extended family, finances and jobs, and sibling rivalry. In addition to these, in the book "*The Dark Sides of Families*," the editors gave several causes of family disputes which they said include, domestic violence: This is one of the main causes of family disputes. It is also known as Intimate Partner Violence (IPV). Olomjobi thought that some partners especially men apply control in the form of threat and emotional abuse to maintain control over their partners.

Additionally, physical abuse of wives is another form of abuse that is perpetrated against women. It includes abuse, assault, battery, pushing, stoning, cutting, burning, slapping, biting, punching, choking, and disfigurement by pouring acids among others directed against wives by their spouses or intimate partners. This usually occurs within the homes and domestic settings either by fathers, husbands, or siblings. This type of abuse is often condoned silently by women until they feel they cannot take it anymore and then opt for separation from their spouses.

Marital rape is also a major cause of family disputes. In the United States, marital rape is also known as spousal rape it consists of non-consensual sex in which the victim is a spouse to the perpetrator¹⁶. Women are more likely to be victims of sexual violence than men. Yinka

¹³ Cahn, Dudley D. *Conflict in intimate relationships*. Guilford Press, 1992.

¹⁴ Roberts, Marian. *Mediation in family disputes: Principles of practice*. Routledge, 2016.

¹⁵ Lauri Revilla, 'Family Conflicts Examples' (2015) Accessed at www.livestrong.com/LIVESTRONG.COM/RelationshipsandFamily

¹⁶ Singh, Akansha. "Marital rape: A socially and legally justified crime in India." *Interpersonal Crimes: A Critical Study of Systematic Bias against Men* (2013): 19-31.

Olomojobi called this sexual violence and says it occurs when a woman is physically pressured, coerced, or forced against her will by a male partner to have sexual intercourse with him against her consent or she is scared of the consequences of her refusal to do so.

VII. CONCLUSION

The study established that family arbitration laws in England offer a structured, flexible, and confidential alternative dispute resolution from out-of-hostile court proceedings, with a strong emphasis on the autonomy of the parties involved in the dispute¹⁷. In contrast, family dispute resolution in Tanzania is more influenced by traditional and customary practices, with a reliance on the formal court system that can present challenges in accessibility and equity. The differences highlight the varying approaches to family law and dispute resolution in these two countries.

(A) Recommendations

The study makes some key recommendations for Tanzanian legislature and policy framers looking to establish arbitration to resolve family matters:

i. Advantages of Family Arbitration

Arbitration allows for more privacy and confidentiality compared to court proceedings. Arbitrators with specialized expertise in family law can be appointed, leading to a more informed decision. The process is generally faster and less adversarial than litigation and the parties have more control over the process and can tailor it to their needs

ii. Scope of Family Arbitration

Arbitration should be allowed for matrimonial property and financial disputes arising from suits for separation and divorce. It can also be extended to other family matters like child custody and maintenance, if the parties consent. Arbitration should not be permitted for criminal matters or issues of status like divorce itself

iii. Regulation and Enforcement

Family arbitration should be regulated by a separate statute with specialized rules, rather than the general Arbitration Act

Arbitration agreements and awards should be made enforceable by the courts and individual Arbitrators should have proper training and be subject to a code of conduct.

¹⁷ Abraham, Sara. *A new politics: multi-racial electoral coalitions in Trinidad/Tobago and Guyana*. The University of Wisconsin-Madison, 1999.

iv. Relationship with Courts

Courts should have a supervisory role to ensure arbitrations are conducted properly with parties accorded limited rights to appeal or challenge arbitral awards and Courts should be able to make interim orders and assist in taking evidence

v. Ensuring Fairness

Safeguards should be in place to protect vulnerable parties like women and children. Moreover, Parties should have the right to seek independent legal advice before agreeing to arbitrate. Arbitrators should ensure parties are not coerced and can make decisions.

vi. Integrating with Traditional Justice Systems

Family arbitration should be designed to complement rather than replace traditional dispute resolution mechanisms.¹⁸

Collaboration between arbitrators and traditional leaders like chiefs and elders can be beneficial. Customary law principles can inform family arbitration where appropriate. In summary, family arbitration can be a useful addition to the justice system in African states, but it must be carefully regulated to ensure fairness and access to justice for all. Integrating it with traditional systems and providing a clear relationship with courts are key considerations.

¹⁸ Neslund, Nancy. "Dispute resolution: A matrix of mechanisms." *J. Disp. Resol.* (1990): 217.