RESOLVING VALUATION AND PROPERTY MANAGEMENT DISPUTES IN KENYA

"A CASE STUDY OF THE CITY VALUATION COURT, TRIBUNALS AND THE ALTERNATIVE DISPUTE RESOLUTION METHODS"

UNIVERSITY OF NAIROBI
COLLEGE OF ARCHITECTURE AND ENGINEERING
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M.A VALUATION AND PROPERTY MANAGEMENT

BY

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DECLARATION

Declaration by the student

I **KICH JOHN AYIECHO** do hereby declare that this thesis is my original work. It has never been presented for the award of any degree in any other university.

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Declaration by the Supervisor

This thesis has been submitted for examination with my approval as a University of Nairobi supervisor and lecturer.

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ABSTRACT

Disputes are bound to arise out of any contract, valuation and property contracts included. It is essential that once a dispute has occurred, it be resolved expeditiously in order to avoid any economic loss that might occur. The existing tribunals through which valuation and property management disputes are resolved in Kenya, are the Valuation Court, Business Premises Rent Tribunal, Rent Restriction Tribunal, Land Acquisition Compensation Tribunal, Land Rent Arbitration Tribunal, Valuers Registration Board, Land Adjudication Committee, Land Control Board, Land Arbitration Board, Physical Planning Liaison Committee and the Land Disputes Tribunal.

This thesis has looked into the workings of the first five (5) tribunals with a view to outlining their shortcomings and exploring the use of the Alternative Dispute Resolution methods. It has been found that these tribunals have become slow thus failing to achieve the intended purpose upon which they were formed. In certain cases, it has been found that it takes as long as Six (6) years to resolve a valuation for rating dispute in the Valuation Court, Ten (10) years to resolve a termination of lease dispute in the Business Premises Rent Tribunal and Twelve (12) years to resolve a general dispute in the Rent Restriction Tribunal. This has been brought about by the fact that the Tribunals have become too legalized and formal to the extent that the process of resolving a dispute slackens. In the Valuation Court, for instance, it took about 8 years to commence the hearing of objections to the 1988 to 1996 Supplementary Valuation Rolls. The Tribunals have been invaded by advocates (who are masters of Civil Procedure Rules) prompting the adoption of the Civil Procedure Rules of the Civil Procedure Act Chapter 21 of the Laws of Kenya, thus making them too legalized. This has resulted into unnecessary delay in hearing cases due to unnecessary adjournments and procedural defect overrules.

Further to the above reasons, there is need to explore the use of the Alternative Dispute Resolution methods to resolve valuation and property management disputes expeditiously. Through review of related literature, and interview with key informants, it has been found that the Royal Institution of Chartered Surveyors (RICS), through its Dispute Resolution Service Department, has employed the use of the Alternative Dispute Resolution methods, with much success. The results have been remarkable since disputes have been expeditiously and cheaply resolved. This has been brought about by the fact that the Alternative Dispute Resolution methods are flexible in application, private in nature and informal in character. As

a result of this, no time is wasted in bureaucratic processes such as filing of a dispute and fixing of a hearing date since the disputing parties have full control of the dispute. For instance, the parties may decide to file a dispute immediately it arises and also commence the hearing at the same time.

This study favours the use of the Alternative Dispute Resolution methods to resolve valuation and property management disputes beforehand. It suggests further that a greater role be played by the Institution of Surveyors of Kenya (ISK), just like the Royal Institution of Chartered Surveyors (RICS) in Britain has done. This will give room for the assessment of the potential to resolve a given dispute through either the tribunals or the Alternative Dispute Resolution methods. In this regard, disputes would be filtered beforehand and no unnecessary delay would be caused.

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BPRT: - Business Premises Rent Tribunal.

RRT: - Rent Restriction Tribunal.

ADR: - Alternative Dispute Resolution.

CIArb: - Chartered Institute of Arbitrators.

RICS: - Royal institution of Chartered Surveyors.

CEDR: - Center for Dispute Resolution.

AIA: - American Institute of Arbitrators.

NIA: - Negotiation Institute of America.

UNCTRAL: - United Nations Commission on International Trade Law.

JCT: - Joint Contracts Tribunal.

ISK: - Institution of Surveyors of Kenya.

L.R NO: - Land Reference Number.

U.S.V: - Un-Improved Site Value.

KPC: - Kenya Pipeline Corporation.

CoL: - Commissioner of Land.

AG: - Attorney General.

HCC: - High Court Case.

FRI: - Full Repairing and Insuring.

CHAPTER ONE

1.1.0 INTRODUCTION

A dispute may simply, be defined as a difference between two persons or parties. It is at the center stage of dispute resolution, without which there is nothing to resolve. The question about how to resolve a dispute does not arise until a dispute has arisen. Dispute resolution is defined as the process of settling differences based on evidence presented by the disputants.

Disputes in Valuation and Property Management arise either from an agreement under the Law of Contract or under Statutes. It begins where a party to a Valuation or Property Management contract makes a claim and the other makes a counterclaim. Disputes in Valuation and Property Management involve a number of issues viz; the valuation figure, exemption from valuation for rating, rental reviews, surrender of lease and rental arrears.

Disputes in valuation and Property Management occur in the following cases;

i. Valuation for Rating under the Valuation for Rating Act Chapter 266;

ii. Valuation for Compulsory Acquisition under the Land Acquisition Act Chapter 295 and the Trust Land Act Chapter 288;

iii. Rental Valuation under the provisions of the Rent Restriction Act Chapter 296 and the Landlord and Tenants Act (Hotels and Catering Establishments) Chapter 301 of the Laws of Kenya;

iv. Rental Arrears, Service Charge, Renewal and/or Extension of Lease, Rental Review and Non Observance of other covenants in a lease/tenancy agreement, entered into between landlord and tenant under the provisions of the Landlord and Tenants (Hotels and Catering Establishments) Act Chapter 301 and the Rent Restriction Act Chapter 296;

v. Objection to the increase in Land Rent under the provisions of the Government Lands Act Chapter 280 of the Laws of Kenya.

vi. Valuation for mortgage, auction, sale, purchase, insurance and book purpose.

Disputes in valuation would occur between, either the valuation surveyor and the property owner, the valuation surveyor and a third party who relies on the valuation report in question or a landlord and a tenant(s), as appropriate, on a valuation figure ascribed. Disputes in Property Management on the other hand would arise between a landlord and tenant on rent arrears, alteration of rent, breach of repairing and maintenance covenants.

Disputes in Valuation and Property Management are currently resolved through the following Statutory Dispute Resolution mechanisms or tribunals:

i. the Valuation Court established under the provisions of the Valuation for Rating Act Chapter 266;

ii. the Business Premises Rent Tribunal established under the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Chapter 301;

iii. the Rent Restriction Tribunal established under the Rent Restriction Act Chapter 296;

iv. the Land Acquisition Compensation Tribunal established under the provisions of the Land Acquisition Act Chapter 295;

v. The Land Rent Arbitration Tribunal established under the provisions of the Government Lands Act Chapter 280 of the Laws of Kenya.

The Valuation Court is established under Sections 12 and 13 of the Valuation for Rating Act Chapter 266 of the Laws of Kenya. It is a quasi-judicial or a special court established to settle disputes related to objections to the Draft and Supplementary Valuation Rolls. Section 10(1) of the Valuation for Rating Act Chapter 266 defines the nature of disputes, for which any person aggrieved may lodge a notice of objection to the Valuation Court as:

i. the inclusion in or omission from, either the Draft or Supplementary Valuation Roll, of any ratable property;

ii. any value ascribed in any Draft Valuation Roll or Draft supplementary Valuation Roll;

iii. dispute as to what property is exempt from Valuation for Rating.

The Business Premises Rent Tribunal is a special court that deals with disputes between landlords and tenants, in controlled commercial premises. It is established under the provisions of Section 11 of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Chapter 301 of the Laws of Kenya. Section 12 of Chapter 301 spells out the nature of disputes within the jurisdiction of the Business Premises Rent Tribunal, that is:

i. determination of a controlled tenancy;

ii. determination or variation of rent payable under a given tenancy agreement;

iii. fixing the amount of service charge payable, where necessary;

iv. making necessary orders to recover rental arrears and mesne profits and also for the recovery of possession of a premises. (mesne profit in relation to property is defined under Part I Section 2 of the Civil Procedure Act Chapter 21 of the Laws of Kenya, as those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession);

v. making orders to have a building repaired and maintained adequately;

vi. permit the levy of distress for rent;

vii. award costs in respect of references made to it;

viii. award compensation for any loss incurred by a tenant on termination of a controlled tenancy;

ix. summon a landlord or a tenant to attend the Tribunal;

x. to enter and inspect premises in respect of which a reference has been made to the tribunal;

xi. investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant;

The Rent Restriction Tribunal deals with disputes between landlords and tenants in controlled residential premises that is, residential premises that fetch a monthly rent of Kshs 2,500/=.

The Rent Restriction Tribunal is established under the provisions of Section 4 of the Rent Restriction Act Chapter 296 of the Laws of Kenya. The powers and jurisdiction of the Rent Restriction Tribunal are set out in Section 5 of the Rent Restriction Act, that is:

i. assess the Standard Rent of residential premises;

ii. apportion Service Charge;

iii. make an order for the recovery of possession of premises;

iv. make an order for the recovery of rent arrears, mesne profits and service charges;

v. make an order ensuring that the premises are in a good state of repair, maintenance and decoration;

vi. permit the levy of distress for rent;

vii. make an order to reduce the standard or recoverable rent where the landlord has failed to carry out the necessary repair, maintenance and decoration of the premises;

Sections 117 and 118 of the Constitution of Kenya provides for the acquisition and setting apart of privately owned land and trust land respectively, for public purposes, provided that due compensation is paid. Under the Land Acquisition Act Chapter 295 of the Laws of Kenya, procedures are set out for compulsory acquisition of private property for public purposes, subject to payment of prompt and just compensation. The Land Acquisition Act provides for the establishment of the Land Acquisition Compensation Tribunal to resolve disputes related to compulsory land acquisition.

According to the provisions of the Government Land Act Chapter 280 of the Laws of Kenya, Land Rent Arbitration Tribunal may be established to determine cases of objection to the review of land rent.

In addition to the above Statutory Methods of Resolving Valuation and Property Management disputes, there are Alternative Dispute Resolution Methods such as: Arbitration, Mediation, Negotiation, Adjudication, Neutral Fact-Finding, Facilitation, Expert Determination and Executive Tribunal. The use of the Alternative Dispute Resolution Methods to resolve Valuation and Property Management disputes have been low keyed, if any, in Kenya. This is as opposed to the practice in Britain, where the Royal Institution of Chartered Surveyors has

established a Dispute Resolution Service Department, which employs the use of the Alternative Dispute Resolution Techniques/Methods to resolve disputes related to Valuation and Property Management before they are taken to the tribunals or the special courts.

1.2.0 PROBLEM STATEMENT AND JUSTIFICATION

The Statutory Dispute Resolution Methods of resolving Valuation and Property Management disputes in Kenya, were aimed at:

i) ensuring that disputes are dealt with by a technically competent tribunal(s), with members who are knowledgeable in law and are conversant with the technical complexity of the dispute in question;

ii) ensuring that disputes are disposed of justly, speedily and at a reasonable cost.

During a preliminary survey on the operations of the Nairobi Business Premises Rent Tribunal, the Rent Restriction Tribunal and the Valuation Court, it was revealed that they function like courts of law. They are anchored on court procedures and formalities and are legalistic as the court of law. The procedures adopted are in accordance with the provisions of the Civil Procedures Act Chapter 21 and the Evidence Act Chapter 80 of the Laws of Kenya.

The City Valuation Court is chaired by an advocate of the High Court of Kenya. It has been quite slow in resolving cases of objection to the Main and Supplementary Valuation Rolls. This was revealed during a preliminary survey of cases of objection referred to it in regard to Supplementary Valuation Rolls prepared between the periods 1991 to the year 2000 that is, out of about 1432 objections filed, only about 426 have been determined to date. Standard time for resolving valuation for rating disputes should be one year, that is, the period not more than that between one preceding Supplementary Valuation Roll and the other, or between one Supplementary Valuation Roll and the preceding Main Valuation Roll. It is noteworthy to say that the longer it takes to resolve a dispute, the higher the cost in terms of litigation fee, valuation fee, and the opportunity cost.

The Rent Tribunals are presided over by either an Advocate of the High Court or a Magistrate with powers to preside over a Sub-Ordinate Court of the first class. Due to the technical nature of valuation and property management disputes, the chairmen of the Rent Tribunals are at a disadvantage to competently deal with the technical aspects of the disputes. At the

end of the day, the disputing parties are left dissatisfied with the decision of the Rent Tribunals. For instance, in the BPRT (Business Premises Rent Tribunal) Case No. 330 filed on 20th June 1997 and determined on 19th February 1998 between The New Thimbigua Provision Store and Tough Hide Limited, the Chairman of the Business Premises Rent Tribunal, in his ruling basically arrived at a mathematical average between the tenants' and the landlords' valuation in determining the amount of rental review. The landlord, in this case, was not satisfied with the decision of the Tribunal, especially due to the fact that the comparables used in the tenants' valuation were faulty. The findings of a preliminary survey revealed that cases referred to the Rent Tribunals for determination take quite long. It takes as long as 3 years, sometimes even a longer period, to resolve disputes relating to rent arrears, rental review, termination and general complaints. It is worth noting that the longer it takes to resolve such disputes, the more the cost incurred.

Initial survey on the Land Acquisition Compensation Tribunal and the Land Rent Arbitration Tribunal revealed that they are presided over by an advocate of the High Court of Kenya with more than five years standing. The Land Acquisition Tribunal has about 14 cases pending whereas the Land Rent Arbitration Tribunal has about 600 pending cases. These two tribunals share the same secretariat and were constituted in the year 2000.

From the foregoing, it is evident that the Statutory Dispute Resolution Mechanism of resolving Property Valuation and Management disputes in Kenya are lengthy. It is therefore imperative to evaluate their performance vis a vis the Alternative Dispute Resolution methods and also identify the shortcomings that hinder their smooth operation. This would be in the hope of recommending new directions or systems capable of resolving disputes faster. This is in line with the sentiments expressed by the American Chief Justice (retired) Warren Burger when he said that "a system or set of systems to be cherished should be that which fulfills the traditional obligation of justice by producing an acceptable result in the shortest possible time, with the least possible expense and with the minimum of stress to the disputing parties".

1.3.0 STUDY OBJECTIVES

This study endeavors to achieve the following objectives:

i. to review the statutory methods of resolving valuation and property management disputes in Kenya;

ii. to identify the shortcomings of the statutory methods of resolving valuation and property management disputes;

iii. to identify the existing alternative methods of resolving valuation and property management disputes;

iv. to determine the extent of application of the Alternative Dispute Resolution Methods in resolving Valuation and Property Management disputes in Kenya; and

v. to explore an effective means of resolving Valuation and Property Management disputes.

1.4.0 HYPOTHESIS

Too much reliance on the processes under the Civil Procedure Rules to resolve valuation and property management disputes in the tribunals is the main cause of delays. Administrative constraints are also a hindrance towards expeditious resolution of valuation and property management disputes in the tribunals.

1.5.0 SCOPE OF THE STUDY

There are eleven (11) tribunals that deal with valuation and property management disputes, that is: the Valuation Court, Business Premises Rent Tribunal, Rent Restriction Tribunal, Land Acquisition Compensation Tribunal, Land Rent Arbitration Tribunal, Land Control Board, Valuers Registration Board, Land Adjudication Committee, Land Arbitration Board, Physical Planning Liaison Committee Board and the Land Disputes Tribunal. Five (5) of these tribunals, chosen at random based on time available vis a vis the cost of research, have been considered in this thesis. The five (5) tribunals chosen for this study are the Valuation Court, Business Premises Rent Tribunal, Rent Restriction Tribunal, Land Acquisition Compensation Tribunal and the Land Rent Arbitration Tribunal. This represents 45% of the total number of tribunals that deal with valuation and property management disputes and therefore it is believed that conclusions and recommendations drawn would reflect, to a greater extent, a true indication aimed at answering the research question and hypothesis.

This study has identified and considered eighth (8) Alternative methods of resolving valuation and property management disputes in Kenya that is Arbitration, Mediation,

Negotiation, Adjudication, Expert Determination, Facilitation, Neutral Fact-Finding and Executive Tribunal.

1.6.0 RESEARCH METHODOLOGY

This section presents a discussion on the specific steps used to carry out the research in order to achieve the set out objectives and prove the hypothesis right or wrong. The steps taken are review of related literature, data collection, presentation and analysis.

1.6.1 Review of Related Literature

This is aimed at building a conceptual framework through the determination of what has been written that is related to the research problem under study. It helps in the formation of a framework within which research findings are to be interpreted, analyzed, synthesized, integrated and summarized. A review of the literature is also aimed at revealing the kind of research strategies, procedures and measuring parameters that are useful in investigating the problem under study. Olive and Abel Mugenda (1999) assert that literature review involves the systematic identification, location and analysis of documents containing information related to the research problem under investigation.

In this study, literature on previous work or cases on disputes in valuation and property management have been reviewed with a view to understanding the nature of disputes that subsist therein. Cases of disputes in valuation and property management that have gone to the courts and tribunals in Kenya have been reviewed.

In addition, literature on dispute resolution management under the statutory methods that deal with disputes in valuation and property management has been reviewed. Also reviewed, generally, is dispute resolution management under the courts of law in accordance with the provisions of the Civil Procedure Act Chapter 21 of the Laws of Kenya. This literature has been sourced from statutes of the Laws of Kenya, that is:

i) sections 3 – 20 of the Valuation for Rating Act Chapter 266;

ii) sections 3 – 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301;

iii) sections 4 – 36 of the Rent Restriction Act Chapter 296;

iv) sections 4 – 26 of the Land Acquisition Act Chapter 295;

v) the Government Lands Act Chapter 280;

vi) the Civil Procedure Rules under the Civil Procedure Act Chapter 21.

In the second section of the literature review, the alternative means of resolving valuation and property management disputes have been reviewed. This is aimed at bringing to picture the process of dispute resolution management under the alternative dispute resolution methods. This literature has been sourced from the works of several writers and institutions that employ the use of alternative dispute resolution methods, for instance the Chartered Institute of Arbitrators (CIArb) and the Dispute Resolution Service Department of the Royal Institution of Chartered Surveyors (RICS). The specific references that have been used in reviewing this kind of literature relate to resolution of Valuation and Property Management disputes through; Arbitration, Mediation, Negotiation, Adjudication, Expert Determination, Facilitation, Neutral Fact Finding and Executive Tribunal. In obtaining literature on the above, Library Research and Internet Surfing has been of great essence.

1.6.2 Data Collection

The collection of qualitative data has been carried out through ethnography, historical research, and case studies. This has directly depended on the researcher as an active participant in gathering the data. The instruments used in collecting qualitative data comprise; review of related literature, scheduled and non-scheduled interviews with key informants, using a checklist, attendance of tribunal sessions, observation and perusal of related case files.

In order to determine the causes for delay in resolving valuation for rating disputes, two (2) out of five (5) members of the Valuation Court were interviewed. In addition to this, three (3) out of seven (7) valuers who represented the city Council of Nairobi in the valuation court were interviewed. None of the disputants was interviewed since the valuation court was not in session at the time of carrying out this research.

In order to determine the causes for delay in resolving disputes in the Business Premises Rent Tribunal, five (5) advocates of the High Court of Kenya who specialize on the tribunal

matters were interviewed. Also interviewed was a senior officer of the tribunal. Views from the disputing parties were also taken at random during attendance of tribunal sessions.

To determine the causes for delay in resolving disputes in the Rent Restriction Tribunal, two (2) advocates of the High Court of Kenya chosen at random from those who specialize on the tribunal matters have been interviewed. In addition, two (2) senior officers of the tribunal were interviewed. Views from disputing parties were also obtained through informal interview during the attendance of tribunal sessions.

In order to determine the causes for delay in resolving disputes in the Land Acquisition Compensation Tribunal and the Land Rent Arbitration Tribunal, one member of each tribunal was interviewed.

In order to determine how effective, in terms of time, it is to resolve disputes through the Alternative Dispute Resolution methods, five (5) Arbitrators were interviewed out of a total population of 184 arbitrators as provided for in the Directory of Members of the Chartered Institute of Arbitrators (Kenya Branch) as at November 2001. The choice of the five (5) arbitrators has been based on the facts that out of the 184 arbitrators, only about 34 are actively practising.

The collection of quantitative data has been through perusal of case files from the valuation court and tribunals under study. Data relating to the cost of resolving valuation and property management disputes through the valuation court and tribunals under study have been obtained through perusal of case files, the Valuers Act Chapter 532 and the Advocates Act of the Laws of Kenya.

Data regarding how long it takes and how much it cost to resolve a dispute through the use of the Alternative Dispute Resolution methods has been collected through interview with arbitrators.

1.6.3 Population and Sample Size

Population sample size selected at random, between the years 1990 to 2001, has been considered to be a good indicator of the actual position for this study.

i) for the Valuation Court, an envisaged sample size of 30 cases have been selected at random out of a population of about 345 decided cases of objection during the period

between 1990 – 2001. This is the span of period during which the researcher was able to trace the verbatim records of proceedings of the valuation court at the valuation section of the City Council of Nairobi. This sample size represents about 8% of the population sample;

ii) for the Business Premises Rent Tribunal, a sample size of 63 cases have been selected out of a population of 3450 decided cases on arrears, rental review, termination and general complaints between the year 1997 to 2001. This is the span of period during which the researcher was able to trace the records, that is before 1997 the recording system was poor therefore hardly any information could be obtained.

iii) for the Rent Restriction Tribunal, a sample size of 38 cases have been selected at random out of a population of 2696 decided cases on arrears, rental review, termination and general complaints between the year 1995 and 1998. This is the span of period within which the researcher was able to obtain records;

iv) the Land Acquisition Compensation Tribunal currently has about 14 pending cases. All these cases shall be considered in this study. The cases span a period between 1986 and 2000.

Also considered for the purposes of this study is the Third Nairobi Water Supply Project (Ndakaini) Land Acquisition case. In this case eighty (80) people whose land was compulsorily acquired appealed to the High Court against the Commissioner of Lands compensation award. It is noteworthy that at the time of the Notice of the intention to acquire this land, on 12th August 1988 Vide the Kenya Gazette Notice Number 3493, there was no statutory provision under the Land Acquisition Act Chapter 295 for the establishment of the Land Acquisition Compensation Tribunal. It is, in actual sense, the Ndakaini Land Acquisition case that culminated into the enactment of the Land Acquisition (Amendment) Bill of 1990 that gave room for the establishment of the Land Acquisition Compensation Tribunal to arbitrate on the award by the Commissioner of Lands and claims by people whose land are to be acquired. In this regard therefore, it is of great importance to also look at the Third Nairobi Water Project (Ndakaini) case;

v) the Land Rent Arbitration Tribunal currently has about 600 pending cases. These cases were transferred from the High Court upon its establishment in the year 2000.

The cases span a period from the year 1989 to date. Twelve (12) of these cases have been considered in this study.

vi) it has not been possible to obtain adequate data regarding the application of the Alternative Dispute Resolution (ADR) methods to resolve valuation and property management disputes in Kenya. This is because the methods are private and confidential and the decisions arrived at are never published. In this regard, the researcher has relied extensively on literature review in addition to three (3) property management disputes resolved through Arbitration and Negotiation.

1.6.4 Type of Data

The nature and type of data that have been used for this study comprise:

- Qualitative data on the types and forms of Statutory Methods of Resolving Valuation and Property Management disputes, for instance the Valuation Court and Business Premises Rent Tribunal;
- Quantitative data on the time taken to resolve disputes using the Statutory Dispute Resolution Methods;
- Qualitative data on the types and forms of the Alternative Methods of Resolving Valuation and Property management disputes for instance Arbitration and Mediation;
- Qualitative data on the extent of use of the Alternative Dispute Resolution methods and the time taken to reach a decision.

1.6.5 Sources of Data

The source of data for this study have been from the following areas:

i) the Nairobi City Valuation Court files, available at the Valuation Section of the City Council of Nairobi;

ii) the Nairobi Business Premises Rent Tribunal Case files, available at Bima House, Harambee Avenue, Nairobi;

iii) the Nairobi Rent Restriction Tribunal case files, available at Agriculture House, Harambee Avenue, Nairobi;

iv) the Land Acquisition Compensation Tribunal case files, available at the National Social Security Fund House on Bishops Road, Nairobi. Data regarding the Third Nairobi Water Supply Project (Ndakaini) were sourced from the City Council of Nairobi and the Ministry of Lands and Settlement Headquarters, Nairobi;

v) the Land Rent Arbitration Board case files, available at the National Social Security Fund House on Bishops Road, Nairobi;

vi) data regarding the performance of Alternative Dispute Resolution Methods were obtained from the written works of; the Chartered Institute of Arbitrators, the Dispute Resolution Services department of the Royal Institute of Chartered Surveyors, the American Institute of Arbitrators, The Center for Dispute Resolution, the Negotiation Institute of America and the Center for Mediation. The Internet has been used as a great source of this information.

1.6.6 Data Presentation and Analysis

Data presentation and analysis is the ways and means through which raw data from the field is cleaned, coded and analyzed in order to make interpretation possible. The methods of data analysis were primarily determined by the objectives of the study and the hypothesis to be tested. This has been as follows:

i) a response to the first objective regarding reviewing of the statutory dispute resolution methods that deal with valuation and property management disputes has been generated through review of related statutes and literature. This data has been presented in a tabular form;

ii) to answer the second objective, which regards identifying the shortcomings of the Statutory Dispute Resolution Methods, time taken to resolve a given dispute has been measured. The cost incurred are primarily time related and will depend on the matters in dispute, the procedure adopted by the parties and the choice of representations. In this regard therefore, it is worth noting that the overall cost in resolving a given dispute is greatly reduced, as a dispute is handled expeditiously. This would be

appropriately done for each Statutory Dispute Resolution Methods in Valuation and Property Management as follows:

a) For the City Valuation Court, time has been measured based on the philosophy that a dispute should be expeditiously resolved before the preparation of the next Draft Supplementary Valuation Roll. Draft Supplementary Valuation Rolls are normally prepared annually. Therefore, the standard time of measure within which Valuation for Rating disputes should be resolved is reasonably considered to be not more than one year. In the course of measuring time, the procedure adopted by the Valuation Court has also be considered since it directly relates to the time and cost incurred by the disputing parties;

b) The Business Premises Rent Tribunal and the Rent Restriction Tribunals were established to fulfill the objectives of the commercial community to resolve tenancy disputes expeditiously and at a lower cost. The shortcomings of the tribunals would therefore been measured against the initial objectives for which they were founded, that is, expedition in relation to time.

   The standard time for resolving a dispute in the Rent Tribunals has, for instance, been reasonably defined as follows:

   - for rent review disputes, that duration of time between which the next rent is due for payment has been considered a reasonable duration to resolve a rental review dispute. In commercial and residential premises (controlled) rents are payable either monthly or quarterly in advance. The latter is more preferable. For the purposes of this study therefore, 3 months is considered to be the most reasonable duration of time within which a rental review dispute should be resolved;

   - in disputes which relate to the renewal, extension and surrender of lease, the standard time to expedite is considered to be that period before the next rent is due. This is reasonably considered to be that period adequate for the negotiation of lease renewal, extension or surrender conditions. For the purposes of this study, this period is considered to be 3 months;

- rental arrears disputes are reasonably settled if it does not accumulate up to the next rent paying period, for instance, in situations where rent are paid quarterly in advance, the rental arrears dispute should be settled before the beginning of the next quarter. This period can fairly be stated to be 3 months;

As to whether the Rent Tribunals have met the objective of informality, the standard of measure would be the procedures adopted by the Tribunals vis a vis the Civil Procedure Rules of the Civil Procedure Act Chapter 21 of the Laws of Kenya.

c) the shortcomings of the Land Acquisition Compensation Tribunal has been measured against time and informality in terms of procedures.

Standard time to resolve a dispute in Land Acquisition Compensation Tribunal is reasonably stated to be any duration within 24 months and 6 days with effect from the date of notice of intention to acquire. This is as per the provisions of clauses 4 and 6 of the Land Acquisition (Amendment) Bill, 1990.

According to the Third Nairobi Water Supply Project (Ndakaini), it took 1 year, that is the period from the date of the notice of intention to acquire in August 1988, to July 1989 when the Commissioner of Lands gave his award. Assuming that an appeal is lodged with the Tribunal immediately after the Commissioner of Lands compensation award, it therefore becomes imperative to say that land acquisition compensation disputes must not take more than 1 year 6 days (the difference between the statutory provision of 24months 6 days and approximately 1 year taken from the date of notice of intention to acquire to inquiry and to compensation award by the Commissioner of Lands).

d) the shortcomings of the Land Rent Arbitration Tribunal are likewise measured against time and informality. Land rent is payable annually to the Commissioner of Lands. Therefore a period of one (1) year should be an appropriate duration within which to resolve objections to the increase in land rent.

iii) the third objective of the study is to identify the existing Alternative Methods of resolving Valuation and Property Management disputes. This has been generated by way of review of related literature from the Chartered Institute of Arbitrators (CIA), the Dispute Resolution Service of the Royal Institution of Chartered Surveyors (RICS), the Center for Dispute Resolution (CEDR), the American Institute of Arbitrators (AIA), the Negotiation Institute of America (NIA) and the Center for Mediation. This data shall be presented in a tabular form.

iv) the fourth objective endeavors to establish the extent of application of the Alternative Dispute Resolution Methods in resolving Valuation and Property Management disputes. In order to answer this objective, response from Valuers, Property Managers, Landlords and Tenants have been weighed and analyzed in terms of percentages, especially to gauge the awareness. The response has been obtained from scheduled and non-scheduled interviews.

v) The fifth objective regards proposing an effective means of resolving Valuation and Property Management disputes. This is achieved through the harmonization of the findings on the other four objectives. The effective means to be proposed is, that which is capable of resolving Valuation and Property Management, disputes expeditiously.

1.7.0 ORGANISATION OF THE STUDY

This study project is organized into four (4) chapters. Chapter One comprises the introduction, problem statement and justification, study objectives, hypothesis, scope of the study, research methodology, and the organization of the study. Chapter Two comprise literature review on what dispute is, the nature and type of disputes in Valuation and Property Management, the Statutory Methods of resolving Valuation and Property Management disputes, and the Alternative Dispute Resolution methods such as Arbitration, Mediation, Negotiation, Neutral Fact Finding, Facilitation, Expert Determination, Executive Tribunal and Adjudication. Chapter Three consists of data presentation and analysis whereas Chapter Four comprise summary, conclusions and recommendations.

CHAPTER TWO

2.0.0.0 LITERATURE REVIEW

2.1.0.0 INTRODUCTION

In order to give a conceptual framework regarding dispute resolution in Valuation and Property Management in Kenya, it is first and foremost important to give a clear description of what Valuation and Property Management are. This helps in the understanding of what Valuation and Property Management entails in terms of activities, and thus nature and characteristics of the disputes that arise therefrom. In addition, this chapter strive to address issues regarding; dispute resolution, nature and type of disputes in valuation, nature and type of disputes in property management and the statutory methods of resolving valuation and property management disputes such as the Valuation Court, Business Premises Rent Tribunal, Rent Restriction Tribunal, Land Acquisition Compensation Tribunal and Land Rent Arbitration Tribunal.

This chapter also looks at dispute management through the Alternative Dispute Resolution methods such as Arbitration, Mediation, Negotiation, Neutral Fact Finding, Facilitation, Expert Determination, Executive Tribunals and Adjudication. Also to be looked at in considerable details are the provisions of the Arbitration Act Chapter 49 of the Laws of Kenya, Arbitration Act of 1995 of the Laws of Kenya and the United Nations Commission on International Trade law (UNCITRAL) Rules.

2.2.0.0 DISPUTE RESOLUTION

Dispute is a difference between two persons or parties whereas dispute resolution is the process of resolving dispute. The potential for dispute or conflict is inherent in any contractual situation and thus it is beneficial to recognize this from the beginning of any contractual relationship. The terms conflict, dispute and claim may sometimes be used to mean the same thing. However there is a significant difference in these terms. A claim was defined in the case of Mayer Newman & Co. Ltd. v Al Ferro Commodities Corporation SA (1990), where it was held that a claim is no more than an assertion and cannot become a dispute until there is a genuinely disputable reason. By definition, dispute arises if there is a genuine difference of opinion regarding the interpretation and implementation of a given contract (Hibberd &

Newman, 1999). Dispute is also commonly referred to as conflict. The word conflict is derived from the Latin word *conflictus, which* implies to strike together. The Oxford Advanced Learners Dictionary defines conflict as a clash, competition or mutual interference of opposing or incompatible forces such as ideas and interests. Conflict is a natural and normal consequence of interaction of people over time. Often, conflict can be instructive and beneficial, if one is capable of finding value in what is considered to be a negative situation.

Dispute resolution may be carried out through litigation or otherwise. It has always been there ever since the existence of mankind. For instance in the bible the origin of dispute resolution may be traced back in the book of Genesis Chapter 3, where Adam and Eve violated the covenant entered between them and God in the Garden of Aden. A compromise resolution was later on reached and fresh covenants were made between man and God as shown in the book of Genesis Chapter 3: 16-24. In the book of 1st Kings Chapter 3, King Solomon, guided by superb wisdom, determined a dispute between two women that concerned the maternity of a child. Dispute resolution may also be said to have originated and developed during the early civilization in Egypt, Mesopotamia, Rome and Venice due to the needs of the commercial community and the customs of the merchants, to deal with disputes arising out of express and/or implied contracts. As the property business developed with time, land became commoditized and buildings were developed for either sale or letting and thus there was need to have rules and regulations to govern the resolution of disputes. In Egypt for instance, dispute resolution developed three (3) centuries before the birth of Jesus Christ and was considered an integral part of business existence and development. According to Philips (1976), Arbitration as a means of settling disputes originated and developed in the Roman Empire about 280 years before the birth of Jesus Christ.

From the foregoing, it is clear that disputes are a way of life from the time more than one human being was created on the earth. Since then, need has often arisen to settle the disputes as a way of co-existence, whether by way of "tit for tat", by seeking redress from a higher authority or submitting the dispute to a respectable neutral person whose opinion will be respected by the disputants.

In respect of the above description of conflict and dispute, and the fact that it arises due to the difference of opinion in regard to the interpretation of a given contract, it is therefore imperative to say that there exists a great potential of conflict or dispute in valuation and

property management. This is because the carrying of management stem from a given contractual agreement either expressed or implied.

2.3.0.0 DISPUTES IN VALUATION

In order to understand the nature of disputes in Valuation, it is important to define: the term Valuation, types of Valuation and the parties involved there in.

2.3.1.0 Valuation Defined

Valuation regards translating the rationally assessed requirements of the average property buyer in to a value estimate. Syagga (1994) asserts that Valuation is concerned with the determination of the value of immovable assets in land and buildings at some point in time, for some purpose and under some specific circumstances.

The Valuation process is a method of deductive reasoning that starts from the first principles of a priori logic and builds analytical means for the purposes of achieving valid deductive inferences (Syagga, 1999). According to Murray (1973), Valuation is the term applied to the procedure followed in ascertaining value of a property and is often times synonymous with the actual estimate of value. It is the art or science of estimating the present worth of a given interest in a property for a given purpose, at a particular time, taking into account all the property characteristics and the prevailing market conditions.

Valuation is further defined by the Royal Institution of Chartered Surveyors (RICS) as the provision of a written opinion as to the capital value or rental value, on any given basis in respect of an interest in property, with or without associated information, assumptions or qualifications (Baum et.al, 1997).

Valuation report is a formal presentation of the valuer's opinion in a written form. As a minimum, a valuation report must contain: sufficient description to identify the property without doubt, value definition, statement as to the interest being valued and any legal encumbrances, the effective date of the valuation, any special feature of the property, the market conditions that have been taken into account and the value estimate.

2.3.2.0 Types of Valuation

Property Valuation may either be statutory or non-statutory in nature. Statutory Valuations are those governed by an Act of Parliament, for instance, Valuation for Compulsory Acquisition, Valuation for Rating, Rental Assessment and Ground Rent Valuation. Non-Statutory Valuations on the other hand are those not governed by statutes. They include Valuation for; Mortgage, Open Market for Sale or Purchase, Insurance, Book purpose, Reversionary interest etc.

The methods and approach for carrying out Statutory Valuations are provided for in the respective legislations, for instance, the Land Acquisition Act Chapter 295,Trust Lands Act Chapter 288, Valuation for Rating Act Chapter 266, the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Chapter 301, the Rent Restriction Act Chapter 296, the Government Lands Act Chapter 280 of the Laws of Kenya etc. defines the approaches to be followed in carrying out the respective statutory valuations.

On the other hand, the methods for carrying out non-statutory valuations are the market comparison, capitalization and the cost approach. The market comparison approach, also known as the sales comparison approach is premised on the principle of substitution. This principle states that when similar or commensurate commodities, goods or services are available for sale in the market, the one with the lowest price attracts the greatest demand, thus a buyer will not pay more for one property than for another that is equally desirable. The income capitalization approach is founded on the principle of anticipation, which states that valuation of a property is a function of the future benefits the property will produce. The replacement cost approach on the other hand, is based on the principle that a property is worth the cost of producing an alternative property of similar utility and thus, no person would pay more for a property than the cost of a feasible production of an alternative property of similar utility (Syagga, 1999).

2.3.3.0 Nature of Valuation Disputes

Statutory valuations are founded on statutes whereas the non-statutory ones are founded on agreement between the valuer and the client, under the law of contract. Whatever the case may be, dispute in valuation relates to the ascribed value where the valuer fails to exercise care and skill in the performance of a given valuation assignment.

Value ascribed may bring about dispute when the valuer carries himself negligently, in which case, he/she may incur liability for professional negligence to his/her client(s), both in contract and tort. The valuers' responsibility has also been expanded, under the law of tort, to third parties to whom they owe a duty of care. This is in so far as the valuer has knowledge or ought to have known that a third person/party will rely on his/her valuation and advice that has been negligently given or may within reasonable foreseeability lead to the suffering of loss or damage on the part of the third party. This is illustrated in the case of Yianni v Edwin & Sons (1982) Q.B 438 where Justice Park held that the valuer, Edwin & Sons, was liable to the third party, Yianni, for negligence (Ross M, 1986). In valuation, third parties may be purchasers, vendors, mortgagor, insurer etc.

Negligence in valuation occurs where the valuer breaches the duty to do something which a reasonable valuer would or when the valuer does something, which a prudent skilled valuer would not do. The duty of care that a valuer owes to his client or to the third party arise under; contractual relationship either express or implied, law of tort under the tort of negligence and an obligation imposed by statute, for instance in Valuation cases that are directed by statute (Konyimbih, 1997). In the course of their duty, Valuation Surveyors may find themselves to be liable in three main ways, that is: professional, contractual and tortuous liability.

Valuers, can find themselves to be professionally liable, in much the same way as any other professional. In this regard therefore, it is instructive that valuers' must possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties.

Professional persons may owe a concurrent duty of care to the client, both in contract and in tort. Indeed, it has been held that valuers may be liable in contract and tort to their clients, and in tort to third parties. In addition, liability may be concurrent with fellow professional persons. Due to the special relationship, the duty of care in giving advice or performing services often extends to protecting the client against pure economic loss, as well as personal injury or damage to property. The contract creates the requisite degree of proximity. The special skills and status of the professional valuer, the reliance by the client upon him and the fact that he is paid for his services all make it just and reasonable for the law of tort and contract to impose such liability.

The valuers' contractual liability stems from the Law of Contract. The Law of Contract is the principal means by which the courts have exercised control over the conduct of a professional valuer. In such a contract there is an implied condition that the valuer will exercise reasonable skill and care in the performance of his duties. These contract conditions exist in the absence of express conditions to that effect. This can be illustrated in the case of Midland Bank Trust Co. Ltd v Hett, Stubbs & Kemp (1979) I Ch. 384, where it was held that the exercise of reasonable skill and care was not the only contractual term which ought to be considered in professional negligence. Included in almost every contract are express or implied terms which additionally define the nature of engagement. The importance of specific terms of contract is that a professional valuer will be liable if he breaks them, irrespective of the amount of skill and care which he has exercised. There is however one exception, to this condition of contract, that is, where a professional valuer undertakes to achieve a specific result, in which case, there is no need to enquire as to whether the valuer exercised reasonable skill and care. The only matter that needs to be ascertained is whether the desired result was indeed achieved. If it was not, then the valuer will be held liable for breach of contract.

Tortuous liability arises out of the tort of negligence. Under the tort of negligence, the following three conditions must be fulfilled, that is: duty of care must be owed by the valuer to some other person, there must be a breach of that duty of care through the negligent act of the valuer, the person owed the duty of care must suffer damage which could have reasonably been foreseen.

The essential questions to be considered in every case are whether a duty of care existed and, if so, what was its' scope. This is illustrated in the case of Smith v Eric S. Bush (1990) I A.C. 831 where a valuer who was instructed to value a modest house for mortgage purposes was held to owe a duty to protect the prospective purchaser/mortgagor against economic loss flowing from unreported defects.

The law does not, however, stipulate that a valuer returns a particular Valuation figure and indeed a valuer is not necessary negligent because the Valuation figure returned is wrong. This is because Valuation is but an informed opinion based on some facts. However, the valuer becomes negligent by failing to consider all the necessary value attributes and facts. Negligence in Valuation arise due to several factors, some of which are; lack of clear instructions on the subject property and purpose of Valuation, lack of legal knowledge

regarding Statutory Valuations, failure to collect adequate information regarding the property, lack of the necessary skill and experience to carry out the Valuation assignment and also due to errors of judgment in analyzing the market.

Disputes in Valuation may also occur in the event that different valuers use different approach in arriving at the value estimate. In this case, the discrepancy in the value estimate may lead to litigation. This may be illustrated in the case of the Third Nairobi Water Supply Project land acquisition case where the Commissioner of Lands value estimate and that of the claimants' had a discrepancy of about 30%.

2.3.4.0 Parties to Valuation Disputes

Parties to valuation disputes depend on the purpose for which Valuation is done. For statutory valuations dispute involves parties as follows:

i) a rating authority and a ratable owner(s) in Rating Valuation carried out under the provisions of the Valuation for Rating Act Chapter 266 of the Laws of Kenya;

ii) the landlord and tenant(s) in rental assessment carried out under the provisions of the Landlord and Tenants (Hotels, Shops and Catering Establishments) Act Chapter 301 of the Laws of Kenya and the standard rent assessment carried out under the provisions of the Rent Restriction Act Chapter 296 of the Laws of Kenya;

iii) the Commissioner of Lands and the property owner in Valuation for Compulsory Acquisition under the Land Acquisition Act Chapter 295 of the Laws of Kenya;

iv) the Commissioner of Lands or a Local Authority and the property owner in Valuation for ground rent and stamp duty under the Government Lands Act Chapter 280 and the Stamp Duty Act of the Laws of Kenya.

For Non-Statutory Valuations, the disputing parties are:

i) the valuer and the instructing party who may be a bank, financial institution, insurance company, a prospective seller or buyer and an individual property owner;

ii) the valuer and the third party who may be a bank, financial institution, insurance company, a prospective seller or purchaser or an individual property owner.

2.4.0.0 DISPUTES IN PROPERTY MANAGEMENT

The concept of dispute in Property Management would be well understood by first defining: property management and outlining the functions and duties of a property manager, nature of disputes in Property Management and the disputing parties.

2.4.1.0 Property Management

Management is the process of bringing together the available resources in order to attain the set out organizational goals. The general business management process entails the performance of a set of functions such as: planning, organizing, staffing, directing, co-coordinating and controlling. These functions remain the same whether people, assets or procedures are being managed, and thus property management has the basic functions of the general business management.

Thorncroft (1969) has defined Property Management as the direction and supervision of an interest in landed property (both land and buildings) with the aim of securing the optimal level of return, which may either, be in financial or social terms. Macey et.al (1978) defined Property Management as the application of skill in caring for land and buildings, its surroundings and amenities. It involves developing sound relationship between the landlord and tenant(s) in addition to dealing with the various interests in land. In this regard, therefore, property management would be considered to include the management of interests in both land and buildings.

2.4.2.0 Principles of Property Management

The principal functions performed by a property manager involve planning and the execution of works, which call for the harnessing of resources, land and buildings, in order to achieve the laid down organizational targets. The functions of planning and execution of works are achieved through the process of forecasting, planning, organizing, staffing, coordinating, motivating, controlling and budgeting.

Planning is an intellectual process through which courses of action to be taken, in order to attain certain organizational goals, are laid down. Through planning, objectives and targets are formulated. Plans are based on facts and information available so as to show the direction that an organization wishes to take in the future. It is the foundation of management since it

acts as the supportive columns of organizing, staffing, directing, and controlling. The process of planning involves formulation of objectives, policies, strategies and procedures and rules.

Organizing is a formalized intentional structure of roles or positions. It concerns itself with combining and coordinating organizational resources. Organizational structure can be thought of as the vehicle through which management works so as to accomplish its goals and objectives. Through organization, activities are integrated into an effective operating system so as to enable the management to accomplish the laid down goals. The process of organizing involves; the determination of the necessary activities for the accomplishment of the plan, grouping of the activities into logical categories and delegating authority to someone to get the activities performed. A sound organization is the answer to most business problems and there is no substitute for good organization. This is exemplified in the words of Andrew Carnegie, the notable industrialist from the United States of America, when he said "take away all our money, great works, mines and coke ovens but leave our organization and in a few years, we shall have re-established ourselves". The principles of a sound organization comprise; clarity of objectives, division of work, unity of command, span of control and the scalar principle.

Staffing involves the proper and effective selection, appraisal and development of personnel to fill the roles designed into an organizational structure. A business is only as strong as its people. The function of staffing has to do with manning the organization structure so as to ensure that an enterprise is competently operated. The very survival and growth of an organization depends on the people who are the custodian of the enterprise interest. Staffing involves the determinant of staffing needs, selecting and recruiting, orientation and training, performance appraisal, transfer and promotions, retirement and dismissal.

Directing involves telling people what to do and seeing that they do it to the best of their ability. It includes making assignments, explaining procedures, seeing that mistakes are corrected, providing on the job instruction and issuing of orders. Directing is the heart of the managerial functions since it involves the initiation of action, giving of orders and instructions, provision of a dynamic leadership and supervision.

Controlling is the measurement and correction of the performance of activities of subordinates in order to make sure that enterprise objectives and the plans devised to attain

them are being accomplished. Controlling helps in the process of delegation and highlights omissions or commissions thus making it possible to take corrective measures.

2.4.3.0 Duties and Activities of Property Management

In order to achieve the aim and objectives of Property Management, a set of duties and activities have to be carried out. The activities entail:

i) selection and administration of lease and licences;

ii) negotiation and administration of the terms of lease and licence;

iii) rent collection;

iv) preparing maintenance schedules and organizing for repairs and maintenance;

v) administration of service charge;

vi) supervising cleaning of the building and administration of staff;

vii) provision of security services;

viii) organizing for prompt payment of rates and ground rent;

ix) carrying out risk management;

x) budgeting, record keeping and reporting to the property owner.

In carrying out the above duties and activities, the property manager encounters disputes which he/she need to resolve in order to achieve the aims and obligations of Property Management.

Letting of premises begins either towards the end or near completion of a new building. It involves the allocation and marketing of the available floor space in a commercial or residential property. Marketing of space in a property may be carried out through advertisement in the media. Before marketing is carried out, the property manager needs to carry out a rental market survey so as to come up with a list of comparables to form a basis for negotiating with tenants. When letting, a property manager need to know the ability of the prospective tenants to pay rent in the agreed manner and at an agreed time. On letting, the

property manager is expected to draft the letters of offer to the prospective tenant stipulating the terms and conditions to be incorporated in the lease agreement. Once the prospective tenant accepts the offer, then an advocate must be contacted so as to facilitate the preparation of the lease agreement for execution by the landlord and tenant. Towards the expiry of the lease term, the property manager should inform the landlord of the same and seek his authority to either renew or terminate the lease depending on whether the tenant in question was quite observant of the lease terms.

Rent is the consideration paid by the tenant for occupying a given property. Rent payment may either be monthly, quarterly, half yearly, yearly or more, in advance. Rent collection is one of the prime activities and duties of a property manager without which, it would be difficult for to accomplish the basic property management aims and objectives such as; optimization of the property utility level, extending the productive life of a property, satisfying the economic and social need of a property by preserving and prolonging the life of the property fabric, provision of essential amenities and payment of land rent and local authority rates. There are several forms through which rent may be collected. These are office rent collection; door-to-door rent collection, credit transfers and bankers order. Situations may arise where a tenant is in gross arrears. Where the tenancy is not controlled, then the property manager may apply the remedies provided for in the lease agreement to recover the rent arrears for instance by levying distress in accordance with the provisions of the Distress for Rent Act Chapter 293 of the Laws of Kenya. Where the tenancy is a controlled one, recovery of rent arrears may be through the Business Premises Rent Tribunal.

It is the duty of the property manager to organize and execute various repairs, decoration and maintenance works in a property. This is aimed at keeping the building fabric in a good state thus prolonging its life, both physically and economically. In order to achieve this, the property manager is expected to formulate a maintenance policy for the landlord's approval. Maintenance policy may either be planned or unplanned. Planned maintenance policy entails works organized and carried out with aforethought control and records. It involves corrective and preventive works aimed at preventing accelerated deterioration of the building. Unplanned maintenance involves undertaking the maintenance works on realizing that it is due and necessary. In implementing the repair and maintenance works, the property manager may opt to have an in house maintenance crew or use a sub contractor. The property manager

is expected to inspect and certify that all maintenance and repair works are done in a proper manner.

Service charge administration is one of the duties in property management. Service charge is a contribution by each tenant in a building to offset the expenses incurred in the provision of various services such as clearing, repair and maintenance (excluding the capital expenditures), security, water, electricity etc. The services, which are to be provided for through service charge, are either stipulated in the lease agreement, in an uncontrolled tenancy, or under the provisions of the landlords and tenants (Shops, Hotels and Catering Establishments) Act Chapter 301, and the Rent Restriction Act Chapter 296 of the Laws of Kenya, in controlled tenancies. Amount of service charge payable is initially based on a budget showing the anticipated annual expenses, which is then allocated to the respective tenants on a pro-rata basis (relative to the area they occupy). At the end of the year, the expenses incurred should be audited. Should there be a debit, then the shortfall is relatively apportioned to each tenant. Where there is a credit, then the tenants' accounts should be credited.

The property manager must ensure that common areas in a building are adequately cleaned. The common areas in a commercial building comprise among others lobbies, staircase, toilets, windows, basement and flower gardens. The property manager may opt to subcontract the cleaning works or, on behalf of the landlord, employ cleaners who will directly be under his/her control.

Property management entails the provision of security services to the building. It is necessitated by the fact that a secure building attracts good tenants and good rental returns. Provision of security services in a building may either be contracted or provided in house. Where security services are contracted to an already established security firm, the workload on the property manager is tremendously reduced since the supervisory work is entirely on the firm contracted and any loss, due to an act of negligence, commission or omission on the part of the security firm, can be counter claimed from the firm. Where security is in house, the property manager is expected to supervise the operations of the security personnel. The property manager is also expected to undertake spot checks on the guards at all times. Additional security to a property may be provided through installation of security alarms, smoke detectors and closed television circuit.

It is also important for the property manager to ensure that statutory payments such as ground rent and land rates are duly paid. Ground rent is payable annually to the commissioner of lands. It is payable on properties under the leasehold land tenure system. Ground rent is payable within the first four (4) months of the year, failure to which a penalty is chargeable for non-payment or for late payment. Land rates are also payable annually on both the leasehold and freehold properties. Payments should be made within the first five (5) months of the year, failure to which a penalty is chargeable.

Risk management is an important aspect in property manager. It may be looked at in terms of insurance of a property and provision of fire protection measures. A property manager must ensure that a building is adequately insured against insurable perils such as fire, plate glass, loss of rent and burglary. The insurance cover taken must be adequate and the premiums must be paid on time. Cautionary measures against possible outbreaks of fire in a property should be put in place. Fire fighting equipment such as fire extinguishers, fire hose reels, smoke detectors, fire alarms and sprinkler system may be provided in a property so as to help in fighting fire when need arises. It is the duty of the property manager to ensure that the fire fighting equipments are in a good working condition at all times. The property manager is also expected to ensure that all signs are posted within the property, instructing the various users of the property upon what to do in case of fire.

Record keeping, reporting and budgeting is an important role in property management. The property manager should regularly appraise the landlord on the various aspects of a property; for instance, on the rent collection position, repairs and maintenance etc. the property manager is also expected to ensure that up to date financial statements on the property income and expenditure account are available.

2.4.4.0 Nature of Property Management Dispute

Lease agreement and property ownership documents, such as title deeds form the basis of operation in Property Management. These documents contain the covenants to be observed and the obligations to be performed by each party. The documents also specify the remedies available for each party on non-observance of the covenants and obligations. Dispute in Property Management would commence when parties to a lease agreement breach the

covenants of the lease/tenancy. Breach of the lease/tenancy agreements may result into dispute of the following nature, between the landlord or his agent and the tenant(s):

i) rent arrears;

ii) rent reviews;

iii) extension and / or renewal of lease;

iv) termination of lease;

v) service charge arrears;

vi) non-observance of repairing and maintenance covenants by either the landlord or tenant.

Payment of rent is an integral part of a lease agreement. Rent is paid in advance on a monthly, quarterly, half yearly or yearly basis, as appropriate. Rent may fall in arrears when the tenant(s) fail to honor payment of rent at the time and manner agreed in the lease agreement. In this case, the landlord or the agent may be compelled to bring an action against the tenant(s) either in the Business Premises Rent Tribunal or the Rent Restriction Tribunal (in the case of controlled tenancy), as appropriate, to recover the rent arrears. The rent arrears may be recovered through distraining for rent under the Distress for Rent Act Chapter 293 of the Laws of Kenya.

Rent review is a common feature of lease agreement. Leases containing rent review clauses usually stipulate how often rent review is to be carried out, for instance on a yearly or two yearly basis. This is for the purpose of bringing rents to be in line with the socio-economic changes in the market. Dispute is likely to occur when the time to review the rent comes. The question that arises in this case is whether to increase or reduce the rent and by how much or even maintain the status quo. This kind of dispute normally drag, eventually ending up in the Business Premises Rent Tribunal or the Rent Restriction Tribunal (for controlled tenancy) where the matter drags once again due to the long process adopted by the Tribunals.

Lease may be terminated in the instance that the tenant fails to perform his/her part of the covenant as provided for under the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Chapter 301 of the Laws of Kenya. For instance, if the tenant is in breach of covenants such as payment of rent and service charge at the time and in the manner

specified, subletting of the premises without express authority of the landlord or his/her agent, using the premises in a manner that is not tenant-like or a manner that is not specified in the lease agreement and also by not keeping the internal condition of the premises in a good state of maintenance and decoration, normal wear and tear excepted, then the lease may be terminated. The landlord may also seek to terminate a lease, in accordance with section (7) of Chapter 301 of the Laws of Kenya, in the instance that he/she requires the premises for own use. Whatever the reason for termination of lease may be, the landlord or his agent is required to bring an action in the appropriate rent Tribunal, for a notice to terminate the lease.

Either the landlord or the tenant may bring an action against the other, regarding non-observance of repairing and maintenance covenants as stipulated either in the lease agreement or the statutes, that is the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Chapter 301 and the Rent Restriction Act Chapter 296 of the Laws of Kenya. This is especially so where, according to the lease agreement, the landlord is expected to keep the internal condition of the property in a good state of repair, maintenance and decoration. Where the premises are let on a Full Repairing and Insuring (FRI) lease, then the tenant is responsible for the internal and external repairs, maintenance and decoration. In this case, the landlord may bring an action against the tenant for failing to keep his/her part of the covenant. Non-observance of repairing and maintenance covenants of a lease may also call for an action under the Public Health Act and the Physical Planning Act of 1996 of the Laws of Kenya.

Disputes in Property Management may also involve the property manager and the property owner or third party under the tort of negligence. This is so when the property manager fails to conduct himself/herself professionally, with due diligence. The property manager would be professionally liable to the property owner or a third party, who suffers loss, or injury due to an act of omission or commission.

Due to the management contract signed between the property manager and the property owner, the property manager is expected to perform his duties with due diligence and also to protect the property owner against pure economic loss as well as personal injury or damage to property (Tamara, 1997). The management contract creates the requisite degree of proximity. Therefore, the special skills and the status of the property manager, the reliance by the client

upon him and the fact that he/she is paid for the services rendered make it just and reasonable for the law of tort and contract to impose liability on him.

2.5.0.0 STATUTORY METHODS OF RESOLVING VALUATION AND PROPERTY MANAGEMENT DISPUTES

2.5.1.0 INTRODUCTION

The statutory methods of resolving valuation and property management disputes in Kenya comprise; the Court of Law, Valuation Court, Business Premises Rent Tribunal, Rent Restriction Tribunal, Land Acquisition Compensation Tribunal, Land Rent Arbitration Tribunal, Divisional Land Control Board, Provincial Land Control Appeals Board, the Central Land Control Appeals Board, Land Adjudication Committee, Land Arbitration Board, Valuers Registration Board etc. However, this project is limited to the first five methods of resolving disputes in valuation and property management.

Valuation and property management disputes are taken beforehand to the relevant statutory tribunals, such as the Valuation Court, the Business Premises Rent Tribunal, the Rent Restriction Tribunal etc. The decision of the statutory tribunals can only be challenged in the court of law on questions of law regarding the principles upon which any valuation has been based and also on the question of procedures. Once a matter has been taken to the court of law from the statutory tribunals, then the entire provisions of the Civil Procedures Act Chapter 21 and the Evidence Act Chapter 80 of the Laws of Kenya would apply.

2.5.2.0 DISPUTE MANAGEMENT IN THE COURT OF LAW

Before discussing the workings of the tribunals, it is important to look at how dispute is managed under the courts of law. This is aimed at assessing the specific rules, under the Civil Procedure Rules of the Civil Procedure Act Chapter 21 of the Laws of Kenya, that affect the management of disputes under the court system and draw a comparison with the dispute management system in the tribunals.

Court of law provides a forum through which disputes of both criminal and civil nature may be resolved. The modern structure of the courts in Kenya have been established under the Constitution of Kenya, the Magistrates' Courts Act Chapter 10, the Kadhi's Court Act Chapter 11 and the Judicature Act Chapter 8 of the Laws of Kenya. The structure comprises, in the order of seniority, the Court of Appeal, High Court, Chief Magistrates Court, Principal

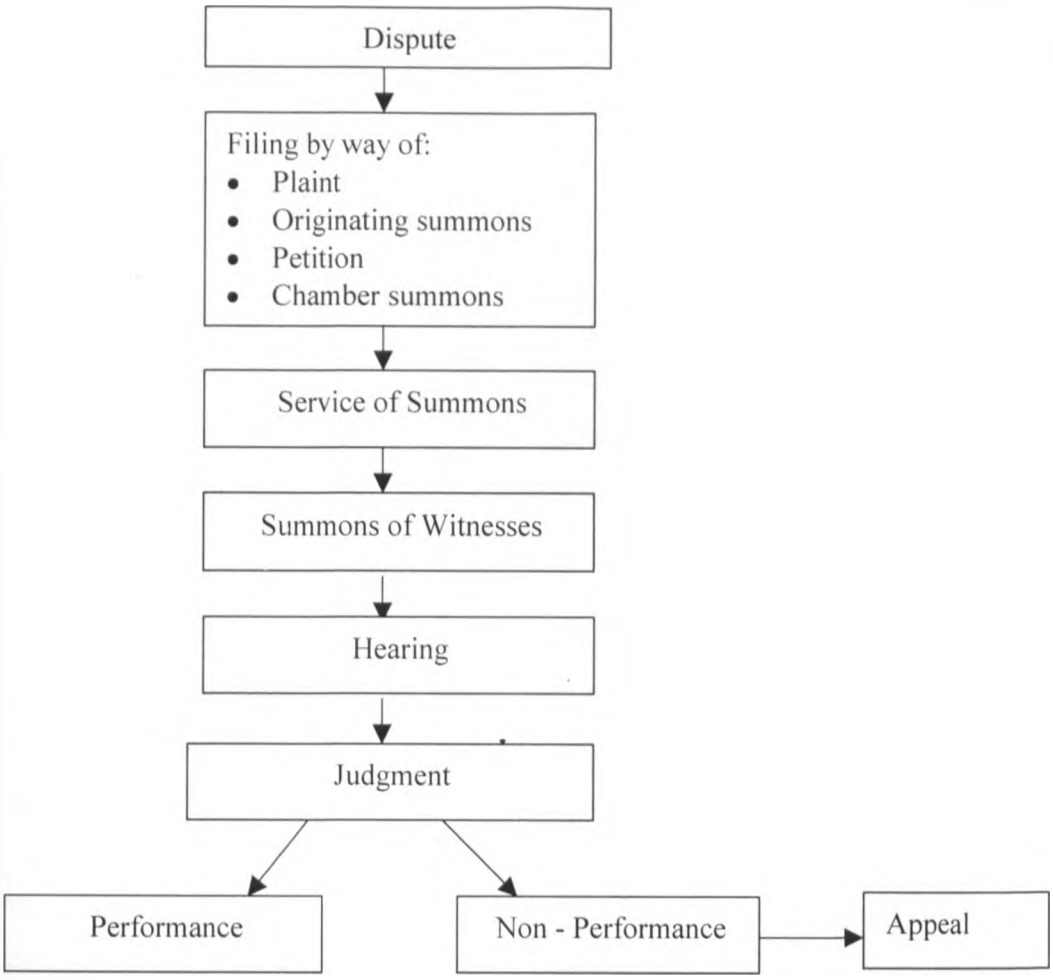
Magistrates Court, Senior Principal Magistrates Court, Resident Magistrates Court, District Magistrates Court, Court Martial and the Kadhi's Court.

The court structure works at different levels. At each level, the court has jurisdiction over certain cases. The jurisdiction of a court may either be original or appellate, or both (Tudor J, 1988). Original jurisdiction gives power to the court to hear cases at first instance whereas appellate jurisdiction gives power to the courts to hear cases on appeal. Certain courts such as the District Magistrate's Court of the Second and Third Class, only has the original jurisdiction whereas the High Court has both the original and appellate jurisdiction. The court of Appeal only has appellate jurisdiction. The jurisdiction of a court may be limited to a prescribed area or subject matter, for instance the level of crimes that can be tried or the amount of money in dispute in a civil case.

Civil disputes in valuation and property management may be taken to the courts of law for resolution where the dispute involve properties that are uncontrolled under the provisions of the Rent Restriction Act Chapter 296 and the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Chapter 301, of the Laws of Kenya. In addition, valuation and property management disputes may be taken to the courts of law for appeal from the tribunals.

Management of civil disputes in the Court of Law is anchored on strict procedures and formalities as per the provisions under the Civil Procedure Rules of the Civil Procedure Act Chapter 21 of the Laws of Kenya. The procedures and formalities regard; filing of a dispute, summoning of defendant and witnesses, hearing, representation, adducing of evidence, ruling and appeal. These procedures are presented in the following Chart No. 1.

CHART NO.1 Showing Civil Dispute Management System in a Court of Law.



Source: Formulated and drawn by the researcher from the provisions of Civil Procedure Rules of the Laws of Kenya.

A civil dispute is filed in a court of law as per the provisions of the Civil Procedure Rules Order II and Order IV of the Civil Procedure Act Chapter 21 of the Laws of Kenya. Suits commence by the preparation and filing of a plaint in the civil court registry. It is noteworthy that a suit that is not filed, in the court, as per the provisions of the Civil Procedure Rules is bound to be dismissed. Once a case has been dismissed on the basis of procedural defects in filing a suit, then fresh applications have to be made. The Civil Procedure Rules does not give room to the applicant to correct the procedural defects in a plaint and allow it to proceed. Instead, it requires the preparation of a totally new plaint devoid of procedural defects.

Once a suit has been filed, summons are issued to the defendants, under Order V of the Civil Procedure Rules, asking him/her to appear within a given time for the mentioning of the case. Each summon must be signed by the judge or an authorized officer of the court and sealed with the seal of the court. Each summon shall be accompanied by a copy of the plaint. Service of the summons are made under Order IV Rule 7 by delivering or tendering a duplicate thereof signed by the judge or such other officer as he may appoint. It is important to note that under Order V Rule 9 of the Civil Procedure Rules, court summons must be served on either the defendant in person, his authorized agent or his/her advocate.

Order VI gives guidance on how pleadings are to be made in the courts. Each pleading, according to Order VI Rule 2, must be divided into paragraphs, with each paragraph containing different pleadings. According to Order VI Rule 3, pleadings are to be based on facts and not evidence. Each pleading is to contain only a summary form of the material facts.

Hearing in the Court of Law is of a public nature as per the provisions of Order XVII Rule 3 of the Civil Procedure Rules. Hearing commences at any time after the close of pleadings as is provided for under the Civil Procedure Rules Order IX_B. According to Order IX_B Rule 2, if on the date of hearing neither party attends, the court may dismiss the suit altogether. If on the other hand only the plaintiff attends, and the court is satisfied that notice of hearing was duly served on the defendant, then it may proceed ex parte. However if it is confirmed that the notice of hearing was not duly served to the defendant, then the court may direct a second notice to be served. Hearing may be postponed if the notice of hearing has not been served in sufficient time for the defendant to attend or for other sufficient cause that made it not possible for the defendant to attend. Where only the defendant attends and admits no part of the claim by the plaintiff, then the court shall dismiss the suit.

During the hearing of a matter, it may be necessary to call upon witnesses to give evidence or to produce documents. Summoning and attendance of witnesses is provided for under Order XV of the Civil Procedure Rules. Expenses to be incurred by the witnesses are supposed to be paid by the party applying for the summons. The witnesses are examined, under Order XVII of the Civil Procedure Rules, in an open court in the presence of and under the personal direction and superintendence of the judge.

Order XXXIX of the Civil Procedure Rules gives powers to the court to grant temporary injunctions and interlocutory orders. The court may by order grant an injunction for the purpose of staying and/or preventing the wasting, damaging, alienation, sale, removal or disposition of a suit property.

Order XX Rule 1 of the Civil Procedure Rules provides that after the conclusion of the hearing, the court shall pronounce a judgment in the open court, either at once or within 42 days from the conclusion of the trial of which due notice must be given to the parties or their advocates. The judgment must be duly signed for it to be valid.

It is important to note that the above procedures as stipulated under the Civil Procedure Rules are dependent upon the court diary. For instance, once a dispute has been filed in the court, pleading, mentioning and hearing dates are fixed depending on how free the court diary is.

2.5.3.0 THE VALUATION COURT

It is a quasi judicial or a special court established under the provisions of sections 12 and 13 of the Valuation for Rating Act Chapter 266 of the Laws of Kenya. It is established to deal with disputes related to:

i) the inclusion in or omission of any rateable property from either the Draft or Supplementary Valuation Roll;

ii) over valuation or under valuation;

iii) exemption or non-exemption from Valuation for rating.

The management of disputes through the Valuation Court, according to the provisions of the Valuation for Rating Act Chapter 266 of the Laws of Kenya comprise the following steps; preparation of the Draft or Supplementary Valuation Roll, filing of objections, appointment of members of the Valuation Court, hearing, representation, adducing of evidence, ruling and appeal.

Disputes referred to the Valuation Court for resolution commence once the Draft or Supplementary Valuation Roll has been prepared. Draft and Supplementary Valuation Rolls are prepared in accordance with the provisions of Sections 3 to 8 of the Valuation for Rating Act Chapter 266 of the Laws of Kenya. Section 3 and 4 gives powers to the local authorities

to cause the preparation of Draft and Supplementary Rolls. Section 5 gives powers to the rating valuer to enter and inspect the ratable property whereas Section 6 gives the particular details to be contained in the Draft and Supplementary Valuation Rolls. Section 7 and 8 gives a clear definition in regard to who a ratable owner is and the basis of valuation for rating, respectively. Once the Draft and Supplementary Valuation Roll has been completed, it is then signed by the valuer and transmitted to the town clerk. The town clerk is then required, under Section 9 of Chapter 266 of to Laws of Kenya to lay the roll for public inspection and advertise the same through the Kenya Gazette Legal Notice, and the local daily newspapers.

Objections to the Draft and Supplementary Valuation Rolls are done through the filling of a prescribed form. Objections must be filed within a period of 28 days from the time of laying the Roll for public inspection. According to Section 10(2) of Chapter 266, no person shall be entitled to argue an objection before the Valuation Court unless he or she has first lodged a notice of objection in the prescribed manner.

Valuation Court is established under the provisions of Section 12 of the Valuation for Rating Act Chapter 266 of the Laws of Kenya. It is chaired by either a magistrate having powers to head a sub-ordinate court of the first class, or an advocate of not less than 5 years standing. It also comprises not less than two (2) other members appointed with the approval of the Minister for Local Authorities. Section 13(1) empowers the local authorities in question to appoint a Valuation Court, notwithstanding the provisions of Section 12, comprising the chairman and not less than two other members. Once the members have been appointed, they have to be duly gazetted through a Kenya Gazette Legal notice within a period of not less than 7 days before the day fixed for the first sitting of the Valuation Court.

At any sitting of the Valuation Court, three members present shall constitute a quorum with all decisions arrived at through a majority vote of the members present. In the event that there is an equality of votes, the chairman or the member acting as such would also have a casting vote. According to Section 15 (3), no member of a Valuation Court shall sit on the hearing of any matter in which he/she is directly interested or concerned as being liable to pay the rates in question or any part thereof.

The procedure of a Valuation Court shall, subject to such regulations, if any, as may be made in that behalf by the Minister for Local Authorities is such as the court may determine. The

Valuation Court would sit in public, unless on application by any party to have the hearing of a given matter be heard in private/camera. This is as per the provisions of Section 15 (6) of the Valuation for Rating Act Chapter 266 of the Laws of Kenya.

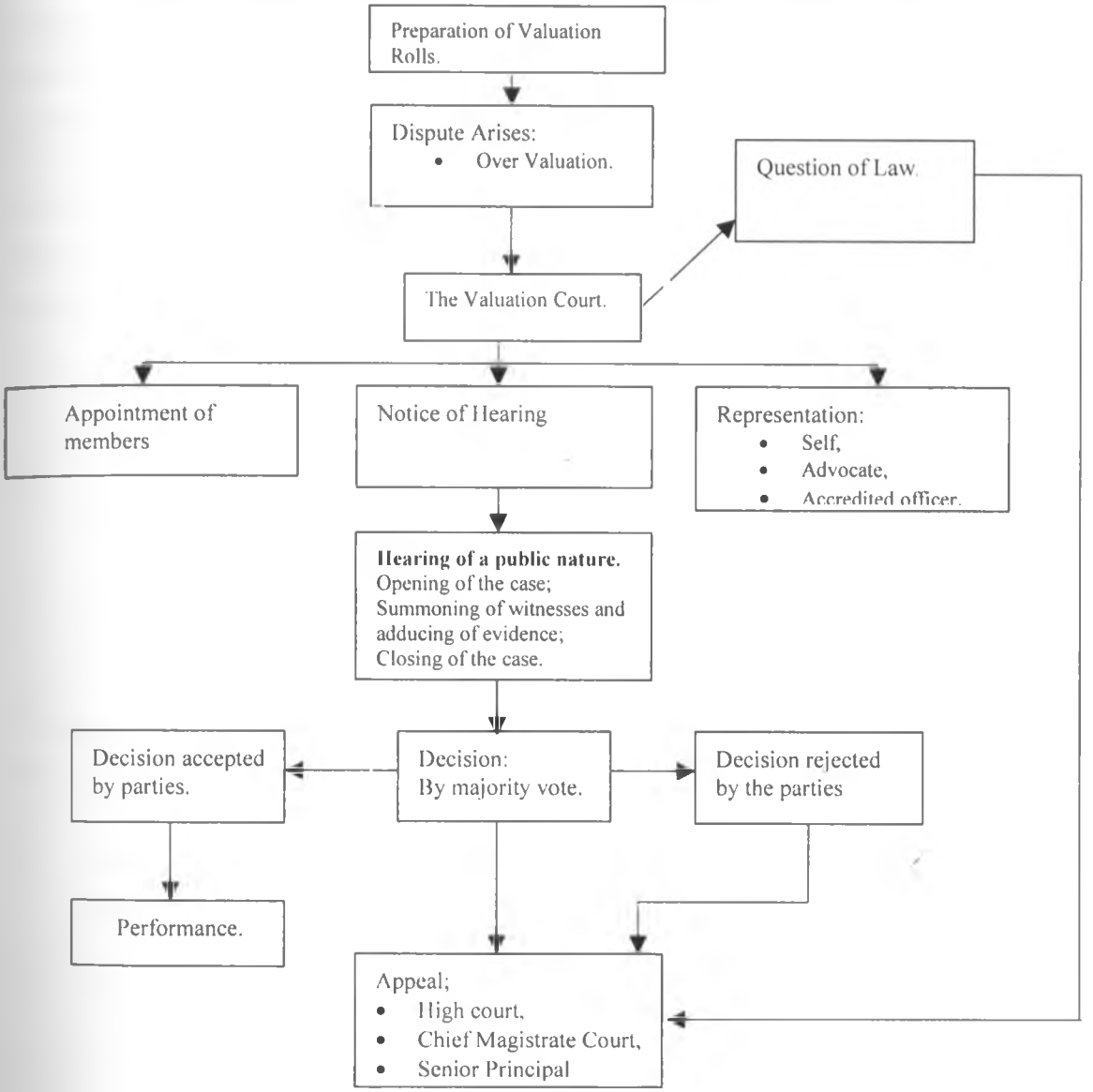
At every sitting of a Valuation Court, it shall be lawful for the court to call and examine any witness on oath or affirmation and to call for the production of all such papers or documents, as it may deem necessary. The rating valuer is expected to attend such court and answer on oath or affirmation all the questions which may be put to him or her by or through the court in regard therefore. The rating valuer may also be represented by an advocate. The objecting party may either appear in the Valuation Court on his or her own or be represented by a lawyer or a valuer. Section 16(2) stipulates that within a period of not less than seven (7) days before the day fixed for the consideration of any objection by a Valuation Court, the Valuation Court Clerk shall send notice of the hearing date to the objecting party. The objecting party may appear and be heard either in person, through an advocate or an accredited representative such as a valuer. After hearing the objecting party or their representative, the Valuation Court shall confirm or may amend the Draft or Supplementary Valuation Roll by way of reduction, increase, addition or omission, as per the provisions of Section 16(4).

Any person who has appeared before a Valuation Court on the consideration of an objection and is not satisfied with the decision of the court may appeal against the decision either to the High Court where the Valuation Court is appointed under Section 12 or to the Chief Magistrates, Senior Resident Magistrates or a Resident Magistrates Court, if the Valuation Court was appointed under Section 13.

If during the consideration of an objection by the Valuation Court, any question of Law arises as to the principle upon which any valuation has been or should be made, it shall be lawful for the Valuation Court to reserve such a question of law for the decision of the High Court. According to section 20 (1) of Chapter 266, any question of law regarding the principle upon which any valuation has been based is referred to the High Court as a special case. This is illustrated in the High Court Civil Appeal Nos. 218 to 333 of 1985 between oil companies (Kenya Shell, BP, Caltex, Kobil, Total, Esso and Agip) v The Nairobi City Council. In the said case, the oil companies were dissatisfied with the decision of the City Valuation Court regarding their objection to the 1982 Valuation Roll. Justice Shield held that the City

Valuation Court made an error in regard to the principles upon which it arrived at its decision. Consequently, he granted leave for the appeal to proceed and subsequently set aside the decision of the Valuation Court. The appeal case was decided on 3rd of June 1993.

CHART NO. 2 Showing Dispute Management System in a Valuation Court



Source: Compiled by the Researcher from the provisions of the Valuation for Rating Act Chapter 266 and the Rating Act Chapter 267 of the Laws of Kenya.

2.5.4.0 THE BUSINESS PREMISES RENT TRIBUNAL

The Business Premises Rent Tribunal is established under section 11 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Chapter 301 of the Laws of Kenya. Under section 11 (1), the Minister in charge of Trade, Commerce and Industry is empowered to appoint members of the Tribunal to settle disputes in controlled commercial premises. According to section 12 (2), the Business Premises Rent Tribunal has no jurisdiction to hear and determine any dispute in uncontrolled commercial premises.

The definition of a controlled tenancy, under the provisions of Chapter 301 of the Laws of Kenya is that tenancy of a shop, hotel, catering establishment, manufacturing premises and godowns, in which the tenancy:

- has not been reduced into writing;
- has been reduced into writing but the duration of the lease does not exceed Five (5) years; or the agreement provide for termination within Five(5) years;
- having been classified as controlled by the Minister for Trade, Commerce and Industry.

Vide section 11 of Chapter 301 of the Laws of Kenya there exist Ten (10) Business Premises Rent Tribunal stations , that is:

- Nairobi Business Premises Rent Tribunal, having jurisdiction in the Nairobi area, Kiambu, Machakos, Makueni, Kajiado and Thika Districts;
- Mombasa Business Premises Rent Tribunal, having jurisdiction in the Mombasa, Lamu, Kwale, Malindi, Taita Taveta, Tana River and Kilifi Districts;
- Kisumu Business Premises Rent Tribunal, having jurisdiction in the Kisumu.Siaya, Kisii, Homabay, Migori, Nyamira, Rachuonyo, Suba, Gucha and Kuria Districts;
- Nakuru Business Premises Rent Tribunal, having jurisdiction in Nakuru, Narok, Baringo, Kericho, Samburu, Koibatek, Bomet and Transmara Districts;

- Nyeri Business Premises Rent Tribunal, having jurisdiction in the Nyeri, Muranga, Maragua, Kirinyaga, Nyandarua and Laikipia Districts;
- Kakamega Business Premises Rent Tribunal, having jurisdiction in Kakamega, Busia, Bungoma, Vihiga, Teso, Malaba, Lugari and Mt Elgon Districts;
- Eldoret Business Premises Rent Tribunal, having jurisdiction in the Uasin Gishu, West Pokot, Turkana, Elgeyo Marakwet, Nandi and Transzoia Districts;
- Embu Business Premises Rent Tribunal, having jurisdiction in Embu, Kitui, Mwingi and Makueni Districts;
- Meru Business Premises Rent Tribunal, having jurisdiction in Meru, Samburu, Isiolo, Marsabit, Mbere, Nyambene and Tharaka Nithi Districts;
- Garissa Business Premises Rent Tribunal, having jurisdiction in Garissa, Wajir and Mandera Districts;

The Business Premises Rent Tribunal has powers to hear and determine disputes, in controlled commercial premises, related to the following matters, as per the provisions of section 12(1) of Chapter 301 of the Laws of Kenya:

i) determination of controlled tenancy;

ii) review of rent to be paid in respect of any controlled tenancy;

iii) apportioning the payment of rent under a controlled tenancy, among tenants sharing the occupation of a given premises comprised in the controlled tenancy;

iv) fixing the amount of service charge payable in a controlled tenancy;

v) make orders for the payment of arrears of rent and mesne profits. This kind of order may be applicable to any person, whether or not he/she is a tenant, being at any material time in occupation of the premises comprised in a controlled tenancy;

vi) make orders permitting landlords to excise vacant land out of premises to enable an additional building to be erected;

vii) compel the landlord to carry out repairs for which he/she is liable;

viii) authorize the tenant to carry out the required repairs and to deduct the cost of such repairs from the rent payable to the landlord;

ix) permit the levy of distress for rent.

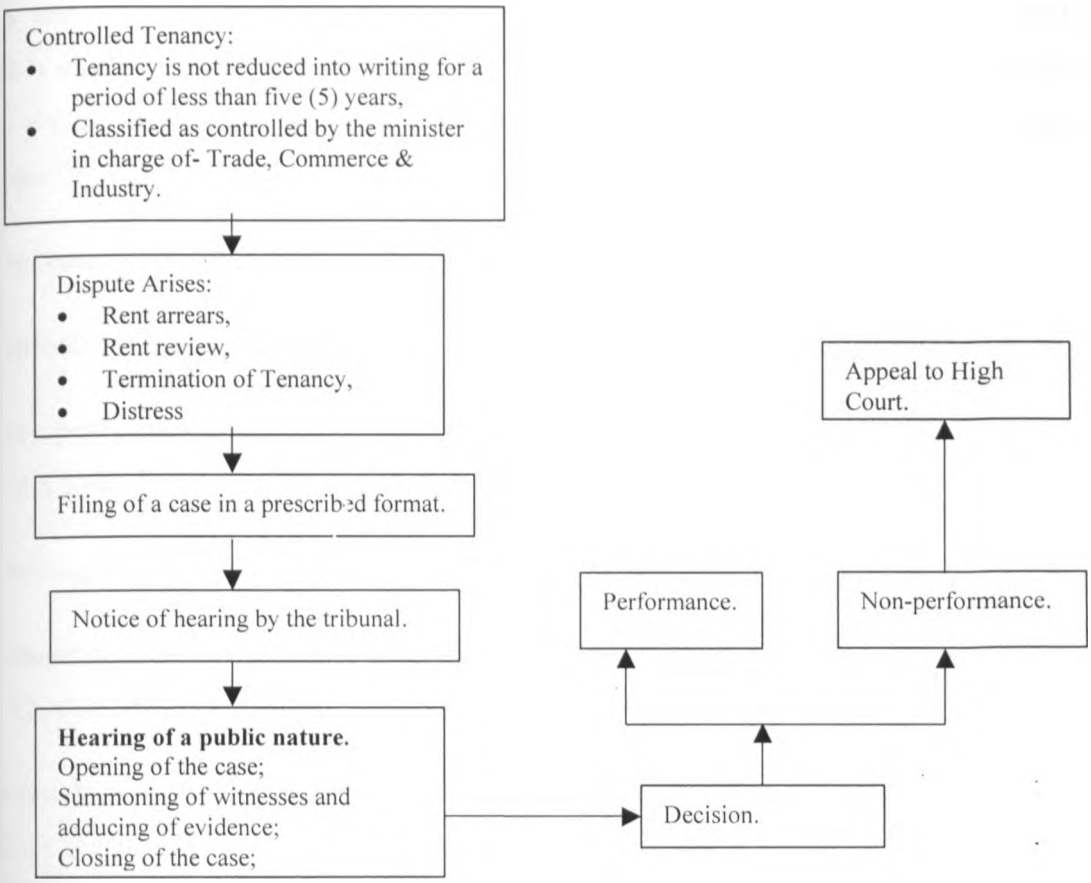
The Business Premises Rent Tribunal is chaired by a magistrate with powers to preside over a magistrates' court of the first class. The Tribunal may also employ officers, valuers, inspectors, clerks and other staff for the better carrying of its functions.

It has been asserted that the Business Premises Rent Tribunal is a toothless bulldog having no powers to enforce its own orders. The Landlord and Tenants (Shops, Hotels and Catering Establishments) Act provides that an order made by the Tribunal must be filed in a court of law and it is only the court and not the Tribunal that can enforce the order. It has been pointed out that this provision causes delay, inconvenience and extra legal costs to the litigants.

Any party who is not satisfied with the decision of the Tribunal may within 14 days from the date of the ruling lodge an appeal against the decision in the High Court on points of law. This can be illustrated in the case of Karibu House (1973) Limited v Travel Bureau Limited. In the said case, Karibu House (1973) Limited appealed to the High Court (Civil Appeal No. 60 of 1976) against the decision of the Business Premises Rent Tribunal at Nairobi, in the Tribunal Case No. 172 of 1975, in which the respondent to the appeal, Travel Bureau Limited, was ordered to pay Kshs. 4,000/= rent to the appellant for premises which it occupied. Justice Kneller and Chesoni held that the Business Premises Rent Tribunal had erred in law in arriving at its decision. The appeal was consequently allowed to proceed.

The management of disputes under the Business Premises Rent Tribunal, according to the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act Chapter 301 of the Laws of Kenya consist of controlled tenancy, arising of a dispute, filing of a case, notice of hearing and summoning of witnesses, representation, adducing of evidence, ruling and appeal. This can be represented in the following model.

CHART NO. 3 Showing Dispute Management in The Business Premises Rent Tribunal



Source: Formulated and Drawn by the researcher from the provisions of the Landlords and Tenants Act Chapter 301 of the Laws of Kenya.

The above procedure is provided for under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedures) Regulations.

Where any tenancy dispute exists, the party desirous of referring such dispute to the tribunal shall make an application to the tribunal in the appropriate form. The tribunal shall thereupon take cognizance of the dispute and register the dispute in the register. The clerk of the tribunal shall after charging an appropriate fee, open a case file and shall record the particulars in the register. The clerk is then expected to fix a hearing date not earlier than seven days from the date of filing the case. However, in fixing the hearing date, due regard must be given to the convenience of the parties to the dispute. Once a hearing date has been fixed, a hearing notice shall be prepared in the prescribed form and served on both the

applicant and the respondent in the manner provided for under the Civil Procedure Act Chapter 21 of the Laws of Kenya. At any hearing before the tribunal, a counsel may represent a party and whenever a witness is required to appear before the tribunal, the clerk shall prepare a witness sermon in a prescribed manner and effect service on the witness. In this regard, the tribunal has the same powers as are vested in a court of law when trying a suit under the Civil Procedure Act. This is especially so in respect to the following matters;

i) appearance of parties to a dispute and the consequences of non-appearance;

ii) enforcing the attendance of any witness and examining him/her on Oath or affirmation;

iii) compelling the production of a document crucial to or necessary for the determination of a given dispute, and

iv) issuing commissions for the examination of a witness.

The tribunal shall be deemed to be a judicial proceeding within the meaning of sections 108, 109, 112, 113, 114, 115, 116 and 121 of the penal code and open to the public.

At the conclusion of a given reference, the tribunal shall make a determination or order to be served on the persons affected by the decisions and such determination or order shall be conclusive proof of the decision of the tribunal.

Where the tribunal consists of two members who arrive at different findings, the decision of the chairman or acting chairman, as the case may be, shall be the decision of the tribunal. Where the tribunal consists of more than two persons, the decision of the tribunal shall be the decision of the majority of the members present.

It is important to note from the above model that once a dispute has been referred to the tribunal for resolution, the disputing parties lose control of the dispute; especially in regard to the process it takes. For instance the disputing parties have to wait until they are properly served with the notice of hearing before the dispute between them can be heard. The time to issue the notice of hearing lies with the tribunal through the clerk.

2.5.5.0 THE RENT RESTRICTION TRIBUNAL

The Rent Restriction Tribunal is established as per the provisions of Section 4 of the Rent Restriction Act Chapter 296 of the Laws of Kenya. The Rent Restriction Tribunal falls under the Ministry of Roads and Public Works. It is empowered to hear and determine disputes filed by landlords and tenants in residential premises falling under controlled tenancy. According to the Rent Restriction Act Chapter 296 of the Laws of Kenya, controlled tenancies are those dwelling houses, furnished or unfurnished which are let at a standard rent of Kshs.2,500/= per month and below. However according to the report of the Task Force to Review Landlord and Tenants Legislations' set up in 1992, it was recommended that the jurisdiction of the Rent Restriction Tribunal be extended to cover all residential premises. This recommendation has however not been implemented.

So far, Nine (9) Rent Restriction Tribunal Stations have been established, vide Legal Notice No. 212 of 21st May 1990 as amended by Legal Notice No. 431 of 3rd November 1994. This is in accordance with the provisions of Section 4 of the Rent Restriction Act Chapter 296. The 9 Rent Restriction Tribunal Stations established so far are:

- Nairobi Rent Restriction Tribunal, having jurisdiction in the Nairobi area, Kiambu, Machakos, Makueni, Kajiado and Thika Districts;
- Mombasa Rent Restriction Tribunal, having jurisdiction in the Mombasa, Lamu, Kwale, Malindi, Taita Taveta, Tana River and Kilifi Districts;
- Kisumu Rent Restriction Tribunal, having jurisdiction in the Kisumu.Siaya, Kisii, Homabay, Migori, Nyamira, Rachuonyo, Suba, Gucha and Kuria Districts;
- Nakuru Rent Restriction Tribunal, having jurisdiction in Nakuru, Narok, Baringo, Kericho, Samburu, Koibatek, Bomet and Transmara Districts;
- Nyeri Rent Restriction Tribunal, having jurisdiction in the Nyeri, Muranga, Maragua, Kirinyaga, Nyandarua and Laikipia Districts;
- Kakamega Rent Restriction Tribunal, having jurisdiction in Kakamega, Busia, Bungoma, Vihiga, Teso, Malaba, Lugari and Mt Elgon Districts;

- Eldoret Rent Restriction Tribunal, having jurisdiction in the Uasin Gishu, West Pokot, Turkana, Elgeyo Marakwet, Nandi and Transzoia Districts;

- Embu Rent Restriction Tribunal, having jurisdiction in Embu, Meru, Samburu, Isiolo, Marsabit, Mbere, Nyambene and Tharaka Nithi, Kitui, Mwingi and Makueni Districts;

- Garissa Business Premises Rent Tribunal, having jurisdiction in Garissa, Wajir and Mandera Districts.

Under Section 4 (3) (4) and (5) of the Rent Restriction Act Chapter 296, the above Tribunal Stations are each supposed to be presided over by a chairman, who is either a Magistrate with powers to preside over a Sub-Ordinate Court of the first class or an Advocate of the High Court of Kenya, having not less than five years experience, and two other members appointed by the Permanent Secretary, Ministry of Roads and Pub'ic Works. However, Mulu (1998) observed that all the above Rent Restriction Tribunal Stations are presided over by one chairman sitting on a rota basis.

The Rent Restriction Tribunal is empowered under Section 5 of the Rent Restriction Act Chapter 296 to settle disputes inherent between landlords and tenants in controlled residential premises, with the exception of excepted dwelling houses (dwelling houses belonging and let to tenants by the Government of Kenya, Kenya Post and Telecommunications Corporation, Kenya Railways & Harbours or a Local Authority).

The duties and functions of the Rent Restriction Tribunal consist of:

i) assessment of standard rent in relation to residential premises;

ii) apportionment of service charge in a tenancy with shared services;

iii) making an order for the recovery of rent arrears, mesne profits and service charge;

iv) making an order for the recovery of possession of premises;

v) making an order to ensure that the premises are in a good state of repair, maintenance and decoration;

vi) permit the levy of distress for rent;

vii) making an order to reduce the standard or recoverable rent;

viii) making an order permitting landlords to excise vacant land out of premises to enable additional buildings to be erected thereon;

ix) adjourn or stay or suspend the execution of any of its order;

x) investigate any complaint relating to the tenancy of premises made to it by either tenant(s) or the landlord of those premises.

Under Section 8 of Chapter 301, every decision, determination and order of the Tribunal shall be final and conclusive with the exception of questions on point of law, powers of the Tribunal as provided for under section (5) and/or in the case of premises where standard rent exceeds Kshs. 2,500 per month. In this case, an appeal shall lie with the High Court of Kenya.

As per the stipulation of the Rent Restriction Regulation No. 11, made vide Legal Notice No. 347/1966 and 148/1967 of 1966 and 1967 respectively, the procedure to be followed by the Tribunal shall be that prescribed under the Civil Procedure Act Chapter 21 of the Laws of Kenya. This means that the Tribunal adopts the procedures akin to the courts of law. This is especially so in terms of: filing of reference, notice of hearing, appearance at the hearing, proceedings (of public nature), examination and cross-examination of witnesses etc.

According to Section 36 of Chapter 296, the Minister for Roads and Public Works is empowered to make regulations to provide for the procedure of the Tribunal, prescription of fees to be paid in respect of any matter or thing to be done under the Act and also to make prescription on circumstances and manner in which a tenant may choose to pay rent due to his landlord, to the Tribunal.

Under Section 37 of Chapter 296, the Chief Justice is empowered to make rules prescribing; the procedure for enforcing determinations or orders of the Tribunal, the time within which an appeal to a court may be brought, procedure to be followed during proceedings and the fees to be paid by the applicants.

The management of disputes under the Rent Restriction Tribunal, according to the provisions of the Rent Restriction Regulations under the Rent Restriction Act Chapter 296 of the Laws

of Kenya consists of controlled tenancy, arising of a dispute, filing of a case, notice of hearing and summoning of witnesses, representation, adducing of evidence, ruling and appeal.

Where any tenancy dispute exists, the party desirous of referring such dispute to the tribunal shall make an application to the tribunal in the appropriate form as provided for under section 4 of the Rent Restriction Regulations. Notice of hearing shall then be served on the parties or their advocates and the date fixed for hearing shall not be earlier than 10 (ten) days from the date of service of the notice of hearing. In fixing the hearing date, due regard is given to the convenience of the disputing parties. At any hearing before the tribunal, a party may appear in person or be represented by an advocate. Section 8 of the Rent Restriction Regulations stipulates that proceedings of the Rent Restriction Tribunal shall be open to the public. According to section 11 of the Rent Restriction Regulations, the procedure to be followed by the tribunal shall be that prescribed under the Civil Procedure Act Chapter 21 of the Laws of Kenya. This is especially so in respect to the following matters;

i) appearance of parties to a dispute and the consequences of non-appearance;

ii) enforcing the attendance of any witness and examining him/her on Oath or affirmation;

iii) compelling the production of a document crucial to or necessary for the determination of a given dispute, and

vi) issuing commissions for the examination of a witness.

At the conclusion of a given reference, the tribunal shall make a determination or order to be served on the persons affected by the decisions and such determination or order shall be conclusive proof of the decision of the tribunal.

Where the tribunal consists of two members who arrive at different findings, the decision of the chairman or acting chairman, as the case may be, shall be the decision of the tribunal. Where the tribunal consists of more than two persons, the decision of the tribunal shall be the decision of the majority of the members present.

It is important to note from the above that once a dispute has been referred to the tribunal for resolution, the disputing parties lose control of the dispute. For instance, the disputing parties

have to wait until they are properly served with the notice of hearing before the hearing of a dispute is heard. The time to issue the notice of hearing lies with the tribunal through the clerk.

2.5.6.0 THE LAND ACQUISITION COMPENSATION TRIBUNAL

The Land Acquisition Compensation Tribunal is established under the provisions of Section 29 of the Land Acquisition Act Chapter 295 of the Laws of Kenya. The Land Acquisition Compensation Tribunal is empowered to hear and determine disputes related to claims on compensation by persons whose interest in land has been affected, in the event of compulsory acquisition of land.

The Land Acquisition Compensation Tribunal is chaired by an advocate of the High Court of Kenya. It is empowered to hear and determine disputes related to compensation award between the Commissioner of Lands and parties whose land have been acquired. It is expected to determine the value of land in accordance with the principles set out in the schedule and determine what compensation is payable to each of the affected parties.

Section 9 (5) of Chapter 295 gives powers to the Land Acquisition Compensation Tribunal, similar to those given to the courts of law. This is especially so in regard to summoning and examining witnesses, administration of oaths and affirmations and compelling the production and delivery of title to land.

Before the amendment of the Land Acquisition Act Chapter 295 of the Laws of Kenya vide the Land Acquisition (Amendment) Bill of 1990, the Commissioner of Lands was empowered to prepare a written compensation award to each person affected. The award was expected to be final and conclusive except in the case where there is a question as to a point of law or fact, in which case an appeal lied with the High Court as conferred by section 75(2) of the Constitution of Kenya. The points of appeal to the High Court are provided for under section 29(1) of the Land Acquisition Act, and they include:

i) determination of interest or right in or over the land;

ii) amount of compensation awarded under section 10 of Chapter 295; and

iii) amount of compensation paid under section 4,23,25 or 26 of Chapter 295.

In the third Nairobi Water Supply Project (Ndakaini) 80 people whose land were acquired compulsorily were dissatisfied with the compensation award by the Commissioner of Lands (See Table No. 1 below). Consequently, they appealed to the High Court where the compensation award was increased by about 20%. This increase however, was only about 35% of what the affected parties were claiming. Two parties were dissatisfied with the decision of the High Court and appealed further to the Court of Appeal. In the Court of Appeal, the decision of the lower court was upheld in 1990; about two (2) years after the notice of intention to acquire the land was published in the Kenya Gazette. Upon the amendment of the Land Acquisition Act Chapter 295 vide the Land Acquisition (Amendment) Bill of 1990 the Land Acquisition Compensation Tribunal was established with powers similar to that of a lower court, henceforth, no land acquisition dispute could be taken to the High Court without first having passed through the Tribunal.

Table No. 1: Showing 10 Compulsory Land Acquisition Cases in the Third Nairobi Water Supply Project (Ndakaini)

L R Number	Disputants	Claim	Commissioner of	Award by the
		ir Kshs.	Lands Award in Kshs.	High Court in Kshs.
Ndakaini/403	Muruithia v CoL	39,645,800	1,175,240	1,433,793
Ndakaini/87	Kiruma v CoL	1,116,705	288,095	351,476
Kiwa/238	Muira v CoL	647,400	244,705	298,540
Kand/119	Kabuki v CoL	914,058	288,905	352,464
Kand/14	Mweru v CoL	7,236,400	2,008,630	2,450,529
Kiwa/159	Muhia v CoL	267,400	77,310	94,318
Makomboki/374	Kimani v CoL	1,524,600	317,055	386,807
Kand/33/223	Mwangi v CoL	502,286	112,690	137,482
Ndakaini/188	Kariuki v CoL	1,067,278	277,490	338,538
Ndakaini/404	Humphrey v CoL	2,937,497	1,002,280	1,222,782

Source: Third Nairobi Water Supply Project (Ndakaini) files from Gitonga Aritho and Associates and the City Council of Nairobi.

The management of disputes under the Land Acquisition Tribunal, according to the provisions of the Land Acquisition (Amendment) Bill of 1990 of the Laws of Kenya begin with a dispute arising out of compulsory land acquisition in accordance with Land Acquisition Act Chapter 295 of the Laws of Kenya. It entails, filing of a dispute, notice of hearing and summoning of witnesses, representation, adducing of evidence, proceeding, ruling and appeal.

Where any dispute related to compulsory land acquisition exists, the party desirous of referring such dispute to the tribunal shall make an application to the tribunal in the appropriate form. Notice of hearing shall then be served on the parties or their advocates and a date fixed for hearing. In fixing the hearing date, due regard is given to the convenience of the disputing parties. At any hearing before the tribunal, a party may appear in person or be represented by an advocate. The Land Acquisition Compensation Regulations stipulates that proceedings of the Land Acquisition Compensation Tribunal open to the public and the procedure to be followed by the tribunal shall be that prescribed under the Civil Procedure Act Chapter 21 of the Laws of Kenya. This is in regard to appearance of parties, summoning of witnesses, adducing of evidence, compelling the production of a document crucial for the determination of a dispute and issuing commissions for the examination of a witness.

At the conclusion of a given reference, the tribunal shall make a determination or order to be served on the persons affected by the decisions and such determination or order shall be conclusive proof of the decision of the tribunal.

Where the tribunal consists of two members who arrive at different findings, the decision of the chairman or acting chairman, as the case may be, shall be the decision of the tribunal. Where the tribunal consists of more than two persons, the decision of the tribunal shall be the decision of the majority of the members present. From the above process, it is important to note that once a dispute has been referred to the tribunal for resolution, the disputing parties lose control of the dispute especially in regard to determining the time of hearing.

2.5.7.0 THE LAND RENT ARBITRATION TRIBUNAL

The Land Rent Arbitration Tribunal is established under the provisions of the Government Land Act Chapter 280 of the Laws of Kenya. It is empowered to hear and determine disputes related to the review of land rent between the Commissioner of Lands and leaseholders. An

advocate of the High Court of Kenya chairs the Land Rent Arbitration Tribunal. Its powers are similar to those given to magistrates' court of the first class. This is especially so in regard to summoning and examining witnesses, administration of oaths and affirmations and compelling the payment of land rent.

The process of the Land Rent Arbitration Tribunal is similar to that of the Land Acquisition Compensation Tribunal, discussed above.

2.5.8.0 COMMON FEATURES AND SHORTCOMINGS OF THE TRIBUNALS

From the foregoing, it is evident that dispute management systems in the tribunals are almost similar in terms of the procedures adopted. The procedures are anchored on the provisions of the Civil Procedure Rules under the Civil Procedure Act Chapter 21 of the Laws of Kenya. This is especially in regard to filing of a dispute, giving notice of hearing, hearing, summoning of witnesses, representation, adducing of evidence, ruling and appeal.

Filing of disputes in the tribunals is through filling of prescribed forms at a given fee. Once a dispute has been filed, the disputing parties lose control of the dispute in entirety. This is because the subsequent stage through which the dispute is to undergo is dependent on the tribunal diary. For instance fixing the hearing date, summoning of witnesses and ruling are at the discretion of the tribunals. The tribunal sessions are also public in nature just like the courts of law.

Reliance on the Civil Procedure Rules have been a great hindrance to expeditious resolution of disputes and thus the need to explore the use of the Alternative Dispute Resolution methods such as Arbitration, Mediation, Negotiation, adjudication, Expert Determination, Facilitation, Neutral Fact Finding and Executive Tribunal.

2.6.0.0 ALTERNATIVE METHODS OF RESOLVING VALUATION AND PROPERTY MANAGEMENT DISPUTES

2.6.1.0 INTRODUCTION

Due to the increasing globalization of trade, industry and services, and the concomitant internalization of disputes, Alternative means of resolving disputes have become a more preferred means of resolving disputes, especially of a business nature. The Alternative Dispute Resolution methods are an alternative to litigation or the due process of the courts of law. Tamara (1996) observes that anything other than litigation is an alternative form of dispute resolution. The Alternative methods of resolving disputes have existed among the communities in Kenya long before the advent of the courts of law. Even after the advent of the legal system in Kenya, many disputes among families and friends are sorted outside the courts through submission to respected family members or friends. Such resolutions are socially binding within the particular cultural or social group.

The Alternative Dispute Resolution methods are in line with Lord Justice Woolfs' recommendations on the improvement of access to justice, and that litigation should be viewed as a last resort. In this regard therefore, it is noteworthy that the Alternative Dispute Resolution methods are intended to divert cases from the courts of law and to ensure that the cases are disposed off as rapidly as possible. Lord Justice Woolf shared this sentiments in his report on the review of the Civil Procedure Rules of Britain in 1995, when he asserted that, although the primary role of the court is as a forum for deciding cases, it is right that the court should encourage parties to consider the use of the Alternative Dispute Resolution methods as a means to resolve disputes.

Litigation as a means of resolving civil disputes may degenerate into a fiercely contested and expensive exercise. In this regard therefore, Alternative Dispute Resolution methods have increasingly become significant if parties to a dispute hope to maintain a degree of decorum and some form of relationships once a dispute has been settled. This factor is of utmost importance in business as well as in inter-personal relationship.

The Alternative Dispute Resolution mechanisms vary each with its own characteristics. They include; Arbitration, Mediation, Negotiation, Adjudication, Expert Determination,

Facilitation, Neutral Fact-Finding and Executive Tribunal. Each of these mechanisms is discussed below:

2.6.2.0 ARBITRATION

In order to understand the concept of arbitration as an Alternative means of Resolving Disputes, it is essential to look at, definition of arbitration, general arbitration rule, types of arbitration, the origin and development of arbitration law in Kenya, features of arbitration and reference to arbitration.

2.6.2.1 Definition

Arbitration is an important feature of modern life, so much so that many businessmen will find it of great service. It is a method of settling civil disputes and differences between two or more parties, whereby such disputes are referred to one or more persons, nominated for the purpose, for determination after a hearing in a quasi judicial manner, either instead of having recourse to an action at law, or by order of the court, after such action has been commenced (Soper, J.P, 1959). According to the Chartered Institute of Arbitrators, arbitration is defined as the procedure for the settlement of disputes, whereby the parties to a dispute agree to be bound by the decision of an arbitrator, whose decision is, in general, final and legally binding on both the parties.

Arbitration and litigation are quite different from all other forms of dispute resolution since they are the only methods of resolving civil disputes, which can result in an award that can be registered as a judgment on application to the High Court and enforced in the same way as a court decision (Chartered Institute of Arbitrators, 1991). The fact that an arbitrators' award is enforceable summarily in the courts of law make it a unique alternative to litigation when compared to other Alternative means of Resolving Disputes.

An Arbitrator is like the master of ceremonies since he/she can determine the procedure to follow. According to the Arbitration Act of 1995 of the Laws of Kenya, an arbitrator is also empowered to rule on his own jurisdiction.

2.6.2.2 General Arbitration Rule

When arbitration is conducted under or through the auspices of a given professional institution, that institution may have its own rules and procedures to govern the conduct of reference. The Arbitrator and the disputing parties are therefore advised to carefully study those rules and comply otherwise failure to do so may lead to a charge for procedural misconduct. Such rules are like those of the Chartered Institute of Arbitrators London, the United Nations International Trade Law (UNCITRAL) Rules, Kenya Branch of the Chartered Institute of Arbitrators e.t.c

2.6.2.3 Types of Arbitration

Arbitration may be carried out in a number of ways, that is, on documents only, written representations, statements of case and formal pleadings. It is within the jurisdiction of the arbitrator to choose which type of arbitration is suitable to resolve a given dispute. The Arbitrator should however be able to analyze the dispute before deciding the type of arbitration to use. Simple and relatively straightforward cases with a few easily identifiable issues may best be resolved by documents only or written representations plus short oral hearings. Where matters are more complicated and masses of evidence are necessary, it may well be that formal pleadings coupled with limited or full discovery will be the most suitable.

Arbitration by Documents Only

This is where the arbitrator studies the files and other documents, regarding a given dispute, presented to him/her by the disputing parties and makes an award on that basis. This type of arbitration is suitable in a case that does not have serious conflicts of evidence, which requires the oral examination of witnesses and where the transaction is properly documented. Such a procedure can be quick and inexpensive.

Arbitration through Written Representation

This method of Arbitration is suitable in the instance that some orality is deemed necessary in order to explain, clarify or elucidate certain issues, which cannot be resolved satisfactorily by merely studying the documents only. It is in fact a modification of the documents only type of arbitration. In this type of arbitration, parties are required to make short written representations to outline their cases and their arguments and if found necessary, they will

call witnesses to speak on a few specific points and not to go through all the possible evidence.

Arbitration through Statement of the Case

This involves the preparation of case documents where formal pleadings are not required. The case documents may be prepared in such a way that they state the claims being made, the justification for those claims and the proof of the claims. The response to the claims is then prepared in the same way. Generally, case documents will contain allegations of fact, legal arguments and evidence. Each party discloses and attaches the documents it feels are important to the decision of the dispute.

Arbitration through Formal Pleadings

Arbitration may take place on a formal pleadings basis whereby both parties are represented by advocates or other experts. It is noteworthy that Advocates prefer formal pleadings as the vehicle for stating their case. This is because it is akin to the system they are used to in the courts of law. Formal pleadings may not be suitable in resolving certain technical matters.

2.6.2.4 Origin and Development of Arbitration Law in Kenya

The origin and development of arbitration law in Kenya may be looked at in terms of: the English Common Law, the Arbitration Agreement and the Statutes.

Origin of Arbitration Law according to the English common Law

English Common Law is derived from judicial precedents than from legislative enactment. It is basically un-enacted law, for instance judicial decisions that are often reduced to writing in the form of law reports. English Common Law are sourced from; the legislation, judicial procedures, customs and books of authority. Therefore, it is important to note that the English Common Law comprises, among others, a body of principles built up from the precedents of the old courts of common law (Phillip S.J, 1976).

Before 1697, arbitration was conducted within the framework of the English Common Law. Under this law, merchants and traders were required to refer civil disputes arising on matters of trade, to neutral persons for determination. Originally, only disputes relating to personal chattels or wrongs could be referred to arbitration. Later on however, disputes relating to real

estate matters could also be referred for arbitration. This practice was found wanting under common law and thus the need to enact a legislation to give guidance to the arbitration profession i.e. the Arbitration Act of 1697. Later on, provisions were added to the statute (the Arbitration Act of 1697), from time to time, to give aid to the Common Law of Arbitration. The additional provisions were made necessary so as to; render submission to arbitration more binding upon the parties, make awards more easily enforceable and to remedy other defects in the practice.

Slowly, the Arbitration Law became extended, from time to time, as Case Law on arbitration matters continued to develop. In 1889, it was considered advisable to codify the general law on arbitration. This culminated into the enactment of the Arbitration Act of 1889, to replace the one of 1697. Under the new act, disputes arising out of oral submissions were not covered. In addition, the arbitrators' authority was made irrevocable, except by consent of the parties or by leave of the court. The award was also made enforceable just as a court judgment.

Arbitration Act of 1934 was enacted to make certain amendments to the provisions in the Arbitration Act of 1889. It was to be read as one under the title "the Arbitration Acts, 1889-1934''(Soper, J.P.H, 1959). In 1950, this act was re-enacted to provide a code of law to regulate all arbitration matters arising under a written agreement between parties, except in so far as certain of its provisions may be expressly varied or excluded by the agreement. The Arbitration Act of 1950 has remained substantially unaltered, being currently referred to as the "Principle Act''. This act has the merits of simplicity and clarity. Pressure from the Chartered Institute of Arbitrators in 1979 resulted into the repeal of the Arbitration Act of 1950. The 1979 Arbitration Act aimed at filling certain gaps in the "Principal Act", such as the one, which arises when an appointing authority named in arbitration agreement neglects or refuses to make the appointment.

Origin and Development of Arbitration according to Agreement

For an arbitration to be governed under the Arbitration Act of 1950 and 1979 of England, it is a requirement that it must be in writing. This requirement has contributed a great deal to the development of arbitration as a profession. This is in so far as arbitration agreements are deemed necessary to be included in an agreement.

Arbitration agreement made before a dispute arises provides for reference to arbitration in regard to any dispute that may arise from the contract under consideration. Where a dispute arises from a contract in which there is no arbitration agreement, within the meaning of the Arbitration Act of 1950 of England, it becomes open to the parties to enter into an ad hoc arbitration agreement in respect of that dispute.

Under arbitration agreement, parties are at liberty to include, either in form of an arbitration agreement, or in an addendum thereto, made either before or after a dispute has arisen, any rules for the conduct of the arbitration. Such rules must be lawful and consistent with the public policy. Such rules must also be in conformity with the provisions of the Chartered Institute of Arbitrators, the London Court of International Arbitration, the United Nations Commission on International Trade Law (the UNCITRAL Rules), the International Chamber of Commerce or the Institution of Civil Engineers (Douglas A S, 1992).

Origin and Development of Arbitration according to Statute

There are two legislations, which govern arbitration practice in Kenya i.e. the Arbitration Act Chapter 49 and the Arbitration Act of 1995, of the Laws of Kenya.

The Arbitration Act Chapter 49 of the Laws of Kenya was enacted in 1968 and revised in 1985. It was aimed at making provisions in relation to the settlement of disputes by arbitration. This act of parliament was enacted on the basis of the provisions of the Arbitration Act of 1950 (the "Principal Act") of England and the English Common Law on arbitration. In essence, the Arbitration Act Chapter 49 was a replica of the Arbitration Act of 1950, which was aimed at providing a code of law to regulate all the arbitration arising under a written agreement. The revision of Chapter 49 of the Laws of Kenya in 1985 was purposed to put it in tune with the 1979 revision of the 1950 Arbitration Act of England. In this revision, the gaps in the "Principal Law" were filled in line with the Chartered Institute of Arbitrators requirements. The 1985 revision of Chapter 49 of the Laws of Kenya was also aimed at bringing aboard the requirements of the Kenya Branch of the Chartered Institute of Arbitrators, which was formed in 1984.

The Arbitration Act of 1995 of the Laws of Kenya is based on the United Nations Commission on International Trade Law (UNCITRAL rules), which were resolved and adopted on 15th December 1976. The UNCITRAL rules have been adopted by many

countries in the world as the law to govern international as well as domestic arbitration. These rules are also referred to as the Model Law. The Arbitration Act of 1995, therefore, was basically aimed at repealing and re-enacting, with amendments, the Arbitration Act Chapter 49 of the Laws of Kenya, so as to put it in line with the UNCITRAL rules. It was aimed at giving more powers to the arbitrator to conduct arbitration in the manner he/she deems fit, inconsistency and repugnance not withstanding, and also keeping court involvement in arbitration matters to the bare minimal.

The 1995 Arbitration Act of the Laws of Kenya is an improvement of the Arbitration Act Chapter 49, of the Laws of Kenya especially in regard to conduct of proceedings, High Court reference, award and the enforcement of the award.

According to the provisions of Section 13 of the Arbitration Act Chapter 49, the conduct of proceedings entail submission to be examined by the arbitrator or umpire, on oath, production of all necessary documents and to do all other things which may be required by the arbitrator or umpire. However, as per the provision of Part IV of the 1995 Arbitration Act, a more elaborate requirement on conduct of arbitral proceedings is put forth. For instance as opposed to Chapter 49, the 1995 Arbitration Act of the Laws of Kenya accords privileges and immunities to all witnesses just as in proceedings before a court of law. The 1995 Arbitration Act goes further to give guidance on; the place of arbitration, commencement of the arbitral proceedings, language to be used, hearing and written representation and also the appointment of experts to give evidence. All these are additional provisions made over and above the Arbitration Act Chapter 49 of the Laws of Kenya, aimed at making the operation of arbitration more autonomous to a given extent.

Regarding recourse to the High Court, the Arbitration Act of 1995 stipulates that an award may be set aside by the High Court on satisfaction that; a given party to an agreement was incapable in law, there was an improper notice of an arbitrators appointment, if a dispute is not within the given terms of the agreement and also if the award is repugnant and/or inconsistent to the constitution. These requirements, regarding reference to the high court, are a development and an improvement of those provided for under the Arbitration Act Chapter 49 i.e. the award may be set aside in the event that; there is misconduct, by the arbitrator etc.

The provisions for the enforcement of award under Section 27 of Chapter 49 of the Laws of Kenya only gave credence to enforcement of an award. This was however developed and improved further by Section 36 and 37 of the 1995 Arbitration Act to include among others; the recognition of an award and the grounds for refusal of recognition or enforcement of an award.

2.6.2.5 Features of Arbitration

Arbitration is used for settling civil disputes whereby parties in the dispute agree to present their grievances to a third party for resolution. The tnird party so appointed is under obligation not to accept appointment in matters that he/she is not fully competent. In addition, the arbitrator is expected to be wholly independent and impartial throughout a given reference.

What make arbitration a tick above litigation and other means of dispute resolution are not really the competence, independence and impartiality of the arbitrator, but its features. The features make arbitration to be more favored as an alternative means of resolving disputes. The features of arbitration are expertise, privacy, flexibility, cost, finality, enforcement and representation.

The arbitrator is chosen collectively by the parties at times with the help of the Chartered Institute of Arbitrators. This ensures that a person with adequate expertise knowledge and experience on the matter at hand is chosen. Since the disputing parties chose the arbitrators, they have maximum confidence in him/her. This is unlike in the courts of law where no disputing party is given a chance to choose a judge.

Arbitration ensures maximum privacy. This is because it is a private process whereby the disputing parties chose an arbitrator privately and proceedings are also held privately. No on-lookers and busy bodies are allowed. This level of confidentiality prevents the publishing of proceedings and award in the press without approval of the parties.

Arbitration is flexible in nature. This is because being private; parties may control the manner of the proceedings having regard to the nature of the dispute and the precise needs of the disputing parties. In essence, the disputing parties and the arbitrator(s) have control over

the procedure and rules to be adopted during proceedings. This is a very attractive attribute of arbitration.

Arbitration may be less costly than litigation due to the fact that the arbitrator and the disputing parties have control over procedures and proceedings. This results in time saving. The costs of an arbitrator are primarily time related and will depend upon the matters in dispute, the procedure adopted by the parties and the choice of representatives. In the courts, parties do not pay the judges directly, but through the state taxation machinery. Parties also do not pay for the court premises, however, they have to pay their advocates and other representatives. In arbitration, on the other hand, parties have to pay the arbitrator and when hearings' are held outside the arbitrators' office, the venue may also have to be paid for. In addition, each party has to pay for their representatives. However, given the speed and flexibility with which arbitration is carried out, it is noteworthy that the overall cost of arbitration is less than those of comparable litigation.

The award of the arbitrator is final and binding upon the parties. It may only be challenged in the High Court on limited grounds such as error of law arising out of an award made in the proceeding, serious irregularities, lack of substantive legislation, disregard for the principles of natural justice or the express agreement of the parties.

The arbitrators' award is enforceable summarily in the courts. This is done by registering the award, as a judgment, in the High Court. This makes it a more favorable means of resolving civil disputes since whatever has been determined can easily and effectively be enforced.

In arbitration, the disputing parties are at liberty to nominate anyone to represent them. This is not so in the courts where a party can only be represented by an advocate, if not, the disputant has to appear in person. In arbitration on the other hand, disputants may appear in person, appoint an advocate or a technical person or anyone to appear on their behalf.

2.6.2.6 Reference to Arbitration

Parties to the dispute reaching an agreement that a dispute would be settled by arbitration ordinarily bring about reference to arbitration. There are three elements of reference to arbitration, that is, who may refer disputes to arbitration, how to refer matters to arbitration and what matters may be referred of arbitration.

Every reference to arbitration arises from the agreement of the parties to have their differences settled by arbitration. In this regard, therefore, anyone who is capable of entering into a binding contract is capable of making a reference to arbitration. The parties in the reference will be the persons whose interests are involved in the dispute. In this regard, therefore, suffice it to say that any person, *sui juris,* can make a binding arbitration agreement.

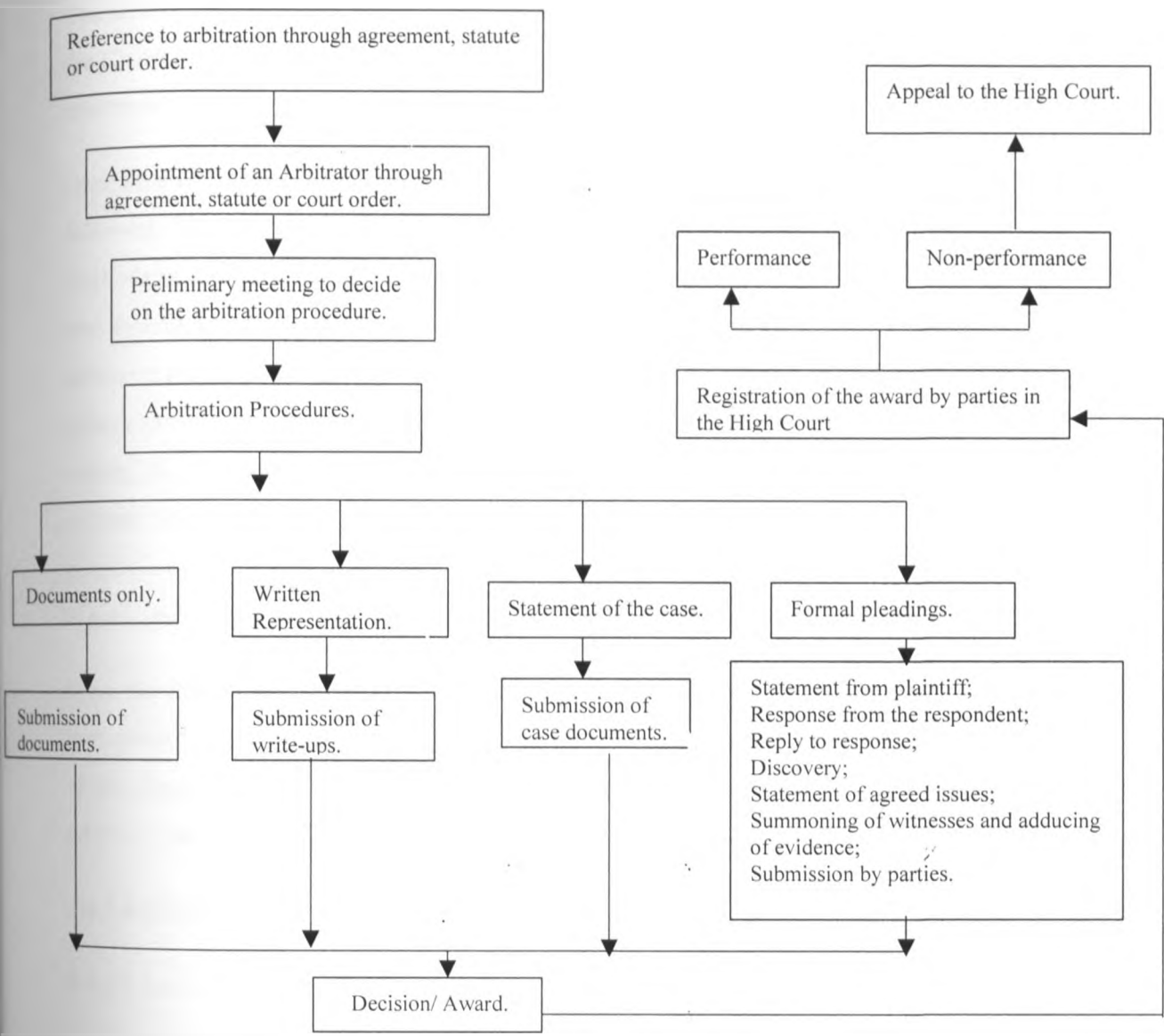
Matters may be referred to arbitration by agreement of the parties, through statute or by an order of the court. Parties to a contract may enter into an agreement to refer any form of civil dispute to arbitration. Statutory provisions may also give rise to reference to arbitration. This is especially so in regard to provision within the statues to refer disputes to arbitration. The court also has powers to refer disputes to arbitration, that is, disputes which have already been submitted to the court for an action, but which are subsequently found to be more suited for arbitration.

Matters, which may be referred to arbitration, depends upon whether the reference is by agreement, statute or order of the court. Most differences or disputes which can arise between two or more parties and which affect their civil rights may be referred to arbitration. This is with the exception of disputes, which are against public policy. Criminal matters, for instance cannot be referred to arbitration since it is an offence against the public as a whole and thus against public policy. However, if the crime gives rise to a civil claim for damages, and then there is no reason why that claim should not be referred to arbitration.

Matters referred to arbitration by statute include all disputes which come within the provisions of an act of parliament, for instance disputes referred to the Tribunals under the Rent Restriction Act Chapter 296, the Landlords and Tenants (Shops, Hotels and Catering establishments) Act chapter 301 of the Laws of Kenya etc. In the case of any statutory reference, the authority of the arbitrator and his/her powers are derived from the statute, which directs the reference of the dispute. Where a dispute is referred to arbitration by statute in which a special procedure for arbitration is provided, the general rule is that the arbitration clauses of that statute will override those in the Arbitration Act Chapter 49 and the Arbitration Act of 1995, of the Laws of Kenya.

2.6.2.7 Arbitration process

Atypical process of dispute resolution through arbitration is shown in Chart No. 4 below:



Source: Compiled by the Researcher from reviewed literature, the Arbitration Act Chapter 49 and the Arbitration Act of the Laws of Kenya.

Dispute may arise out of an agreement, either implied or express. Once a dispute has arisen, the arbitration clause in the agreement may be invoked where; the agreement clearly specifies that any dispute arising out of the contract would be resolved through arbitration. Where the agreement does not specify reference of a dispute to arbitration, then the parties to a dispute

may mutually agree, in writing once a dispute has occurred, to refer such a dispute to an arbitrator. The court may also make an order to refer a dispute to arbitration when it finds that a dispute, which has already been referred to it for action, is best suited for arbitration.

The arbitration agreement would either specify the body to appoint an arbitrator, for instance, the Chartered Institute of Arbitrators or give the disputing parties a free hand to agree on an arbitrator.

Once an arbitrator has been appointed, he/she is expected to be the master of procedures to be followed. The arbitrator may choose to adopt any one or a combination of the forms or methods of arbitration, that is; documents only, written representation, statement of the case, and formal pleadings. Notwithstanding the method to be adopted during arbitration, the arbitrator may commence hearing almost immediately and summon witnesses. The disputing parties may be represented by an advocate, self or any other party desirable for instance a valuer, doctor, engineer, quantity surveyor etc. The proceedings in arbitration are held in private. After listening to the disputing parties and the witnesses, the arbitrator is expected to prepare a written award, based on the evidence adduced. The award arrived at by an arbitrator is enforceable summarily in a court of law by registering the same as a judgment.

From the foregoing arbitration process, it is important to note that the disputing parties do not lose control of the dispute. In this regard the disputing parties may determine the speed with which dispute may be resolved. For instance, a hearing session may begin immediately an arbitrator has been appointed.

2.6.3.0 MEDIATION

2.6.3.1 Introduction

It is an alternative means of resolving civil disputes. The concept of mediation may be looked at in regard to its definition, nature and characteristics of mediation, the role of the mediation, the process, type of disputes which are best resolved through mediation and the difference between mediation and arbitration.

2.6.3.2 Definition of Mediation

Professor Karl Mackie (1995) defines mediation as a voluntary and non-binding private dispute resolution process in which a neutral party is appointed by the disputants to help in reaching a negotiable settlement. It is further defined as a confidential process whereby parties to a dispute invite a neutral individual to facilitate negotiations between them with a view to achieving a resolution.

According to Tamara (1995), mediation simply assists the disputing parties to focus on their real interests and strengths in an attempt to draw them together towards possible settlement. The mediator is not there to impose a solution, but to allow the parties to reach their own settlement.

According to Hibberd and Newman (1999), mediation is where a neutral third party assists the disputing parties to arrive at a settlement. The third party may be empowered to make a recommendation or impose a settlement subject to certain conditions.

According to the British Academy of Experts, Center for Dispute Resolution (CEDR) and the Chartered Institute of Arbitrators (CIArb), mediation is defined as a process whereby a dispute between two parties is resolved by submitting the dispute to an independent neutral third party whose role is to assist the parties to reach a mutually satisfactory solution.

2.6.3.3 Nature and Characteristics of Mediation

The main objective behind mediation is to help disputing parties to reach a settlement. A mediator does not adjudicate between disputing parties or make an award or a declaration. This objective is achieved by virtue of a set of characteristics, which make it possible to formulate a given process to be followed.

Mediation is non-binding in nature and character since entering into the process is voluntary. It involves no commitment to settle a dispute and the mediator has no power to impose a given solution. When a mediated agreement is reached however, the mediator may set down the terms in writing. Once the parties to the dispute sign the mediated agreement, it becomes a legally binding contract and can be enforced through the court of law under the law of contract.

Unlike the traditional methods of resolving disputes, mediation provides an opportunity for the parties to work together constructively towards a settlement. It also offers the chance to bring into discussion elements, which are quite outside the original dispute that can frequently lead to a resolution where both parties gain from the agreement.

Similar to arbitration, mediation is conducted on a confidential basis, away from the glare of publicity. This is because the discussions with the mediator are private. The disputing parties can share confidences with the mediator and reveal the true interests. In this way, the mediator achieves a unique overview of the dispute and can help in identifying ways in which the parties can reach a settlement while at the same time maintaining good relations.

Mediation as a means of resolving disputes is impartial in nature and can be used to settle any type of civil dispute. It is non-adversarial since the disputing parties are not eyeball-to-eyeball across a table; rather they negotiate through a mediator who helps by introducing objectivity and expertise.

Since mediation is private and informal, it offers a very fast means of resolving civil disputes. For instance, according to the dispute resolution service of the Royal Institute of Chartered Surveyors (RICS), most mediation takes no more than one day to complete (Dispute Resolution Service, 2000). This is remarkable especially in regard to the cost of resolving disputes, which is tremendously reduced when a dispute is resolved expeditiously.

According to the Dispute Resolution Service of the Royal Institution of Chartered Surveyors (RICS), Mediation have been a successful means of resolving disputes. It is actually approximated that more than 90% of cases referred to mediation has been successful.

It is important to note that at the end of the day, mediation results in a win-win situation since both parties to a dispute are happy with the final result.

2.6.3.4 Types of Disputes which can be Resolved through Mediation

Any civil dispute has a potential for mediation provided that the parties to it are willing. However, some disputes are more suitable for resolution through mediation than others. For instance, the process is suitable for settling disputes between parties who have along term relationship to protect.

Valuation disputes that may be suitable for mediation include valuation for; compulsory acquisition, rental, mortgage, sale, purchase, insurance, rates, ground rent and stand premium. Property management disputes, which may be resolved through mediation, are;

i) rental reviews;

ii) lease extension or renewal;

iii) landlord and tenant rights and obligations;

iv) disputes over residential leasehold obligations and restrictive covenants on the title including contractor/employer and contractor/sub-contractor relationships;

v) disputes regarding professional fees or other aspect of professional appointments;

vi) professional negligence claims;

vii) partnership disputes;

viii) boundary and other neighbours disputes;

ix) disputes involving public bodies and national utilities such as compensation for compulsory purchase;

2.6.3.5 Approaches to Mediation

There are two basic approaches to mediation that is the facilitative approach and the evaluative approach.

The facilitative approach to mediation is also referred to as the interest based approach. In this approach, the mediator is interposed between the disputing parties so as to provide a means of communication between them. This is aimed at enhancing the common interest between the parties and providing an ambience that is conductive to encouraging the parties to find their own solution to their dispute. In this form of mediation, the mediator does not express an opinion or proposes a settlement.

The evaluative approach to mediation on the other hand is based on the respective rights of the parties in a dispute. In this case, the mediator attempts to evaluate with or without expert

help, the strength and weaknesses of each party's case and indicates a view. This is aimed at influencing the parties to modify their positions so that the dispute may be resolved. (Hibberd and Newman, 1999).

2.6.3.6 The Mediation Process and Reference

There is no strict procedure regarding reference of a dispute to mediation since it is characterized by a great degree of flexibility on how the mediator manages it. The mediator, just as the arbitrator, is the master of process and procedure in mediation. The mediator is any event expected to be fair and impartial in the process and procedure chosen and upholds the rule of natural justice.

According to the works of professor Karl Mackie (1995) the Chief Executive of the Center for Dispute Resolution (CEDR) in Britain and the Dispute Resolution Service of the Royal Institution of Chartered Surveyors (RICS), the process and procedure for mediation may be summarized as follows;

i) Agreement to Mediate and the Appointment of a Mediator

In the event that disputing parties have already agreed to mediate then a particular mediator would be agreed upon. The disputing parties may also contact the organizations dealing with dispute resolution such as the Dispute Resolution Service of the Royal Institution of Chartered Surveyors (RICS), the Center for Dispute Resolution (CEDR) (there is a Kenya Branch with offices on Elgeyo Marakwet Road) or any other body that deals with mediation, for the appointment of suitable mediator.

The mediation agreement needs to be clear so that both the parties know what to expect from the mediation. According to the Joint Contracts Tribunal (JCT) practice Note No. 28, paragraph 3; a good mediation agreement must include the following items;

- a clear and precise statement of the issue in dispute;
- a declaration by the parties that they wish to use a mediator to facilitate settlement;
- a period during which the mediation is to take place;
- the name and qualifications of the mediator;

- the mediation is to be conducted on a confidential, without prejudice basis, unless the parties agree otherwise;
- a date to meet with the mediator to discuss the format;
- how costs arising out of the mediation are to be dealt with;
- if the mediation results in a settlement of some or all of the issues, the parties will execute a binding agreement setting out the terms of settlement.

If any party to a dispute is initially working to agree to mediation, the initiating party can nevertheless request the mediation bodies to appoint a mediator who will re-contact the other party or parties with a view to securing their agreement to mediation.

Once arrangement to mediate has been reached, a mediation agreement would be prepared and signed by the disputing parties. The mediation agreement provides a framework within which the parties agree to the mediation process on a "without prejudice" confidential basis.

ii) Preparing for Mediation

Having appointed the mediator, he/she is expected to liaise with the parties to arrange an appropriate date and location for the mediations. Before arranging for the date and location, the disputing parties are expected to forward to the mediator, written summary on the dispute with any essential background documentation in advance of the first mediation meeting.

The fees and costs of the mediation are then agreed on by the parties and are paid before mediation begins.

iii) The Mediation Process

One of the strengths of mediation is its flexibility to adapt to the circumstances of the disputing parties and the dispute itself. Therefore there is no rigid procedure. It can be based on joint or separate meetings of parties and the mediator; technical experts can also be used alongside a mediator.

The mediator will explain the procedure to be adopted during the first meeting with the disputants. In most cases mediation begins with initial joint session with the parties during

which each presents, to the mediator, a summary of the dispute and how they see it. After a period of questioning and some discussion, the mediator would meet each party privately to explore the case in confidence. Several sessions of this kind may take place so that the mediator can be fully briefed on the background of the dispute and each party's views and interests, so that intensive discussion can take place openly and frankly. During this time, options available to resolve the dispute are also explored with each party making settlement offers.

When agreement is reached on resolution of the dispute in question, the terms of the settlement are then drafted with the assistance of the mediator. The terms are then signed by the parties with the aim of forming a legally binding contract.

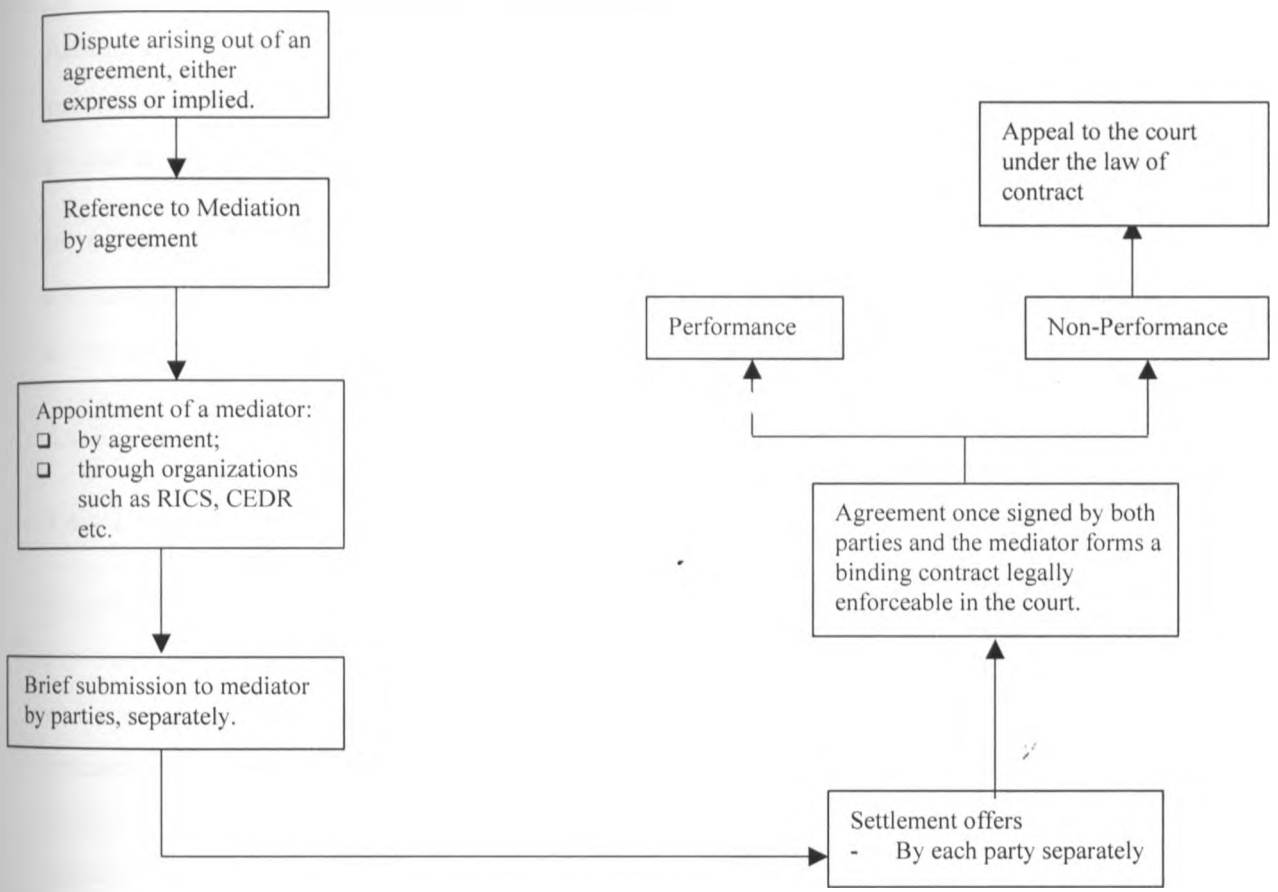
In the event that there is no agreement on settlement of the dispute the mediation will be ended or postponed to a future meeting. The Mediator may suggest terms of settlement to the parties as a basis for future negotiation. The suggestions are based on the mediators' view of possible terms for settlement and are not a legal or expert opinion. The Mediator may also draw up and give a review report to the parties, summarizing the outcome of the mediation and the differences that remain unresolved.

The above process and reference may be summarized as follows;

- parties to submit a brief statement on their views regarding the dispute;
- each party is provided with a copy of the statements;
- each party presents their cases to the mediator, informally, in the presence of the other party;
- the mediator to isolate key points in the submission;
- discussion in confidence, the strengths and weaknesses of the parties' respective cases and get them to focus on what is in their best interests;
- the mediator to extract ideas from the parties in confidence, for resolving the key points of the dispute;

- the mediator to assist the disputing parties to put their proposals for settlement to the other party;
- the mediator to close any gap that exists between the disputing parties;
- the mediator to draw up a draft agreement based on the above proposals and secure a binding settlement that can be enforced in the law.

CHART NO.5: Showing the Process of Mediation



Source: Compiled on by the Researcher from reviewed lit‹ rature.

2.6.3.6 Differences between Mediation and Arbitration

Mediation and Arbitration, though aimed at reaching a settlement, are different mostly in process. The differences may be summarized as follows;

A mediator attempts to bring the parties interests to the surface with a view to broadening the options for settlement. In arbitration, however, the parties rarely wish to expose their underlying interest in a given dispute.

In mediation, the mediator has control over the process and proceedings. This is so in the sense that the mediator does much of the questioning. On the other hand, arbitration takes more of an adversarial stance and the arbitrator remains aloof from the proceedings.

Mediation involves private caucusing with the parties and meeting with each party separately. Arbitration on the other hand does not allow caucusing and meeting with each party separately. The arbitrator must not be seen to be partisan and caucusing would be sufficient ground to have the award set aside.

In mediation, the parties seek to reach an agreement with a view to maintaining a future relationship whereas in arbitration the parties are only guided by their rights and usually utilize adversarial means to attain them.

2.6.4.0 NEGOTIATION

2.6.4.1 Introduction

Negotiation is one of the methods of alternative dispute resolution. It involves taking positions on a dispute, haggling and swapping concessions arising out of the haggling process and reaching an agreement at the middle of bargaining range. Negotiation is a core skill practiced by lawyers in litigation and commercial transactions. It calls for the introduction of a third party neutral so as to give it some added value. In actual sense, life is generally a process of negotiation, for instance from negotiating contracts with clients, buying a house and negotiating for first salary increase.

2.6.4.2 Historical Development of Negotiation

A United States of America Attorney, Gerald I Nierenberg, founded negotiation as an alternative means of resolving disputes in the 1960s. He was moved by the fact that civil disputes, especially of commercial nature, were taking too long to resolve in the federal courts. In 1966, Nierenberg started an educational non-profit making Institute in New York

City, known as the Negotiation Institute and also published a guide on the negotiation process.

In developing the negotiation model and discipline, Nierenberg was propelled by the philosophy, which states that in negotiation, everybody wins. He asserted that this was the greatest philosophy on which the pillars of negotiation are built.

Nierenbergs' efforts to develop negotiation as a formidable tool for resolving civil disputes gained credence in America when most American Law Scholars adopted the inclusion of formal courses in negotiation theory and practice into their programs (Wheeler M, 1986). In fact, in America, courses on business administration, public administration, planning, political science, real estate, economics and social sciences, comprise considerable depth of negotiation theory. In essence, negotiation as a method of alternative dispute resolution traverses all aspects of our lives, for instance in international diplomacy, collective bargaining of labour disputes, family disputes and business disputes.

The works of Nierenberg on negotiation as a means of resolving disputes were recognized on the 19th December 1979 in a letter to him by the then United States of America President Jimmy Carter. In 1998, Nierenbergs' efforts were again recognized, in a letter to him, by President Bill Clinton, especially in regard to his efforts to encourage, where possible, consensual resolution of civil disputes through negotiation.

2.6.4.3 Nature and Characteristics of Negotiation

The main objective behind Negotiation is to assist the disputing parties reach á Negotiated settlement. A Negotiator does not adjudicate between the disputing parties or make an award or a declaration.

Just like Mediation, Negotiation is non-binding in nature and character since entering into the process is on a pure voluntary basis. There is no commitment to resolve a dispute and the Negotiator has no power to impose a given solution. When a Negotiated agreement is

reached however, the terms may be set down in writing for the parties' signature. Once signed by the parties, it becomes a legally binding contract and can be enforced through the court of law under the Law of Contract.

Negotiation gives an opportunity to the disputing parties to work together constructively towards a settlement. Like Mediation, it also offers the chance to bring into discussion

elements, which are quite outside the original dispute that can frequently lead to a resolution where both parties gain from the agreement.

Similar to Arbitration and Mediation, Negotiation is carried out on a confidential manner. This is because the discussions with the Negotiator are private and no member of the public or press is allowed to attend. The disputing parties share confidences with the Negotiator and reveal the true interests. In this manner, the Negotiator achieves a unique overview of the dispute. This is likely to lead to quick resolution of dispute.

Since Negotiation is private and informal, it offers a very fast means of resolving civil disputes. It is highly recommended by the Dispute Resolution Service of the Royal Institution of Chartered Surveyors (RICS).

2.6.4.4 The Negotiation Process

The negotiation process, according to Nierenberg, in his book, the Art of Negotiating, involves proper identification of issues in a dispute, assessing the potential of the issues identified to be resolved through negotiation, prioritize the issues, identifying issues of common interest, prioritizing the areas of common interest, being aware and controlling the emotional climates and finally handling the conflicts so that everybody wins.

In order to achieve the above negotiation process, the negotiator must be adequately skilled and must possess a personal philosophy with an ethical concern; one that can bring negotiation that is completely satisfactory to both parties. According to Aristotle, ethical concern, equivalent to that required of a negotiator, is revealed in his words when he stated, "...man has a sufficient natural instinct for what is true and usually does arrive at the truth". Therefore, the man who makes a good guess at truth and encourages give and take is likely to be a good negotiator. Aristotle further stated that ethical consideration in negotiation is "... useful because things that are true and things that are just have a natural tendency to prevail over their opposites". He re-affirmed his belief when he stated that things that are true and things that are better are, by their nature, practically always easier to prove and easier to believe (Neirenberg, 2000).

For a negotiator to be effective, he or she has to follow the art of negotiating, which is basically divided into seven areas of preparation as follows:

i) defining the subject matter of dispute. This is aimed at proper identification of what the negotiation is all about. In this regard, the parties to negotiation are also properly identified;

ii) determination of the basic objectives of the disputing parties, that is, what each party expects or wants from a negotiation;

iii) identify and understand the issues that give rise to the disputes. During this process emotional issues must be identified. The emotional issues must then be reworded in a neutral language;

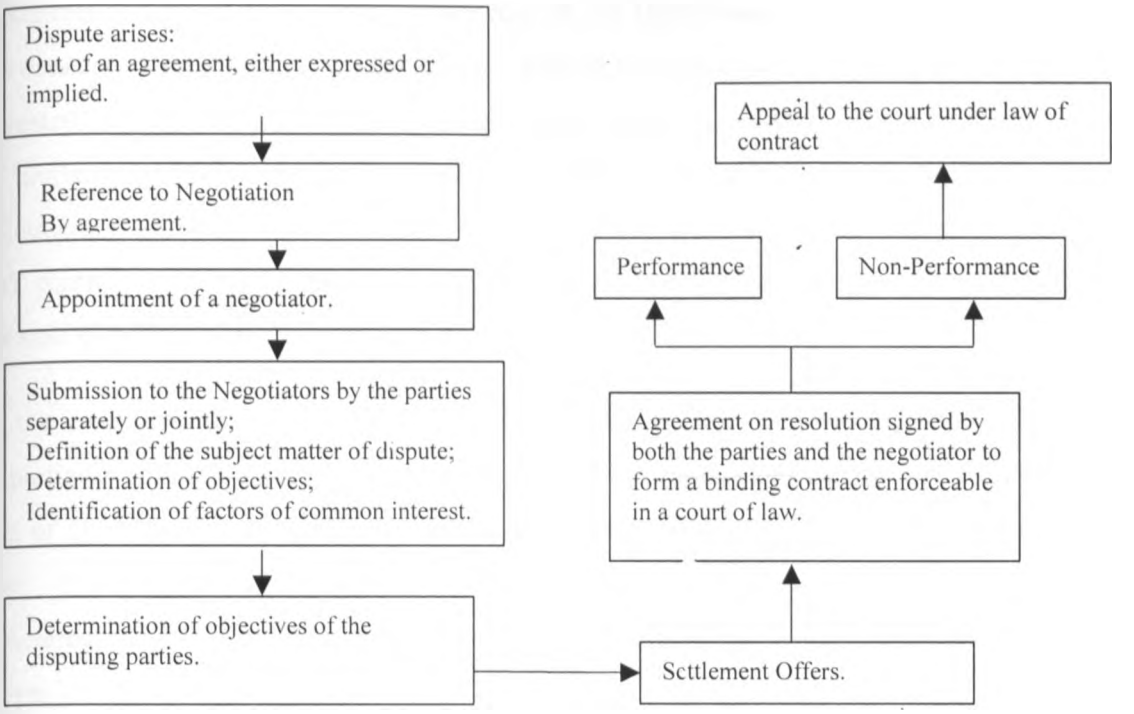
iv) in accordance with the needs and objectives of the disputing parties, new negotiating alternatives, known as gambles, must be developed. This would help in evaluating the strengths, weaknesses and risks of each alternative;

v) controlling the emotional environment of the disputing parties during negotiation is a very important role of the negotiator if success is to be achieved. This involves the transformation of a negative situation in a dispute into a positive one;

vi) negotiation must be approached with a sober and clear mind by both the disputing parties and the negotiator. Each disputing party must be prepared in advance with counter strategies;

vii) for the negotiator to be in control of the entire process and to pre-empt any antagonistic approach by the parties, it is important for him to prepare a secret agenda and points of discussion or negotiation in any negotiation meeting. This helps the negotiator in developing a strategic plan on questions, which channel constructive thinking by the disputants. This process may be presented in the following model.

CHART NO.6 Showing the Negotiation Process



Source: Compiled by the Researcher from review of related literature.

2.6.5.0 ADJUDICATION

2.6.5.1 Introduction

It is a "quasi arbitration" where a third party hands down an award, but it is not legally binding unless a certain period of time passes without one party challenging the decision. It is most commonly associated with the resolution of disputes in the building and construction industry. It is a simple and efficient method of settling civil disputes, whereby an adjudicator uses his/ her own knowledge and investigations, whilst weighting the evidence presented by the parties in order to reach a legally binding decision.

2.6.5.2 Origin of Adjudication

Adjudication unlike arbitration does not have a long history. According to Tamara (1995), adjudication as a means of resolving civil disputes is founded on the recommendations of the Latham Report. The Latham Report was a response to the Lord Justice Woolf Report on the use of alternative dispute resolution methods to resolve civil disputes. The report

recommended the use of adjudication to resolve civil disputes. Based on the recommendations set forth in the Latham Report, the Department of Environment introduced the concept of adjudication as a compulsory dispute resolution mechanism in the construction industry. This is contained in the Housing Grants Construction and Regeneration Act of 1996 of England, which became operative in May 1998 (Tamara, 1995). In this regard therefore, adjudication as a means of settling civil disputes in construction industry was made statutory and compulsory. In this context, Adjudication has been made to be a first tier dispute resolution mechanism in construction disputes.

In the exercise of his/her duties, the statutory adjudicator is however, expected to act impartially and must in accordance with the Housing Grants, Construction and Regeneration Act of 1996, be able to take the initiative in ascertaining the facts of the dispute and of the law. On the other hand, adjudication became a common means of resolving disputes in Valuation and Property Management under the auspices of the dispute resolution service of Royal Institution of Chartered Surveyors.

The concept of adjudication has not taken much root in Kenya, as it has in England. This is so especially when it is considered against the fact that in England, it is statutory in resolving construction disputes as per the provisions of the Housing Grants, Construction and Regeneration Act of 1996, whereas in Kenya, there is little to talk about it even in terms of statutes. As opposed to arbitration and mediation where we have the Kenya Branch of the Chartered Institute of Arbitrators and the Center for Mediation, adjudication does not have an institution that governs its course in Kenya.

2.6.5.3 Nature and Features of Adjudication

Adjudication lacks some of the fundamental features, which are inherent in arbitration. The most significant of these is that unlike an arbitrator, a statutory adjudicator will not have an obligation to observe all the rules of natural justice or the law that governs evidence.

Generally, adjudication has the characteristics of speed, timeliness and conclusiveness.

Where adjudication is statutory as per the provisions of the Housing Grants Construction and Rehabilitation Act of 1996 of England, it is regulated by a strict timetable, which ensures that decisions are made quickly, typically within 28 days from the date of reference (Dispute

Resolution Service, 2000). This aspect makes adjudication to be expeditious thus saving on cost for both the disputing parties.

In construction, adjudication gives room for resolution of disputes as and when they arise. Disputes are not allowed to rumble on and cause increased tension between the parties, which in turn may cause delay in terms of completion and rise in resolution costs. Timely resolution of disputes as they arise is one of the greatest features of adjudication.

Adjudicators' decision is binding and must be complied with immediately, or on a date set by the adjudicator. In the instance that either party does not accept the adjudicators' decision, it can be reviewed later through arbitration or legal proceedings.

2.6.5.4 Reference to Adjudication

If the contract is governed under the provisions of the Housing Grants Construction and Regeneration Act of 1996 of England, then either party to the contract has a right to refer a dispute arising to an adjudicator. This would hold even when there is no adjudication clause in the contract agreement. In this case, reference to adjudication would be statutory.

Under the law of contract, reference to adjudication may be through agreement. In this case an adjudicator is named in the contract agreement. In certain cases, the contract agreement would name an organization, for instance, the Royal Institution of Chartered Surveyors, as the body, which will appoint someone from its list of approved adjudicators.

2.6.5.5 The Adjudication Process

Adjudication is flexible in nature and thus it does not have a rigid procedure. It can be based on joint or separate meetings just like in mediation.

The adjudicator starts by explaining the procedure to be adopted during the first meeting with the disputants. In most cases it begins with joint session during which each party presents, to the adjudicator a summary of the dispute. After a period of questioning and some discussion, the adjudicator would meet each party privately to explore the dispute in confidence. Options available to resolve the dispute are also explored with each party making settlement offers.

When agreement is reached on resolution of the dispute in question, the terms of the settlement are then drafted with the assistance of the adjudicator. The parties with the aim of forming a legally binding contract then sign the terms.

In the event that there is no agreement on settlement of the dispute the adjudication will be ended or postponed to a future meeting. The adjudicator may suggest terms of settlement to the parties as a basis for future negotiation. The suggestions are based on the view of possible terms for settlement and are not a legal or expert opinion.

2.6.6.0 EXPERT DETERMINATION

2.6.6.1 Introduction

This is a procedure whereby the parties to a dispute agree to be bound by the decision of a third party that has expert knowledge of the subject matter of dispute. An expert's role is one of investigation. He/she will often receive and may take into account evidence and arguments from the parties to the dispute. The final decision however, lies with the expert who combines the parties' arguments, evidence and his/her expert knowledge.

2.6.6.2 Nature and Features of Expert Determination

The independent experts' decision known as determination is final and binding except in the instance of question of negligence or serious irregularity in which case the expert witness may be sued for professional misconduct under the tort of negligence.

An expert, for instance a valuer or a quantity surveyor has in-depth knowledge of the subject matter of the dispute and is free to make his / her own investigations. Consequently, the dispute can be determined quickly. Independent expert determination is generally quicker and cheaper than going to court. This is because the parties may even decide not to submit any evidence at all to the expert, leaving him/her to make the decision using his / her own expertise and investigation and therefore keeping costs at a minimum.

2.6.6.3 Reference to Expert Determination

Agreement to refer disputes to an independent expert is made in a contract agreement, for instance, a lease document. The disputing parties can also agree to refer a matter to an independent expert after the dispute has arisen.

The disputing parties may also make an application to professional institutions such as the Institution of Surveyors of Kenya, Royal Institution of Chartered Surveyors, Institution of Engineers of Kenya, Architectural Association of Kenya etc, for the appointment of a suitable qualified independent expert.

2.6.6.4 Expert Determination process

Resolution of a dispute through expert determination does not have a rigid procedure, just like the other alternative dispute resolution methods. Once the disputing parties have agreed to refer a dispute to an independent expert for determination, a date may be set during which the disputing parties are expected to give their evidence. Once the expert is able to get the facts of the dispute, he/she is left alone to make a decision using his / her own expertise. Decision by an independent expert may be enforced by seeking an order of the High Court.

2.6.7.0 FACILITATION

2.6.7.1 Introduction

It is certain times referred to as conciliation. It is an alternative means of resolving civil dispute whereby an intermediary is appointed to help bring together the disputing parties, who have resisted contact, for settlement discussions. It is normally used in serious conflicts before the disputing parties can agree to negotiate on the dispute. Facilitation was born out of the larger theory of negotiation. Generally, facilitation helps groups to identify their interests in a dispute, define their legitimacy, understand their relationships, and appreciate their alternatives and options to negotiate and to understand the methods for communication. Facilitation also includes establishing paths of contact and understanding between the disputing parties. It uses a variety of processes that aid parties to become ready for negotiation.

A facilitator is that person who acts as an intermediary between two disputing parties. He/she helps in bringing the disputing parties together by creating an environment that makes the disputing parties to give their best and focus on the real interests.

2.6.7.2 Nature, Characteristics and Process of Facilitation

Facilitation is a process that eventually leads towards resolution of dispute through negotiation or mediation. It is not an end in itself since it is only purposed to help bring disputing parties to the negotiating table. It is suitable for resolving conflicts where the parties are refusing to talk to each other, in which case, the facilitator serves to provide a bridge, which allows the parties to talk effectively. It is also suitable in cases where the disputing parties have a chronic conflict and have been unable to reach a negotiated settlement. Through facilitation, the disputing parties get an opportunity to work together towards reaching a settlement. It is carried out in a confidential manner since the facilitation meetings are carried out privately outside the public eye. The disputing parties share confidential information thus leading to the identification of the interests thereon.

Where professionally carried out, facilitation is quicker and results into either settlement or agreement to negotiation or mediation. Since the real interests of the disputing parties might have been thrashed during facilitation, time and cost would be saved a great deal in reaching a negotiated or mediated settlement.

Facilitation results into agreement to enter either negotiation or mediation. The facilitator would put the agreement in writing for the parties to sign. Upon signing, it becomes legally binding and is enforceable in the court of law under the law of contract.

It is worth noting that facilitation, just like the other alternative dispute resolution methods has the characteristics of ensuring that the disputing parties maintain a good business relationship, which subsisted before the dispute arose.

2.6.8.0 NEUTRAL FACT FINDING

2.6.8.1 Introduction

Neutral Fact Finding is an independent investigative process in which a neutral party is invited to conduct a due process type of search for facts and answers regarding a given

dispute. A Neutral Fact Finder, trained in conflict resolution is capable of conducting the necessary investigations of a given conflict, in order to ascertain the facts. In order to achieve the necessary goals, the Neutral Fact Finder needs to be honest and thorough.

It is noteworthy that a fact-finding initiative may be undertaken in connection with a dispute resolution process that is administered by an adjudicative body such as a court. Oral or recorded testimony documents and physical evidence may be obtained by the fact finder and reviewed to determine the facts of the dispute. The outcome is reported back to the party or entity that commissioned the fact-finding.

2.6.8.2 Nature, Characteristics and Process of Neutral Fact Finding

Neutral Fact Finding is voluntary and consensual in nature. Once the disputing parties consent to it and agreement to that effect is drawn for the parties' signature, upon signing the agreement, it becomes legally binding and can be enforced in a court of law under the law of contract.

Neutral Fact-Finding is flexible and is carried out in a friendly atmosphere. It can be tailored to address specific interests in a conflict. It is also carried out in a private and confidential manner just as is in the case of other alternative dispute resolution methods.

Neutral Fact-Finding can be cost effective and highly responsive to decision making needs. It is an effective tool, but requires individual adjustments to optimize information and fact finding while at the same time protecting confidentiality and costs.

2.6.9.0 EXECUTIVE TRIBUNAL

2.6.9.1 Introduction

Executive Tribunal is a more formalized approach to the mediation process whereby a neutral third party chairs a hearing where a summary of the dispute is presented by each party or their representative, to a panel of professionals in the area of dispute. In essence, it is like a mini-trial in which the disputing parties or their representatives present arguments and evidence to a neutral third party who provides advice as to the facts of the dispute.

2.6.9.2 Nature, Characteristics and Process of Executive Tribunal

Reference of a dispute to an Executive Tribunal is voluntary and consensual in nature. However, once the parties agree in writing to refer a dispute to an Executive Tribunal for resolution, the agreement becomes legally binding and can be enforced in a court of law under the law of contact.

The Executive Tribunal is akin to a mini-trial, whereby the disputing parties or their representatives may call, examine and cross-examine witnesses. It is a kin to the court process; however, it is carried out on a private and confidential manner, away from the eyes and ears of the general public.

Executive Tribunals are also characterized by flexibility in terms of procedures and process to be followed and relatively cost effective due to the fact that it leads to a timely resolution to disputes.

2.7.0.0 CONCLUSION

It is noteworthy that the above Tribunals that deal with resolution of Valuation and Property Management disputes are all anchored on the Civil Procedure Rules, and the Evidence Act of the Laws of Kenya.

The literature review has also revealed that the Alternative Dispute Resolution Methods are founded on, almost, similar kind of a principle that is flexibility, cost effectiveness, timeliness, confidentiality, non-adversarial nature and expertise.

It is also noteworthy that all civil disputes arising out of Valuation and Property Management have the potential of being resolved through the Alternative Dispute Resolution Methods. This is due to their nature and characteristics, which are more business oriented, that is, in terms of time and cost. This is as opposed to the Statutory Dispute Resolution Mechanisms, which take too long.

CHAPTER THREE

3.0.0.0 DATA PRESENTATION AND ANALYSIS

3.1.0.0 INTRODUCTION

This chapter presents the research findings and analyses with a view to answer the study objectives and tests the hypothesis. The study objectives may briefly be stated to be; reviewing Statutory Methods of resolving Valuation and Property Management disputes, outlining the Alternative means of resolving Valuation and Property Management disputes and determining their extent of use and exploring an effective means of resolving Valuation and Property Management disputes.

The hypothesis to be tested states that too much reliance on the Civil Procedure Rules under the Civil Procedure Act Chapter 21 of the Laws of Kenya is the main cause for delay in resolving valuation and property management disputes in Kenya. The hypothesis states further that administrative constraints are also a hindrance towards expeditious resolution of valuation and property management disputes.

3.2.0.0 STATUTORY DISPUTE RESOLUTION METHODS OF RESOLVING VALUATION AND PROPERTY MANAGEMENT DISPUTES

The Statutory Dispute Resolution Methods that deal with Valuation and Property Management disputes are contained in several acts of Parliament. They may be outlined in Table 2 below.

Table No. 2: Statutory Dispute Resolution Methods in Valuation and Property Management

	DISPUTE RESOLUTION METHOD	STATUTORY PROVISION
1	The Valuation Court	The Valuation for Rating Act Cap 266
2	The Business Premises Rent Tribunal	The Landlords and Tenants (Shops, Hotels , and Catering Establishment) Act Cap 301
3	The Rent Restriction Tribunal	The Rent Restriction Act Cap 296
4	The Land Acquisition Compensation Tribunal	The Land Acquisition Act Cap 295
5	The Land Rent Arbitration Tribunal	The Government Lands Act Cap 280

6	The Valuers Registration Board	The Valuers Act Cap 532
7	The Land Adjudication Committee	The Land Adjudication Act Cap 284
8	The Land Arbitration Board	The Land Adjudication Act Cap 284
9	The Land Control Board	The Land Control Act Cap 302
10	The Physical Planning Liasion Committee	The Physical Planning Act of 1996
11	Land Disputes Tribunal	The Land Disputes Tribunals Act of 1990

Source: Compiled by the Researcher from Statutes that deal in Valuation and Management of Land and Buildings.

3.2.1.0 THE VALUATION COURT

The Valuation court is established under the provisions of sections 12 and 13 of the Valuation for rating Act Chapter 266 of the Laws of Kenya. It is chaired by an advocate of the High court of Kenya. It comprises four (4) other members in addition to the chairman. Two of the members of the Valuation Court are valuers, one is a businessman and the remaining one is a farmer.

The last Nairobi City Valuation Court was convened, by the Town Clerk, on 7th March 1996 vide the Kenya Gazette Legal Notice No. 1440, to hear objections relating to Supplementary Valuation Rolls for the years from 1988 to 1994. An advocate of the High Court of Kenya who has more than five years experience chairs it. It also comprises of six (6) other members three (3) of who are valuers, two (2) businessmen and one (1) farmer from within Nairobi. The decision of the Valuation Court is by a majority vote by the members.

The City Valuation Court last met in May 1997. Scheduled interview with three senior valuation officers at the City Council revealed that the Valuation Court has not been convened since May 1997 due to personal conflicts between the members of the court and the city council officials.

In order to answer the study objectives and test the hypothesis, especially, in regard to how formal or informal the valuation court has been in terms of its operation, the verbatim reports of proceedings have been studied especially with a view to determining the length of time it

takes to resolve objection disputes and the procedure adopted by the court in undertaking its work.

The procedure taken is typical to the provisions of the Civil Procedure Rules under the Civil Procedure Act Chapter 21 and the Evidence Act Chapter 80 of the Laws of Kenya. This is in relation to: filing of objections, representation, notice of hearing, summon of witnesses and adducing of evidence, production of exhibit and filing of a valuation report, filing of notice of appointment or change of advocate, adjournment, granting of prayers and notice of preliminary objection. These procedures are provided for under the Civil Procedure Rules of The Laws of Kenya. The procedures are briefly discussed herein below:

3.2.1.1 Filing of Objections

Objections to the Main Valuation and Supplementary Valuation Rolls are filed in writing with the Valuation Court Clerk almost in a similar manner to filing of a reference in a court of law. An objection form must be duly filled, stating the property index, situation, the registered owner, the grounds of objection and the Unimproved Site Value. Upon receiving the application for objection, the Clerk to the Valuation Court would set a hearing date and time and officially invite the objecting party for the hearing.

This procedure is, however a bit informal in comparison to that of the court of law. This is, especially so because filing of a reference in the court of law requires the preparation of a plaint and serving of summons to the defendant.

3.2.1.2 Representation

Perusal of a letter inviting the objecting party to the Valuation Court reveals, in accordance with the provisions of section 16 (3) of the Valuation for Rating Act Chapter 266 that the objecting party may either appear in person or through representation by an advocate of the High Court or a valuer. Perusal of verbatim reports of Valuation Court proceedings indicates that objectors prefer to be represented by either an advocate or a valuer. An advocate appears as an official of the court whereas the valuer appears as an expert witness. Further perusal of verbatim records of the proceedings of the Valuation Court reveal that it has mimicked the court procedures hence becoming too formal. As a result, the objecting parties have developed a notion that their objection pleas would fail in the event that an advocate does not represent them.

3.2.1.3 Notice of Hearing

The objecting party is expected to appear before the valuation court either in person or through representation on the date and time specified in the notice of hearing. He cannot appear before the court unless the clerk to the Valuation Court duly serves him/her with a notice.

3.2.1.4 Summon of Witnesses and Adducing of Evidence

Upon giving of the Notice of hearing by the Clerk to the Valuation Court, the hearing commences at the time and date specified therein. It may reach a time when the objecting party wants to bring forth a witness or witnesses before the court to adduce evidence in his/her favour. In such a case, the procedure adopted is similar to that of the court of law, whereby the Clerk to the Court invites a witness formally, in writing. In the instance that the witness fails to turn up, then the court may invoke powers equivalent to that of the court of law to serve summons to the witness, by use of process servers or the police, to either appear before the court or face contempt charges.

Adducing of evidence by the witnesses is in accordance to the Evidence Act of the Laws of Kenya. Evidence is given under oath and in the instance that the evidence adduced has turned out to be untrue/unreliable, then the witness may be charged for perjury.

3.2.1.5 Production of Exhibit and Filing of Valuation Report

Unlike the provisions under the Civil Procedure Act Chapter 21 of the Laws of Kenya, production of exhibit and filing of a valuation report with the Valuation Court does not require payment of any fee. However, it is a requirement that any exhibit and/or valuation report must be filed with the court in good time so as to give the members of the court ample time to study it and see whether it can form a good record of evidence. This has to be done well in advance and not during the court proceeding.

3.2.1.6 Filing of Notice of Appointment or Change of Advocate

Representation by an advocate as well as change of the same must be duly filed with the court. This requirement is akin to the procedures in the court of law. Failure to comply with this requirement may lead to procedural defects thus leading to delay of the case.

Adoption of the above procedures in the valuation court has left parties unhappy, especially with the delay caused. This can be illustrated in table 3 below.

Table No. 3: Showing 30 Determined and Undetermined Valuation for Rating Objection cases filed with the City Valuation Court from 1984-1995.

L.R Number	U.S.V Kshs.	Nature of Dispute	Date of Objection	Date of. Determ.	Approx. Time Taken (Yrs)	Std Time (Yrs)	Deviation From Std Time
7879/10	1,000,000	Excess Value	12/1984	09/1986	1.75	1	-0.75
336/24	1,500,000	Excess Value	06/1986	07/1986	0.08	1	0.92
336/67	695,000	Excess Value	08/1995	08/198 /	2	1	-1
57/27	7,000,000	Excess Value	07/1984	05/1986	1.8	1	-0.8
2259/75	230,000	Excess Value	03/1988	Not Determ.	13	1	-12
8145/3	210,000	Excess Value	02/1985	09/1987	2.58	1	-1.58
209/2574	3,659,000	Excess Value	12/1984	05/1986	1.58	1	-0.58
7879/10		Excess Value	12/1984	09/1986	1.25	1	-0.25
209/8883	1,089,000	Excess Value	07/1987	09/1986	1.17	1	-0.17
5990/2	594,000	Excess Value	06/1987	09/1987	0.17	1	0.83
93/1082	29,000	Excess Value	04/1991	10/1996	5.5	1	-4.5
2951/81	482,000	Excess Value	03/1991	06/1996	5.25	1	-4.25
1870/VI/196	130,500	Excess Va.ue	06/1991	02/1997	5.67	1	-4.67
13150/2	125,000	Excess Value	03/1992	Not Determ.	9.58	1	-8.58
7200/8	1,300,000	Excess Value	05/1992	07/1996	4.17	1	-3.17
7752/111	72,000	Excess Value	08/1992	08/1996	4	1	-3
12661/2	1,777,000	Excess Value	05/1993	07/1996	3.17	1	-2.17
209/111000	2,022,500	Excess Value	05/1993	08/1997	4.25	1	-3.25
209/11077	1,979,500	Excess Value	05/1993	04/1997	2.96	1	-1.96
209/9650	287,000	Excess Value	05/1993	06/1997	3.96	1	-2.96
12209/2	2,900,000	Excess Value	05/1993	Not Determ.	9	1	-8
12210/12	2,608,500	Excess Value	05/1993	Not Determ.	9	1	-8
13148/23	200,000	Exemption	06/1995	Not Determ	6.25	1	-5.25
209/10631	776,500	Excess Value	10/1995	Not Determ.	5.96	1	-4.96
Nbi/Blk 72/2028	17,500	Excess Value	06/1995	Not Determ.	6.25	1	-5.25
209/9680/2	68,000	Excess Value	06/1995	Not Determ.	6.25	1	-5.25
209/10494	165,000	Excess Value	06/1995	Not Determ.	6.25	1	-5.25
Nbi/Blk 104/253	45,500	Excess Value	06/1995	Not Determ.	6.25	1	-5.25
36/I/914/1	29,500	Excess Value	06/1995	Not Determ.	6.25	1	-5.25
Dag/Riruta/1848	40,000	Excess Value	06/1995	Not Determ/	6.25	1	-5.25

Source: Compiled by the Researcher from City Council of Nairobi Valuation Court files and Varbatim records of Proceedings.

Note: The following words have been shortened;

Determ. – Determination, Nbi/Blk. – Nairobi/Block, Dag. – Dagoretti, Approx. – Approximately, Std. – Standard and Yrs. – Years.

From the above table, it is evident that it takes as short as one month and as long as 6 years approximately, from the date of objection, to resolve valuation for rating disputes. Out of a sample of 30 objection cases selected at random since 1984 to 1995, only 2 objections were determined within one year. This represents 6.7% of the selected sample size. The remaining 93.3% of the objection cases was determined within a range of 2 years and 6 years.

During an interview with one of the members of the current Valuation Court, it was revealed that the delay in resolving valuation for rating disputes shown in the above table are not only as a result of the procedures adopted by the court, but are also due to the following factors:

- the process of convening the Valuation Court takes a long time. It sometimes takes as long as Eight (8) years between the time of objection and the convening of the Valuation Court. This is illustrated in the Kenya Gazette Legal Notice No. 1440 of 8th March 1996, through which the Valuation Court was convened to hear, cases of objection to Supplementary Valuation Rolls for the years from 1988 to 1994.
- the current Valuation Court last met in may 1997. Since then to date, no cases of objection to the subsequent Supplementary Valuation Rolls have been resolved. According to separate interviews with a member of the Valuation Court and the City Chief Valuer, it was revealed that the Valuation Court has not met since May 1997 due to differences between the members of the court and the City Council Officers. In this regard, there have been approximately 4650 pending objection cases to resolve for the Supplementary Valuation Rolls prepared between 1995 to the year 2000.

It is important to note that the main cause of dispute in a valuation court regard over-valuation. However, perusal of objection forms and a critical analysis of the above cases of objections show that the properties were actually not over valued. It is noted that the problem stems from the fact that since the valuation forms a basis for rating, contesting the value is viewed as a means of reducing the annual rates liability. Whereas this may not be true, the reason cited by the objectors clearly shows that rating as a system of taxing land by the local authorities is not well understood by many. For instance, in certain cases the objectors would wonder why their property have been valued as vacant (in the case where the Un- Improved Site Value system is used) or why the property should be valued on an open market value

basis. It is noted that some of the ratepayers objected to the value on the premise that it shows how much annual rates liability they are supposed to pay. This problem may be resolved by making the ratepayers know about the relationship between rates and valuation for rating. In addition to this, it has been noted from perusal of the verbatim records of the valuation court proceedings that certain cases of over valuation occur due to professional negligence where the valuer fails to make the necessary inspection to determine the general topographical details such as high gradient and swampy in order to adjust the values accordingly.

3.2.1.7 Analysis of Cost Incurred in Resolving Valuation for Rating Disputes

The cost incurred in resolving valuation for rating disputes may be analyzed in terms of;

- The cost of filing an objection;
- Cost to the advocates;
- Cost to the valuer.

The current cost of filing objections in a valuation court is Kshs. 500/=. The cost chargeable between 1986 and 1997 varied considerably between Kshs. 50/= and 200/=. The advocate's fee is provided for under the Advocates Act of the Laws of Kenya whereas the Valuers fees are chargeable as per the provisions of the Valuers Act Chapter 532 of the Laws of Kenya. In addition to the fees above, court attendance fees are paid appropriately.

Cost incurred on each case of objection is difficult to quantify since apart from the objection fees whose records are properly filed at the City Council of Nairobi offices, the rest of the cost are not filed any where since it is purely between the objector and the professionals hired.

3.2.2.0 THE BUSINESS PREMISES RENT TRIBUNAL

The Business Premises Rent Tribunal falls under the Ministry of Trade, Commerce and Industry. It is headquartered on the second floor of Bima House on Harambee Avenue, Nairobi. It is headed by a Magistrate and sits on a rota basis in Nairobi, Mombasa, Kisumu, Nakuru, Embu, Nyeri, Garrissa, Kakamega and Eldoret. The Nairobi Station of the Business Premises Rent Tribunal is situated at the headquarters.

Though the Landlord and Tenants (Shops, Hotels and Catering Establishment) Act Chapter 301 Empowers the Tribunal to employ officers such as valuers, for the betterment of carrying its functions, it was revealed, during the field survey, that no valuer is employed by the Tribunal. However, the Tribunal has employed clerks, inspectors and officers who do not have any background training in real estate matters.

Perusal of case files indicates that the most common type of disputes that are referred to the Tribunal for determination is termination of tenancy, distress for rent, rental review and general complaints.

In order to answer the study objectives and test the hypothesis, especially, in regard to how formal or informal the Nairobi station of the Business Premises Rent Tribunal is, in terms of its operation, the researcher attended Tribunal sessions from 10th to 14th September 2001. During this time, it was noted that the Tribunal operates so much like courts of law. The Tribunal has adopted each and every procedure provided for under the Civil Procedure Rules of the Laws of Kenya, especially in regard to: filing of notice, representation, notice of hearing, summon of witnesses and adducing of evidence, production of exhibit and filing of a valuation report, filing of notice of appointment or change of advocate, adjournment, granting of prayers and notice of preliminary objection. These procedures are briefly discussed herein below:

3.2.2.1 Filing of Notice and Notice of Hearing

Filing of notice in the Business Premises Rent Tribunal is carried out by filling a prescribed notice form as provided for under the Schedule in the Landlords and Tenant (Shops, Hotels and Catering Establishment) Act Chapter 301 of the Laws of Kenya. The notice form, (see appendix 3), must be duly filled, stating the property index, situation, the name of the landlord or tenant (as appropriate) and the grounds of notice. The notice must be duly served upon the defendant, requesting him/her to appear before the Tribunal at a given date and time.

This procedure is, however a bit different to filing a reference in a court of law, which is by way of preparing a plaint and serving of the same to the defendant. The defendant is expected to prepare a replying affidavit to the plaint and file the same with the Tribunal.

3.2.2.2 Representation

Disputants in the Business Premises Rent Tribunal may either appear in person or through representation by an advocate of the High Court of Kenya. Valuers may only appear before the Tribunal as expert witnesses. During attendance of the Tribunal sessions between 10th to 14th September 2001, the researcher noted that advocates were handling all the cases (about 50 cases), which came up either for mentioning or hearing. In real sense, the Tribunal has been so much invaded by advocates to the extent that disputants feel that they don't stand any chance of winning a case should an advocate not represent them.

3.2.2.3 Summon of Witnesses and Adducing of Evidence

Upon giving of the notice of hearing by the Tribunal Clerk, the hearing commences at the time and date specified therein. In the instance that the disputants require to call a witness or witnesses before the Tribunal to adduce evidence, the procedure adopted is similar to that of the court of law, whereby the Clerk to the Tribunal invites a witness formally, in writing. In case the witness fails to turn up, then the court may invoke powers under the Civil Procedure Rules to issue summons to the witness, through a process server, the police or otherwise. Failure to comply with the Tribunal summons may lead to contempt charges.

Adducing of evidence by the witnesses is in accordance to the Evidence Act Chapter 80 of the Laws of Kenya. Evidence is given under oath, and in the instance that the evidence adduced has turned out to be untrue/unreliable, then the witness may be charged for perjury.

3.2.2.4 Production of Exhibit and Filing of Valuation Report

Production of exhibit may be done during the Tribunal proceeding. The exhibit must be that which is acceptable under the provisions of the Evidence Act of the Laws of Kenya. Filing of a valuation report with in Tribunal requires payment of filing fee, which currently stand at Kshs 250/=. Both the exhibit and the valuation report must be filed with the Tribunal in good time before the date of the next hearing.

3.2.2.5 Filing of Notice of Appointment or Change of Advocate

Representation by an advocate as well as change of the same must be duly filed with the court. This requirement is typical the court procedures. Failure to comply with this requirement may lead to serious procedural defects.

Due to the adoption of the above procedures by the Tribunal, there have been delays in determining cases as shown in Table No. 5 below.

In addition to the above, the proceedings of the Tribunal are open to the eye and ear of the public, full of, unnecessary, court procedures such as bowing to the chair, presence of the police, frequent adjournments, examination, cross examination and re-examination of witnesses. An informal interview with advocates of the High Court of Kenya revealed that this is one of the causes of delay in determining cases in the Tribunal. This can be illustrated in the BPRT Case No. 488 of 1988 between Lakhamshi Khimji & Sons v Stutin Pharmaceuticals Limited. This case was determined in 1998 after 10 years. Perusal of the file at the Case File Registry of the Tribunal revealed that this case was a victim of more than

Thirty Seven (37) adjournments. Further interview with Advocates of the High Court of Kenya, revealed that whereas the initial intention upon which the Tribunal was formed was to expeditiously determine cases, in a less than formal manner compared to the court of law, this intention has been hampered by the following reasons:

- the chairman being a magistrate (having been transferred from a magistrates court to the Tribunal) have never known any other procedure apart from the Civil Procedure Rules. Therefore any advocate, appearing before him, who does not conduct themselves in accordance to the Civil Procedure Rules would be ruled out on the basis of procedural defects;
- due to the above reason, disputing parties in the Tribunal have been led to believe that without an advocates representation they would always be ruled out and their cases would fail miserably.

It was also found that the Tribunal would be very efficient were it not sitting on a rota basis. This is supported in the following implementation report for all the Business Premises Rent Tribunal stations for the period January to October 2000.

Table 4: Showing Business Premises Rent Tribunal Implementation Report for the Period January to October 2000

Station	Period as per BPRT Sitting Program	Number of Cases Pending Before Session	No. of Cases Determined	No. of Cases Pending after Session	New Cases Filed after Session	Percentage of Cases Determined After Session
Nairobi	4/1/2000 - 3/3/2000	706	300	406	49	41%
	17/4/2000 - 5/5/2000	406	200	206		
	5/5/2000 - 9/7/2000	261	100	161		
	28/6/2000 - 6/8/2000	201	90	111		
Mombasa	6/3/2000 - 14/4/2000	427	188	239	80	44%
Nakuru	12/6/2000 - 23/6/2000	225	92	133	8	39%
	6/8/2000 - 18/8/2000	170	64	106		
Eldoret	21/8/2000 - 25/8/2000	110	68	42	3	61.82%
Kakamega	28/8/2000 - 1/9/2000	222	133	89	0	59%
Kisumu	3/9/2000 - 16/9/2000	128	60	68	5	46%
Kisii	18/8/2000 - 25/9/2000	96	36	60	1	36%
Nyeri	22/5/2000 - 31/5/2000	192	54	138	8	28%
Embu	15/5/2000 - 19/5/2000	108	53	55	10	50%

Meru	8/5/2000 - 12/5/2000	132	90	42	12	68%
Total		**3384**	**1528**	**1856**	**176**	**45%**

Source: Compiled by the Researcher from Case Files available at the Business Premises Rent Tribunal

From the above table, it is noteworthy that the Business Premises Rent Tribunal operates at an average capacity of 45% due to the fact that the Ten (10) Tribunal stations are presided over by a single chairman sitting on a rota basis. However if the performance of each Tribunal Station, for instance the Nairobi Station, is to be independently assessed, then it is worth noting that within a period of Two (2) months between 4th January to 3rd March 2000, a total of 300 out of 706 pending cases were determined. This can be equated to 42% performance level within a period of Two (2) months. Therefore it is imperative to note that if there were, in one way or the other, a chairman for each Tribunal station, then the performance level of the Tribunal would rise considerably. The above Table No. 4 does not indicate the details of the individual cases, but gives an insight into one of the factors, which hinder the smooth operation of the Tribunal as far as expeditious determination of cases is concerned.

In order to analyze how long it takes to determine cases in the Tribunal, the Nairobi Station of the Tribunal has been taken as a case study. Sixty-Three (63) decided cases on arrears, termination of tenancy, rental review and general complaints have been taken into account. This is presented in the following Table No. 5

Table No. 5: Showing 63 cases filed and determined in the Nairobi Station of the Business Premises Rent Tribunal from 1988 to the year 2001

BPRT Case Number	Disputants	Nature of Dispute	Date Filed	Date Determ.	Standard Time Yrs.	Approx. Time Taken (Yrs)	Deviation from the Standard Time
164 of 1997	Wam. v Njor.	Termination	Feb-97	Apr-97	0.25	0.17	0.08
32 of 1996	Kara v Math	Termination	Jan-96	Apr-97	0.25	1.50	-1.25
31 of 1996	Gach v Waith	Termination	Jan-96	Apr-97	0.25	1.25	-1.00
333 of 1995	Thim. v T Hide	Termination	Apr-95	Feb-97	0.25	1.83	-1.58
557 of 1995	Chom. v K.B	Termination	Apr-95	Apr-97	0.25	2.00	-1.75
312 of 1992	Naiyer v Gik	Termination	Mar-92	May-97	0.25	0.17	0.08
124 of 1988	Film v Kireita	Termination	May-88	Jun-97	0.25	9.08	-8.83
252 of 1997	Beauty v Link	Termination	Mar-97	Jun-97	0.25	0.25	0.00
127 of 1997	Gondal v Gitu	Termination	Feb-97	Aug-97	0.25	0.50	-0.25
593 of 1996	Gitau v Yawalo	Termination	Sep-96	Dec-97	0.25	1.17	-0.92
87 of 1997	Mure v Muth	Termination	Feb-97	Feb-98	0.25	1.00	-0.75
637 of 1989	Ujenzi v Virji I.	Termination	Oct-89	Apr-98	0.25	8.50	-8.25
133 of 1997	Kbathi v Mugo	Termination	Feb-97	Jul-98	0.25	1.42	-1.17

244 of 1997	F. S v Shah	Termination	Mar-97	Feb-99	0.25	1.92	-1.67
387 of 1998	Kam v Kungu	Termination	Feb-98	Jul-99	0.25	1.42	-1.17
35 of 2000	Huss v Ngu	Termination	Jan-00	Aug-00	0.25	0.58	-0.33
268 of 1999	C.Design v Ajit	Termination	Feb-99	Sep-00	0.25	1.58	-1.33
341 of 1998	Mwangi v Irungu	Termination	Feb-99	Oct-00	0.25	1.67	-1.42
174 of 1999	Mathu v Kmuyu	Termination	Feb-99	May-01	0.25	2.25	-2.00
252 of 2000	Machibi v Weit	Termination	Feb-00	Jul-01	0.25	1.42	-1.17
179 of 1996	Alpha v Kendo	Rental Review	Feb-96	Apr-97	0.25	1.15	-0.90
382 of 1996	Tenz v Jubilee	Rental Review	Mar-96	Apr-97	0.25	1.08	-0.83
604 of 1995	Raishi v Chauh	Rental Review	Apr-95	May-95	0.25	0.08	0.17
709 of 1993	Waljee v Mawa	Rental Review	Sep-93	Jun-97	0.25	3.75	-3.50
7 of 1997	Lucille v G Ug	Rental Review	Apr-97	Jan-97	0.25	0.33	-0.08
116 of 1997	Bulling v Thuru	Rental Review	Feb-97	Dec-97	0.25	0.83	-0.58
381 of 1997	Mwangi v Kabui	Rental Review	Mar-97	Dec-97	0.25	0.75	-0.50
330 of 1997	Thim v T Hide	Rental Review	Mar-97	Feb-98	0.25	0.92	-0.67
381 of 1998	Katiku v Mutahi	Rental Review	Feb-98	Jan-99	0.25	0.92	-0.67
31 of 1999	Denis v Kmuyu	Rental Review	Jan-99	Mar-99	0.25	0.17	0.08
380 of 1996	Mtown v Gatani	Rental Review	Mar-96	Feb-01	0.25	3.92	-3.67
294 of 1999	Bayo v Delphis	Rental Review	Mar-99	Apr-00	0.25	1.08	-0.83
14 of 2001	Wanja v Sehmi	Rental Review	Jan-01	Feb-01	0.25	0.08	0.17
96 of 2000	Amana v Mwa	Rental Review	Jan-00	Oct-00	0.25	0.75	-0.50
133 of 2000	Henkam v Ken	Rental Review	Jan-00	Dec-00	0.25	0.92	-0.67
4 of 1995	Agenyi v Oyugi	Distress	Jan-95	May-95	0.25	0.33	-0.08
60 1995	Mkting S v Gichi	Distress	Jan-95	Jul-97	0.25	0.50	-0.25
41 of 1997	Njau v Gitau	Distress	Jan-97	Feb-98	0.25	1.08	-0.83
9 of 1998	Esmail v Katam	Distress	Jan-98	Aug-98	0.25	0.58	-0.33
46 of 1996	Ngugi v Muchiri	Distress	Jan-96	Jun-99	0.25	0.42	-0.17
7 of 2000	Kaugo v Nyanjui	Distress	Jan-00	Feb-00	0.25	0.08	0.17
10 of 1999	Stans v Njoroge	Distress	Jan-99	Aug-99	0.25	0.58	-0.33
10 of 1996	Marego v Gitau	Distress	Jan-96	Jun-00	0.25	4.42	-4.17
30 of 2000	Mwaura v Gagi	Distress	Jan-00	Nov-01	0.25	1.83	-1.58
20 of 1998	Muna v Mwaga	Distress	Jan-98	Oct-01	0.25	3.75	-3.50
2 of 2001	Kosgei v Kisa	Distress	Jan-01	Feb-01	0.25	0.08	0.17
37 of 2000	L Beer.v Chege	Distress	Jan-00	Mar-01	0.25	1.17	-0.92
2 of 1999	Thagichu v Njoro	Distress	Jan-01	Jul-01	0.25	0.5	-0.25
31 of 1998	Marugu v Wanja	Distress	Jan-01	Mar-01	0.25	0.17	0.08
113 of 1997	Kegag v Kasm	Complaints	Feb-97	Apr-97	0.25	0.17	0.08
214 of 1997	Wanjiru v Thuo	Complaints	Mar-97	Apr-97	0.25	0.08	0.17
262 of 1997	Mutex v Florin	Complaints	Mar-97	May-97	0.25	0.17	0.08
218 of 1997	Kihura v Thiongo	Complaints	Apr-97	Jun-97	0.25	0.17	0.08
683 of 1996	Amos v Muhu	Complaints	Sep-96	Aug-97	0.25	0.92	-0.67

471 of 1997	Mwati v ICDC	Complaints	May-97	Oct-97	0.25	0.42	-0.17
459 of 1997	Muoki v Sumba	Complaints	Jun-97	Dec-97	0.25	0.50	-0.25
17 of 1998	Gadrv v U Motor.	Complaints	Dec-97	Feb-98	0.25	0.17	0.08
32 of 1998	Zarbhai v K Inv.	Complaints	Jan-98	Feb-98	0.25	0.08	0.17
58 of 1998	M.Hard. v THot.	Complaints	Feb-98	Apr-98	0.25	0.17	0.08
17 of 1999	Jamka v Martim	Complaints	Jan-99	Feb-99	0.25	0.08	0.17
41 of 2000	Kanyo v Kionga	Complaints	Jan-00	May-00	0.25	0.33	-0.08
22 of 2001	Weru vM Prop.	Complaints	Jan-01	Mar-01	0.25	0.17	0.08
15 of 2001	Hesbon v Semi	Complaints	Jan-01	Feb-01	0.25	0.08	0.17
215 of 2000	Ndugu v L. Tyre	Complaints	Mar-01	May-01	0.25	0.17	-0.08
185 of 2001	Kyera v Devi ltd	Complaints	Feb-01	Jul-01	0.25	0.42	-0.17

Source: Compiled by the Researcher from Case Files available at the Tribunal Registry.

Note: Name of the disputing parties in the above table has been shortened in certain cases.

Only 2 cases, with a deviation ranging from 0 to 0.08, out of 20 termination of tenancy cases were determined within the standard time of 3 months. This represents 10% of the sample taken on termination of tenancy disputes. The remaining 18 cases with negative deviations, from the standard time, were determined for periods ranging from 4 months to 9 years 1 month.

Out of 15 rental review disputes, in Table No. 5 above, 3 (20%) were determined within the standard time of 3 months. The rest of the disputes (12No.) were determined for periods ranging from 9 months to 3 years 11 months.

The reasonable standard time to resolve distress for rent disputes is 3 months. In Table No. 4 above, 14 distress for rent cases were considered. Out of the 14 cases, 3 cases (representing 21.4%) with deviations, from the standard time, ranging from 0 to 0.17 were determined within the standard time of 3 months. The rest of the disputes (11 No.) took a period of 4 months to 4 years 5 months to resolve.

General complaints cases regard several issues, which:

- repairing and maintenance covenants;
- cases of nuisance by the landlord thus making difficult for the tenant to have a peaceful enjoyment of the tenancy;
- cases regarding the use of the premises, by the tenant in a non tenant-like manner etc.

From the above Table No.4, time taken to resolve 16 cases of general complaints was considered against the background of a reasonable time of 3 months. 10 out of the 16 cases, with deviations ranging from 0 and 1 were determined within the standard time. This represents 63% of the sample taken.

An interview with a senior official of Nairobi station of the Business Premises Rent Tribunal revealed that currently there are about 4500 pending cases in the Tribunal. Some of the cases span a period as long as 12 years. During this interview, it was revealed that some cases are not pending in actual sense, but have either been settled out of court or the tenant has moved out of the suit premises, without informing the Tribunal. It was also noted that delays in resolving disputes also occur due to unnecessary adjournments by advocates. This can be illustrated in the BPRT Case No. 488 of 1988 between Lakhamshi Khimji & Sons v Stutin Pharmaceuticals Limited which was determined in 1998. The delay was caused by frequent adjournments on flimsy grounds.

3.2.2.6 Analysis of Cost Incurred in Resolving Dispute in the Business Premises Rent Tribunal

The cost incurred in resolving dispute in the Business Premises Rent Tribunal may be analyzed in terms of;

- The cost of filing a dispute;
- Cost to the advocates;
- Cost to the valuer where dispute relates to rent review;

The current cost of filing dispute in the Business Premises Rent Tribunal is Kshs. 250/=. The advocate's fee is provided for under the Advocates Act of the Laws of Kenya whereas the Valuers fees are chargeable as per the provisions of the Valuers Act Chapter 532 of the Laws of Kenya. In addition to the fees above, court attendance fees are paid appropriately.

Cost incurred on each case may be difficult to quantify since apart from the filing fees, which is recorded in the case files, the rest of the costs are not filed. This is because the fees are agreed upon and paid by the disputant to the advocate and/or valuer.

3.2.3.0 THE RENT RESTRICTION TRIBUNAL

The Rent Restriction Tribunal falls under the Ministry of Roads, Works and Housing. It is headquartered on the first floor of Agriculture House on Harambee Avenue, Nairobi. It is presided over by a magistrate of the first order. The Tribunal sits on a rota basis in Nairobi,

Mombasa, Kisumu, Nyeri, Nakuru, Embu, Kakamega, Eldoret, Garissa and Lamu (Mulu, 1998).

Perusal of case files indicates that the most common type of disputes that are referred to the Tribunal for determination are termination of tenancy, distress for rent/rental arrears, rental review and general complaints.

In order to answer the study objectives and test the hypothesis the researcher attended Tribunal sessions from 3rd to 7th September 2001. During this time, it was noted that the Tribunal operates so much like courts of law. The Tribunal has adopted all the procedures provided for under Order I to X of the Civil Procedure Rules of the Laws of Kenya. This is especially in regard to: filing of notice, representation, notice of hearing, summon of witnesses and adducing of evidence, production of exhibit and filing of a valuation report, filing of notice of appointment or change of advocate, adjournment, granting of prayers and notice of preliminary objection. These procedures are briefly discussed herein below:

3.2.3.1 Filing of Notice and Notice of Hearing

Filing of notice in the Rent Restriction Tribunal is done by filling of a prescribed form as provided for under the Schedule in the Rent Restriction Act Chapter 296 of the Laws of Kenya. The form must be duly filled, stating the property index, situation, the name of the landlord or tenant and the nature of the disputes. The notice must be duly served upon the defendant, in accordance to the provisions of Order V of the Civil Procedure Rules of the Laws of Kenya, requesting him/her (the defendant) to appear before the Tribunal at a specified date and time.

This procedure is a little bit different to the one used in the court of law where filing of reference is through the preparation of a plaint and serving of the same to the defendant. Upon receiving the plaint, the defendant is expected to prepare a replying plaint.

3.2.3.2 Representation

Disputants in the Rent Restriction Tribunal may either appear in person or through representation by a recognized official of the court, an advocate of the High Court of Kenya, as per the provisions of Order No. III of the Civil Procedure Rules of the Laws of Kenya. Valuers may only appear before the Tribunal as expert witnesses. During attendance of the Tribunal sessions between 3rd to 7th September, all the cases (about 15 cases), which came up either for mentioning or hearing, were being handled by advocates. Just like the Business

Premises Rent Tribunal, advocates have invaded the Rent Restriction Tribunal to the extent that disputants feel that they don't stand any chance of winning a case should an advocate not represent them.

3.2.3.3 Summon of Witnesses and Adducing of Evidence

Upon serving of notice, the hearing commences at the time and date specified in the notice form. In the instance that the disputants require to call a witness or witnesses before the Tribunal to adduce evidence, the procedure adopted is similar to that of the court of law, whereby the clerk to the Tribunal invites a witness formally, in writing. In case the witness fails to turn up, then the Tribunal may invoke powers conferred upon it under the Civil Procedure Rules to issue summons to the witness, through a process server, the police or otherwise as per the provisions of Order No. IV of the Civil Procedure Rules. Failure to comply with the Tribunal summons may lead to contempt charges.

Adducing of evidence by the witnesses is in accordance with the Evidence Act Chapter 80 of the Laws of Kenya. Evidence is given under oath and in the instance that the evidence adduced has turned out to be untrue/unreliable, then the witness may be charged for perjury.

3.2.3.4 Production of Exhibit and Filing of Valuation Report

Production of exhibit may be done during the Tribunal proceeding so long as the exhibit produced is of an acceptable nature under the provisions of the Evidence Act of the Laws of Kenya. Filing of a valuation report with the Tribunal requires payment of a filing fee. The valuation report must be filed in good time before the date of the next hearing.

3.2.3.5 Filing of Notice of Appointment or Change of Advocate

Similar to the Business Premises Rent Tribunal, notice of appointment or change of advocate must be duly registered with the Rent Restriction Tribunal. This requirement is typical to that adopted in the court of law. Failure to comply with this requirement may lead to procedural defects thus leading to unnecessary delay.

The proceedings of the Rent Restriction Tribunal are open to the eyes and ears of the public, full of unnecessary court procedures like bowing to the chair, presence of the police, frequent adjournments, examination, cross examination and re-examination of witnesses by the advocates.

An informal interview with a senior officer of the Tribunal revealed that the adoption of the Civil Procedure Rules in conducting the business of the Rent Restriction Tribunal is the major cause of delay in expeditious determination of cases as shown in Table No. 6 below.

The Rent Restriction Tribunal was established to expeditiously determine cases between landlords and tenants in controlled residential premises and thus any procedure that goes against this initial intention should not be cherished. According to the Executive officer of the Tribunal, full adoption of the Civil Procedure Rules by the Tribunal is caused by the following factors:

- the chairman being a magistrate only knows the Civil Procedure Rules as the only legitimate procedure to follow. In this regard therefore, all advocates who appear before the Tribunal must conduct themselves in accordance to the Civil Procedure Rules, failure to which they shall be ruled out on the basis of procedural defects.
- as a result of the above reason, disputing parties in the Tribunal have been led to believe that since advocates are quite conversant with the Civil Procedure Rules, they are better placed to when represented by an advocate.

It was noted that delay in determination of cases is also caused by the fact that there is only one chairman who sits on a rota basis in all the Tribunal stations across the country. The following Table No. 6, compiled by the researcher, shows how this fact has hampered expeditious resolution of disputes.

Table No. 6: Showing Number of Cases Handled in different Stations of the Rent Restriction Tribunal from 1995 to 1998

Station	Cases Pending in 1995	Cases Determ. in 1995	Cases Pending in 1996	Cases Determ. in 1996	Cases Pending in 1997	Cases Determ. in 1997	Cases Pending in 1998	Cases Determ. In 1998	Average Performance Rate in %
Nairobi	4652	505	4988	1308	4734	535	4851	348	13.90%
Mombasa	1549	490	1489	345	1483	335	1373	53	20.30%
Kisumu	306	58	321	205	170	47	168	12	29.40%
Nakuru	561	357	556	256	490	202	462	230	50.20%
Nyeri	227	100	293	152	293	168	241	76	46.20%
Kakamega	90	64	116	58	67	53	90	18	55.10%
Eldoret	87	33	106	61	102	32	79	7	33.90%
Embu	114	48	116	24	154	53	133	18	27.70%
Garissa	4	0	4	0	4	0	4	0	0%
Lamu	2	0	2	0	12	0	20	0	0%
Total	**7592**	**1655**	**7991**	**2409**	**7509**	**1425**	**7421**	**762**	**27.67%**

Source: Compiled by the Researcher from Case Files available at the Rent Restriction Tribunal Registry.

Note: The following words have been shortened; Determ. – Determination.

From the above Table No. 6, it is worth noting that the Rent Restriction Tribunal operates at an average capacity of 26.7 % due to the fact that one chairman presides over, on a rota basis, all the Tribunal stations. The above Table No. 6 does not show the period it takes to determine a particular dispute but gives an insight into one of the factors, which hamper the expeditious determination of disputes in the Rent Restriction Tribunal.

In order to analyze how long it takes to determine cases in the Rent Restriction Tribunal, the Nairobi Station has been taken as a case study. 28 decided cases on arrears, termination of tenancy, rental review and general complaints have been taken into consideration. This is presented in Table No. 7 below:

Table No.7: Showing 28 decided cases filed and determined in the Nairobi Station of the Rent Restriction Tribunal

RRT Case No.	Disputants	Nature of Dispute	Date Filed	Date Determ.	Standard Time Yrs	Approx. Time Yrs	Deviation From Std Time
431 of 1998	Asgarali v Shah	Rental Review	Sep-98	Jul-00	0.25	1.83	-1.58
37 of 1998	Muyobo v Gitau	Rental Review	Jan-98	Apr-00	0.25	2.25	-2.00
49 of 1997	Jared v Gathuo	Rental Review	Jan-97	Apr-98	0.25	1.25	-1.00
322 of 1997	Gatonga v Chege	Rental Review	July-97	Feb-99	0.25	1.58	-1.33
524 of 1994	Kabuthia v Ngugi	Rental Review	Oct-94	Aug-97	0.25	2.83	-2.58
498 of 1992	Rukirio v Bibir Inv.	Rental Review	Jun-92	Dec-97	0.25	5.60	-5.35
147 of 1997	Wanyeki v Kuria	Rental Review	Feb-97	Aug-97	0.25	0.58	-0.33
179 of 1997	Esmail v Gitahi	Rental Review	Feb-97	Apr-97	0.25	0.17	0.08
602 of 1997	Gachugu v Kibugi	Termination	Nov-97	Jun-98	0.25	0.58	-0.33
551 of 1995	Gatheba v Mkundi	Termination	Oct-95	Sep-98	0.25	3.00	-2.75
385 of 1996	Wanja v Karanja	Termination	Jun-96	Jun-98	0.25	2.08	-1.83
232 of 1998	Njogu v Kinuthia	Termination	May-98	Jun-98	0.25	0.08	0.17
435 of 1995	Ogola v Abuya	Termination	Sep-95	Jan-99	0.25	3.67	-3.42
610 of 1996	Sharma v Maina	Termination	Nov-96	Mar-99	0.25	2.67	-2.42
49 of 1999	Irungu v Mureithi	Termination	Jan-99	Aug-99	0.25	0.58	-0.33
581 of 1997	Mubea v Wambua	Termination	Oct-97	Aug-00	0.25	2.83	-2.58
662 of 1995	Ngugu v Muchori	Termination	Nov-95	Jul-99	0.25	3.67	-3.42
86 of 1999	Mwangi v Waiyaki	Termination	Feb-99	Jul-99	0.25	0.42	-0.17
105 of 1999	Kariuki v Thiongo	Termination	Feb-99	Apr-01	0.25	2.25	-2.00
4 of 1997	Rudia v Emilio	Distress	Jan-97	Jul-97	0.25	0.50	-0.25

168 of 1994	Arimi v M'Ringera	Distress	Feb-94	Jul-97	0.25	3.42	-3.17
46 of 1997	Kamau v Kamau	Distress	Jan-97	Mar-97	0.25	0.17	0.08
13 of 1998	Mburu v Nduta	Distress	Jan-98	Aug-98	0.25	0.58	-0.33
35 of 1998	Gitoho v Alukhaba	Distress	Jan-98	Jan-99	0.25	1.00	-0.75
30 of 1997	Kio v Gachie	Distress	Jan-97	May-99	0.25	1.75	-1.50
8 of 1999	Gichuhi v Kabera	Distress	Jan-99	Jul-99	0.25	0.50	-0.25
3 of 2000	Kabura v Kimani	Distress	Jan-00	Aug-00	0.25	0.58	-0.33
31 of 2000	Kiminda v Maina	Distress	Jan-00	Jul-00	0.25	0.50	-0.25
3 of 2001	Obiero v Olilo	Distress	Jan-00	Feb-01	0.25	1.08	-0.83
216 of 1997	Ouma v Murage	Complaint	Mar-97	Apr-97	0.25	0.08	0.17
225 of 1997	Owiti v Wagombe	Complaint	Mar-97	Apr-97	0.25	0.08	0.17
24 of 1998	Kabui v Ndegwa	Complaint	Jan-98	Feb-98	0.25	0.08	0.17
45 of 1998	Mwambia v Juma	Complaint	Jan-98	Feb-98	0.25	0.08	0.17
479 of 1998	Domian v Mihubu	Complaint	Sep-98	Feb-99	0.25	0.42	-0.17
38 of 1999	Mwanzia v Mwangi	Complaint	Jan-99	Feb-99	0.25	0.08	-0.17
58 of 1999	Kanuthu vWambui	Complaint	Jan-99	Feb-99	0.25	0.08	0.17
492 of 1999	Buluma v Mwihia	Complaint	July-99	Jan-00	0.25	0.50	-0.25
278 of 1999	Wayida v Maina	Complaint	Apr-99	Jan-00	0.25	0.75	-0.50

Source: Compiled by the Researcher from Case Files available at the Registry of the Rent Restriction Tribunal.

Note: Names of the disputing parties have been shortened in certain cases. The following words have also been shortened; Determ. – Determination and name of months such as Jan. – January.

From the above table only One (1) case, with a deviation of 0.08, out of Eight (8) rental review cases was determined within the standard time of 3 months. This represents 12.5% of the sample taken on rental review cases. The remaining Seven (7) cases with negative deviations, from the standard time of 3 months, were determined for periods ranging from Seven (7) months to 5 years 7 months.

Out of 11 termination of tenancy cases, in Table No. 6 above, 1 case representing 9.1%, with a deviation of 0.17 was determined within the standard time of 3 months. The remaining 10 cases representing 90.9% were determined for duration ranging from 4 months to 4 years 4 months.

Out of 10 distress for rent cases considered in Table No. 6 above, 1 case with deviation of 0.08 was determined within the standard time of 3 months. The remaining 9 distress for rent cases took a period of 4 months to 3 years 4 months to resolve.

General complaint cases in the Rent Restriction Tribunal are quite similar to those in the Business Premises Rent Tribunal. Issues regarded as general complaints are, for instance:

- repairing and maintenance covenants;
- cases of nuisance by the landlord thus making difficult for the tenant to have a peaceful enjoyment of the tenancy;
- disputes regarding the use of the premises in a non tenant-like manner etc.

From Table No.7 above, time taken to resolve 9 cases of general complaints was considered against the reasonable time of 3 months. 5 out of the 9 cases, all with deviations of 0.17 were determined within the standard time. This represents 56% of the sample taken.

An informal interview with a senior official of the Nairobi Rent Restriction Tribunal revealed that currently there are about 4970 pending cases in the Tribunal. Some of the cases span for a period as long as 10 years. During the interview, it was revealed that some cases are not actually pending, but have either been settled out of court or the tenant having moved out of the suit premises, without informing the Tribunal. It was further noted that fact that delays in resolving disputes occur due to unnecessary adjournments by advocates.

3.2.3.5 Analysis of Cost Incurred in Resolving Disputes in the Rent Restriction Tribunal

The cost incurred in resolving dispute in the Business Premises Rent Tribunal may be analyzed in terms of;

- The cost of filing a dispute;
- Cost to the advocates;
- Cost to the valuer where dispute relates to rent review;

The current cost of filing a dispute in the Rent Restriction Tribunal is Kshs. 250/=. The advocate's fee is provided for under the Advocates Act of the Laws of Kenya whereas the Valuers fees are chargeable as per the provisions of the Valuers Act Chapter 532 of the Laws of Kenya. In addition to the fees above, court attendance fees are paid appropriately.

Cost incurred on each case may be difficult to quantify since apart from the filing fees, which is recorded in the case files, the rest of the costs are not filed. This is because the fees are agreed upon and paid by the disputant to the advocate and/or valuer.

3.2.4.0 THE LAND ACQUISITION COMPENSATION TRIBUNAL

The Land Acquisition Compensation Tribunal falls under the Ministry of Lands and Settlement. It is headquartered on the 11th floor of the National Social Security Fund House on Bishops Road, Nairobi. It is presided over by an advocate of the High Court with more than 5 years experience. It also has four other members who are; two valuers, one farmer and one businessman.

Disputes in the Land Acquisition Tribunal are of one nature, that is compensation award.

In order to answer the study goals and test the hypothesis, the researcher had a scheduled interview with two (2) senior officials of the tribunal. During the interview, it was revealed that the Tribunal was established recently in May 2000. This is about 10 years after the Act of Parliament to establish it, the Land Acquisition (Amendment) Bill of 1990, was enacted. Before its establishment, compulsory land acquisition cases were being handled at the High Court. Upon its establishment, all cases on compulsory land acquisition were transferred to the Tribunal. The cases are shown in Table No. 7 below. It was further revealed that the Tribunal began its work in January 2001 though not fully since the members are still working on some logistics such as the procedures to adopt. According to the Tribunal Secretary, the procedure to be adopted shall be in line to that provided for under the Civil Procedure Rules of the Laws of Kenya. The procedures regard filing of notice, representation, notice of hearing, summon of witnesses and adducing of evidence, production of exhibit and filing of a valuation report, filing of notice of appointment or change of advocate, adjournment, granting of prayers and notice of preliminary objection. Anyway the Tribunal being chaired by an advocate of the High Court is bound to adopt the Civil Procedure Rules since as an advocate he knows no any other better procedure. Adoption of the Civil Procedure Rules is a major hindrance to expeditious resolution of disputes in the Business Premises Rent Tribunal and the Rent Restriction Tribunal, as discussed earlier in this chapter. This would lead to invasion of the Land Acquisition Compensation Tribunal by advocates (masters of civil procedures) just as it has become in the Business Premises and Rent Restriction Tribunals.

Table No. 8 below shows the number of cases, which have been transferred from the High Court to the Land Acquisition Compensation Tribunal for determination.

Table No. 8: Showing 14 Cases Transferred from the High Court and are Pending in the Land Acquisition Compensation Tribunal

Case Number	Disputants	Award in Kshs.	Project Location	Date Determined
HCC Appeal No. 289 of 1986	Kioko v AG	-	Muoni Dam	Not Determined
HCC Appeal No. 289 of 1988	Much.v CoL	-	Kabete/Limuru Rd	Not Determined
HCC Appeal No. 1 of 1990	Talai v CoL	25,499,905	Moi University	Not Determined
HCC Appeal No. 162 of 1991	Warui v CoL	688,300	Kiserian Dam	Not Determined
HCC Appeal No. 3 of 1991	Kapng.v CoL	1,587,138	Army Eldoret	Not Determined
HCC Appeal No.162 of 1993	Ruto v CoL	54,315	Eldoret Water	Not Determined
HCC Appeal No. 226 of 1998	Kipruto v CoL	-	Eldoret Sanitation	Not Determined
HCC Appeal No. 859 of 1997	Titame v CoL	1,753,775	Amala Narok Rd	Not Determined
Memo of Appeal of 24/9/1997	Nashon v CoL	62,135	Gambogi Serem Rd	Not Determined
Notice of Intention to sue	Kimuron v CoL	52,810	Eldoret Water	Not Determined
The AG of 17 /1/2000				
Memo of Appeal of 8/9/2000	Marula v CoL	977,500	KPC Staff Houses	Not Determined
HCC Appeal No. 6 of 1990	Mogeri v CoL	-	Busia Prison	Not Determined
At Kakamega High Court				
HCC Appeal No. 44 of 1990	Agnes Atieno v CoL	-	Busia Prison	Not Determined
at Kakamega High Court				

Source: Compiled by the Researcher from case files available at the Land Acquisition Tribunal Offices in Nairobi.

From the above table, it is evident that the 14 compulsory land acquisition cases have not been determined to date. According to the provisions of clause 4 and 6 of the Land Acquisition Tribunal (Amendment) Bill of 1990, standard time to resolve a dispute in the Land Acquisition Compensation Tribunal must not exceed 24 months and 6 days with effect from the date of notice of intention to acquire. Since January 2001 when the Tribunal began its work, it has been dealing with one case only, Marula Farmers LTD v the Commissioner of Lands. This case has not yet been determined.

3.2.5.0 THE LAND RENT ARBITRATION TRIBUNAL

The Land Rent Arbitration Tribunal falls under the Ministry of Lands and Settlement. It is headquartered on the 11th floor of the National Social Security Fund House on Bishops Road, Nairobi. It shares the same secretariat with the Land Acquisition Compensation Tribunal. It

was set up to determine cases of objection to the revision of ground rent in 1989. It is presided over by an advocate of the High Court with more than 5 years experience. It also has four more members who are two (2) valuers, a businessman and a farmer. Disputes in the Land Rent Arbitration Tribunal are of one nature, which is excessive valuation.

The researcher had a scheduled interview with a senior official of the tribunal in order to find out how formal or informal the Tribunal operates. During the interview, it was revealed that the Tribunal was established recently in December 2000. This is about 11 years after the Act of Parliament to establish it, the Government Land (Amendment) Act of 1989, was enacted. Before its establishment, objections to the increase in land rent were being handled by the High Court. Upon its establishment, about 600 cases of objection to the increase in land rent were transferred to the Tribunal from the High Court. About 30 of these cases are shown in Table No. 8 below. The Tribunal began its work in January 2001 though the members are still working on some logistics for instance procedures. According to the Tribunal Secretary, the procedure to be adopted shall be in line to that provided for under the Civil Procedure Rules of the Laws of Kenya. The procedures regard filing of notice, representation, notice of hearing, summon of witnesses and adducing of evidence, production of exhibit and filing of a valuation report, filing of notice of appointment or change of advocate, adjournment, granting of prayers and notice of preliminary objection. Since an advocate of the High Court chairs the Tribunal, it is bound to adopt the Civil Procedure Rules. This is because as an advocate, the chairman knows no other better procedure.

Adoption of the Civil Procedure Rules is a major hindrance to expeditious resolution of cases in the Business Premises Rent Tribunal and the Rent Restriction Tribunal, as earlier discussed in this chapter. This would lead to invasion of the Land Rent Arbitration Tribunal by advocates, who are masters of civil procedures. If not checked, the Land Rent Arbitration Tribunal shall at the end of the day become as legalistic as the court of law. Table No. 9 below shows the number of objection to increase in land rent which have been transferred from the High Court to the Land Rent Arbitration Tribunal for determination.

Table No. 9: Showing 11 Objection to Increase in Land Rent that have been Transferred from the High Court to Land Rent Arbitration Tribunal

LR Number	Disputants	Nature of Dispute	Date Filed	Date Determined
209/555	Mwaura & Another v CoL.	Excessive Value	20/08/89	Not Determined

209/742	Dhavji v CoL.	Excessive Value	20/08/89	Not Determined
209/1614	Milligan & Co Ltd v CoL.	Excessive Value	01/12/89	Not Determined
209/4864	Lustman & Co v CoL.	Excessive Value	26/10/89	Not Determined
209/7362	Lloyd Masika Ltd v CoL.	Excessive Value	03/11/89	Not Determined
209/683	S. Joshi v CoL.	Excessive Value	16/08/89	Not Determined
209/2465	Milligan & Co Ltd v CoL.	Excessive Value	25/09/89	Not Determined
209/606	Old Mutual Kenya v CoL.	Excessive Value	15/09/89	Not Determined
209/2772	Surat Association v CoL	Excessive Value	13/04/89	Not Determined
209/2649	Dhanji & Rayani v CoL	Excessive Value	29/09/89	Not Determined
209/1945	Jayantilal v CoL	Excessive Value	13/09/89	Not Determined
209/4382	V.M Patel	Excessive Value	08/09/89	Not Determined

Source: Compiled by the Researcher from case files available at the Land Rent Arbitration Tribunal Offices in Nairobi.

From the above table, it is evident that no cases on objection to the increase in land rent have been determined to date. According to the provisions of the Government Lands Act Chapter 280 of the Laws of Kenya, land rent is payable to the Commissioner of Lands annually. It is therefore imperative and reasonable that cases of objection to increase in land rent should be resolved within one year.

3.3.0.0 ALTERNATIVE DISPUTE RESOLUTION METHODS OF RESOLVING VALUATION AND PROPERTY MANAGEMENT DISPUTES

The Alternative Dispute Resolution Methods that deal with Valuation and Property Management disputes are outlined as follows in Table No. 10 below:

1	Arbitration
2	Mediation
3	Negotiation
4	Adjudication
5	Expert Determination
6	Facilitation
7	Neutral Fact Finding
8	Executive Tribunal

Source: Compiled by the Researcher from the Literature Reviewed.

Due to the private and confidential nature of the Alternative Dispute Resolution methods, the researcher was unable to obtain enough data necessary to determine how effective, in terms of time, it is to resolve disputes.

In view of the above, the researcher carried out an informal interview with arbitrators who have handled Valuation and Property Management disputes. During the interview, it was noted that the arbitrator is the master of procedures. He/she is empowered under the Arbitration Act of 1995 of the Laws of Kenya to determine the procedures to follow in the conduct of proceedings. In addition, it is at the discretion of the arbitrator to adopt an appropriate method of arbitration that is documents only, written representation, statement of the case and formal proceedings. It was however noted, during the interview, that just like the tribunals described above, arbitration has been invaded by advocates who, in the course of representing their clients, adopt the procedures under the Civil Procedure Act Chapter 21 and the Evidence Act Chapter 80 of the Laws of Kenya. This is in relation to filing of objections, representation, notice of hearing, summon of witnesses and adducing of evidence, production of exhibit and filing of a valuation report, filing of notice of appointment or change of advocate, adjournment, granting of prayers and notice of preliminary objection. As a result of invasion of arbitration by advocates (who know no any other procedure apart from the civil procedure rules as a means through which civil disputes may be resolved) and the adoption of civil procedure rules has also caused delays in resolving disputes. However due to the fact that the arbitrator is not duty bound by the Arbitration Act of 1995 of the Laws of Kenya to adopt the Civil Procedure Rules, the method is still faster than the Tribunals.

The other alternative forms of resolving disputes such as Mediation, Negotiation, Adjudication, Expert Determination, Facilitation, Neutral Fact Finding and Executive Tribunal were found not to have taken much roots in Kenya.

The following table number 11 shows three (3) cases resolved through arbitration and negotiation.

L.R Number	Disputants	Nature of Dispute	Type of ADR used	Date filed	Date Determined	Time Taken
209/8288	APL v World Ahead Ltd	Rent Arrears	Arbitration	November 2001	February 2002	3 months
209/8288	APL v KATO	Rental Arrears	Negotiation	January 2002	March 2002	2 months
209/8288	APL v Furaha Travels	Termination of lease	Arbitration	October 2001	March 2002	5 months

Source: Compiled by the researcher from field survey.

Note: The following words have been shortened: APL – Amalgamated Properties Limited, KATO – Kenya Association of Tour Operators.

From the above table it is evident that it takes as short as two (2) to Five (5) months to resolve a dispute through the Alternative Dispute Resolution methods.

CHAPTER FOUR

4.0.0.0 FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

4.1.0.0 FINDINGS

4.1.1.0 INTRODUCTION

The findings of this project study have been categorized as follows:

i) findings emanating from literature review on the Statutory and Alternative methods of Resolving Valuation and Property Management disputes;

ii) findings gathered through scheduled and non-scheduled interviews with key informants, and questionnaires administration. These findings relate to the Statutory and the Alternative means of Resolving Valuation and Property Management disputes.

4.1.2.0 FINDINGS FROM REVIWED LITERATURE

Findings from the literature reviewed may be classified into two as follows:

- Statutory means of Resolving Valuation and Property Management disputes;
- Alternative Dispute Resolution Methods.

4.1.2.1 Statutory Means of Resolving Valuation and Property Management Disputes in Kenya

There are several statutory means of resolving valuation and property management disputes in Kenya. The methods are provided for in various Acts of Parliament and are aimed at ensuring that disputes related to valuation and management of land and buildings are adequately resolved. The Statutory methods comprise: Valuation Court, Business Premises Rent Tribunal, Rent Restriction Tribunal, Land Acquisition Compensation Tribunal, Land Rent Arbitration Tribunal, Land Arbitration Board, Land Adjudication Committee, Land Control Board, Physical Planning Liaison Committee and the Land Disputes Tribunal.

The main findings stemming from review of related literature on the first Five (5) Statutory methods of Resolving Valuation and Property Management disputes, that is Valuation Court, Business

Premises Rent Tribunal, Rent Restriction Tribunal, Land Acquisition Compensation Tribunal and Land Rent Arbitration Tribunal) are:

- the Statutory methods (Tribunals) are all quasi judicial in nature and are anchored in the Civil Procedure Rules of the Civil Procedure Act Chapter 21 of the Laws of Kenya:
- the Tribunals are presided over either by an advocate of the High Court of Kenya with five years standing or a magistrate with powers to preside over a magistrates' court of the first class;
- the Tribunals are like a toothless bulldog having no powers to enforce own orders. In effect, any order made by the tribunals must be filed in a court of law and it is only the court that can enforce the order.

4.1.2.2 Alternative Dispute Resolution Methods

Through review of related literature, Eight (8) Alternative Dispute Resolution methods were identified, that is Arbitration, Mediation, Negotiation, Adjudication, Expert Determination, Facilitation, Neutral Fact-Finding and Executive Tribunal.

The main findings stemming out of the review of related literature on the Alternative Dispute Resolution methods are:

- the Alternative Dispute Resolution methods are alternatives to litigation;
- the methods are almost similar in nature and characteristics, that is in terms of expertise, privacy, cost effectiveness, finality, representation and non-adversarial;
- award given under any of the Alternative means of Resolving Disputes may be enforceable summarily in a court of law. This is done by registering the award as a judgement in the High Court;
- due to their nature and characteristics, the Alternative Dispute Resolution methods have the potential of resolving all kind of civil disputes. In commercial/business disputes, the Alternative Dispute Resolution methods have the tendency of ensuring that the good business relationship that subsisted before the dispute arose is maintained;

- the Royal Institution of Chartered Surveyors (RICS) through its Dispute Resolution Service have employed the use of the Alternative Dispute Resolution methods, with success, to resolve civil disputes that arise out of Valuation and Property Management;
- the Alternative Dispute Resolution methods are also employed by institutions such as: the American Institute of Arbitrators (AIA), Centre for Dispute Resolution (CEDR), Negotiation Institute, Centre for Mediation and the Chartered Institute of Arbitration (CIA) in resolving civil disputes.

4.1.3.0 FINDINGS GATHERED THROUGH FIELD RESEARCH

Findings stemming from the field research may be classified as follows:

- findings from perusal of case files;
- findings obtained through questionnaire administration, formal and informal interviews.

4.1.3.1 Findings Stemming from Perusal of Case Files

Valuation Court

- the Valuation Court is chaired by an advocate of the High Court of Kenya. It is anchored on court procedures as per the provisions of the Civil Procedure Rules. The Valuation Court has not met since May 1997 due to conflicts between the court members and the council officials;
- it also takes along time to constitute a Valuation Court, for instance the current Valuation Court was constituted on 7th March 1996 vide the Kenya Gazette Legal Notice No. 1440 to hear objections to supplementing valuation rules for the years from 1988 to 1994. This means that an objection case filed in 1988 could only be listened to in 1996. In addition to this factor, it takes more than the standard time of 1 year to resolve cases of objections to the valuation rule.

Business Premises Rent Tribunal

The Business Premises Rent Tribunal is chaired by a magistrate with powers to preside over a sub-ordinate court of the first class. So far, there are Ten (10) Business Premises Rent Tribunal Stations

presided over by one chairman sitting on a rota basis. Due to the fact that all Tribunal Stations are presided over by one chairman, the Tribunal has been operating at an average capacity of 45%.

The Business Premises Rent Tribunal is similar to the courts of law. It follows the civil procedure rules as provided for under the Civil Procedure Act Chapter 21 of the Laws of Kenya. This is especially in regard to: filing of notice and notice of hearing, representation, summoning of witnesses and adducing of evidence, production of exhibit and filing of a Valuation Report, filing of notice of appointment or change of an advocate.

Due to the adoption of the Civil Procedure Rules, the Tribunal has become slow in resolving disputes related to termination of tenancy, rental review, distress for rent and general complaints. It takes as long as 4 years to resolve these disputes. Currently, there are about 4,500 pending cases, in the Tribunal, some pending for a period as long as 12 years.

It was however revealed that the adoption of the Civil Procedures Rules by the Tribunal is not the only cause of delay in resolving disputes. Some disputes appear on record as pending, though the disputants might have either withdrawn or settled out of court without informing the Tribunal.

Rent Restriction Tribunal

The Rent Restriction Tribunal is chaired by a magistrate with powers to preside over a sub-ordinate court of the first class. Nine (9) Rent Restriction Tribunal Stations presided over by one chairman, on a rota basis, have been established. Due to the fact that the Tribunal chairman has to sit on a rota basis in all the stations, the Tribunal is operating at 26.7% efficiency.

The Rent Restriction Tribunal operates in a similar manner to the court of law. This is in terms of filing of notice, representation, summon of witnesses and issuing of evidence, production of exhibit, filing of a Valuation Report and filing of notice of appointment or change of advocate. This process is provided for under the Civil Procedure Rules of the Civil Procedure Act Chapter 21 of the Laws of Kenya. Adoption of the Civil Procedure Rules has led to delay in resolution of disputes. It takes as long as 5 years 7 months to resolve disputes related to termination of lease, distress for rent, rental review and general complaints. This is against the standard time of 3 months. Currently there are about 4970 pending cases in the Tribunal.

Land Acquisition Compensation Tribunal

The Land Acquisition Compensation Tribunal is chaired by an advocate of the High Court of Kenya, with more than 5 years experience. It was established in December 2000, about 10 years after the Act of parliament to establish it, the Land Acquisition (Amendment) Bill of 1990, was enacted.

Its establishment vide the above act of parliament was a culmination of the Third Nairobi Water Supply Project (Ndakaini) land acquisition case where 30 people whose land were acquired compulsorily appealed to the High Court of Kenya against the compensation award by the Commissioner of Lands.

Upon the formation of the Tribunal in December 2000, 14 cases were transferred from the High Court. Since January 2001, the Tribunal has been handling only one case, that is the case of Marula Farmers Limited v the Commissioner of Lands.

The procedures adopted by the Tribunal are akin to those provided for under the Civil Procedure Act Chapter 21 of the Laws of Kenya.

Land Rent Arbitration Tribunal

The Land Rent Arbitration Tribunal is chaired by an advocate of the High Court of Kenya with more than 5 years experience. It was established almost at the same time with the Land Acquisition Compensation Tribunal, in December 2000. This was about 11 years after the Act of Parliament to establish it, the Government Lands (Amendment) Act of 1989 was enacted. Upon the formation of the Tribunal in December 2000, about 600 cases were transferred from the High Court of Kenya. The Tribunal has not yet decided on any case so far.

The procedures adopted by the Tribunal are similar to those provided for under the Civil Procedure Rules as stipulated under the Civil Procedure Act Chapter 21 of the Laws of Kenya.

The Alternative Dispute Resolution Methods

Due to the Private nature of the Alternative Dispute Resolution methods, the researcher was unable to peruse the case files. This is especially in regard to Arbitration and Mediation, which have

already taken roots into the country. However, the researcher managed to obtain some information through informal interview with a key informant and an arbitrator. Three (3) cases handled through the Alternative Dispute Resolution methods were analyzed and found that it takes a reasonably shorter time, two (2) to Five (5) months, to resolve a given dispute that would otherwise have taken a longer time to resolve through the tribunals.

4.1.3.2 Findings from Formal and Informal Interviews

The respondents in formal and informal interviews were:

- Property Managers and Valuers;
- Landlords and Tenants at the Nairobi Station of the Business premises Rent Tribunal and the Rent Restriction Tribunal;
- a senior officer of the City Council of Nairobi Valuation Section;
- senior officials of both the Business Premises Rent Tribunal and the Rent Restriction Tribunal;
- senior official of the Land Acquisition Compensation Tribunal and the Land Rent Arbitration Tribunal;
- Advocates of the High Court of Kenya; and
- Arbitrators who deals or has dealt with Valuation and Property Management disputes.

Property Managers and Valuers felt that it takes along time to resolve disputes in the Tribunals. They decried the fact that the Tribunals have become like courts in terms of procedures and process. They attribute this to the fact that the Tribunals are chaired by either a magistrate or an advocate, and have also been invaded by advocates. According to Property Managers and Valuers, the professionals in the field of Valuation and Property Management are better placed to resolve certain disputes in Valuation and Property Management. Apart from Arbitration, most Valuers and Property Managers are not aware of the existence of the other Alternative means of Resolving Disputes.

An informal interview with a senior officer of the City Council of Nairobi, Valuation Section revealed that since May 1997, the Valuation Court has not met. This is due to differences between the members of the court and the City Council Officers.

Landlords and Tenants interviewed at the Business Premises Rent Tribunal and the Rent Restriction Tribunal felt that it is taking unnecessarily long to resolve disputes. They blame it on the fact that there is only one chairman for all the Tribunal Stations. They also blame it on advocates who cause delay of cases through unnecessary adjournments.

About 30% of the landlords and tenants interviewed are aware of the existence of the Alternative means of Resolving Disputes, especially Arbitration. Informal interview with Advocates of the High Court of Kenya revealed that the Business Premises Rent Tribunal and the Rent Restriction Tribunal are in essence Arbitration Tribunals grounded on statute. In this regard therefore, reference to the tribunals is by statute and not agreement. The advocate further revealed that in the absence of an amendment in the Acts of parliament establishing the Tribunals to recognize the use of the Alternative methods of Resolving Disputes, disputes between landlords and tenants in controlled tenancies would always be resolved through the Tribunals.

Interview with senior officers of the of both the Business Premises Rent Tribunal and the Rent Restriction Tribunal revealed that certain disputes may be seen to have taken too long to resolve but this may not be the case. This is because the disputants have failed to inform the Tribunals in the event that they settle the matter out of the Tribunal so as to evade paying some fee to the Tribunals. The senior officers of the two tribunals also decried the fact that all the Tribunal Stations are presided over by one chairman. The chairman has to criss-cross the entire country and thus he cannot be 100% efficient because when he is out of the Nairobi Tribunal Station then the cases in Nairobi have to wait for him to come back.

The Land Acquisition Compensation Tribunal and The Land Rent Arbitration Tribunal share the same secretariat. An interview with senior officials of both the Tribunals revealed that both the Tribunals began their operations in January 2001. Members are though, still not clear on the kind of procedures to be adopted and sustained in carrying out the business of the Tribunals. It is however envisaged that the procedure to be adopted and sustained would be in accordance with the provisions of the Civil Procedure Act chapter 21 of the Laws of Kenya.

4.2.0.0 CONCLUSIONS

Based on the foregoing field research findings, study objectives and hypothesis, the following conclusions can be drawn:

- there are Eleven (11) Statutory methods of Resolving Valuation and Property Management Disputes. These comprise: the Valuation Court, Business Premises Rent Tribunal, Rent Restriction Tribunal, Land Acquisition Compensation Tribunal, Land Rent Arbitration Tribunal, Valuers Registration Board, Land Control Board, Physical Planning Liaison Committee and the Land Disputes Tribunal.

- the shortcomings of the five (5) statutory (tribunals) methods of Resolving Valuation and Property Management Disputes under study are:

  i) it takes a long time before a hearing date is set this is because the setting of a hearing date is dependent on the tribunal diary;

  ii) reliance on the Civil Procedure Rules in the tribunals when it comes to filing of a dispute, setting of a hearing date, hearing, summoning of witnesses, adducing of evidence and lodging appeal clogs the tribunal process;

  iii) the tribunals are slow in resolving disputes since they are too formal and have mimicked the court of law procedures that is, they are conducted in public and are adversarial in nature. It also takes quite a long time to file a dispute and fix a hearing date. Summoning of witnesses and adducing of evidence is also affected by the procedures both in the Civil Procedures Rules as stipulated under the Civil Procedure Act Chapter 21 of the Laws of Kenya.

  iv) they are chaired by either advocates or magistrates, who are not competent to deal with the technical aspects of Valuation and Property Management. This is more of a technical problem;

  v) the Tribunals have been invaded by advocates thus turning them into mini courts of arguments based on the Civil Procedure Rules;

  vi) all the Business Premises Rent Tribunal Stations are chaired by one person. This causes delay in resolving disputes since when the tribunal chairman is away in another station, then

work in other stations have to wait. This is likewise to the Rent Restriction Tribunal. This is more of an administrative problem.

- the study identified Eight (8) Alternative methods of Resolving Disputes. These are:

  i) Arbitration;

  ii) Mediation;

  iii) Negotiation;

  iv)Adjudication;

  v) Expert Determination;

  vi)Facilitation;

  vii) Neutral Fact-Finding;

  viii) Executive Tribunal.

- the use of Alternative Dispute Resolution methods to resolve Valuation and Property Management disputes has not taken much roots in Kenya. Though quite a number of respondents are aware of Arbitration as an Alternative means of Resolving Disputes in Valuation and Property Management, its use is limited since disputes in controlled tenancies are referred to the Tribunals by statute. However in the instance of uncontrolled tenancies where some leases have arbitration agreement/clause in-built in them, any dispute is referred to arbitration where the provisions of Arbitration Act Chapter 49 and the arbitration act of 1995 would apply.

  The Alternative Dispute Resolution methods are fast, cost effective, inexpensive, non-adversarial/less antagonistic, flexible, private expertise and flexible in representation.

4.3.0.0 RECOMMENDATIONS

The recommendations below are related to the research findings, which have outlined the Statutory and Alternative Dispute Resolution methods, the shortcomings inherent in the methods and the

extent of use of the Alternative Dispute Resolution methods. The recommendations therefore are as follows:

- The Valuation for Ratings Act Chapter 266, the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Chapter 301, the Rent Restriction Act Chapter 296, the Land Acquisition Act Chapter 295 and the Government Lands Act Chapter 280 of the Laws of Kenya should be amended to introduce a provision requiring the use of the Alternative Dispute Resolution methods to resolve disputes beforehand. This will enable appropriate filtration of disputes that end up in the Tribunals thus decongesting the Tribunals. This will also allow the use of the Alternative Dispute Resolution methods in order to achieve expedition in resolving Valuation and Property Management disputes.

  The Acts of parliament governing the operation and procedures of the tribunals that deal with valuation and property management disputes should be amended so as to make the rules and procedures regarding filing of reference, representation, hearing, summoning of witnesses, adducing of evidence and production of exhibit to be more flexible than as provided for under the Civil procedure Act Chapter 21 of the Laws of Kenya. This would work well to minimize the time taken in following the procedures under the Civil Procedure Rules, since a lot of time is wasted in trying to comply with the procedures as opposed to dealing with the dispute at hand.

- The Institution of Surveyors of Kenya should emulate the Royal Institution of Chartered Surveyors (RICS) and establish a Dispute Resolution Service Department. The department should employ the use of the Alternative Dispute Resolution methods to resolve disputes in Valuation and Property Management. It should be professionally manned by qualified Valuation and Property Management Surveyors who are also qualified in the art of arbitration as per the requirements of the Chartered Institute of Arbitrators, Kenya Branch. In addition, the dispute resolution department should be able to monitor the progress made in each dispute that is under resolution in order to ensure expeditious resolution. A database of the nature of disputes, time taken and cost incurred to resolve them must also be kept.

- In uncontrolled tenancies, that is:

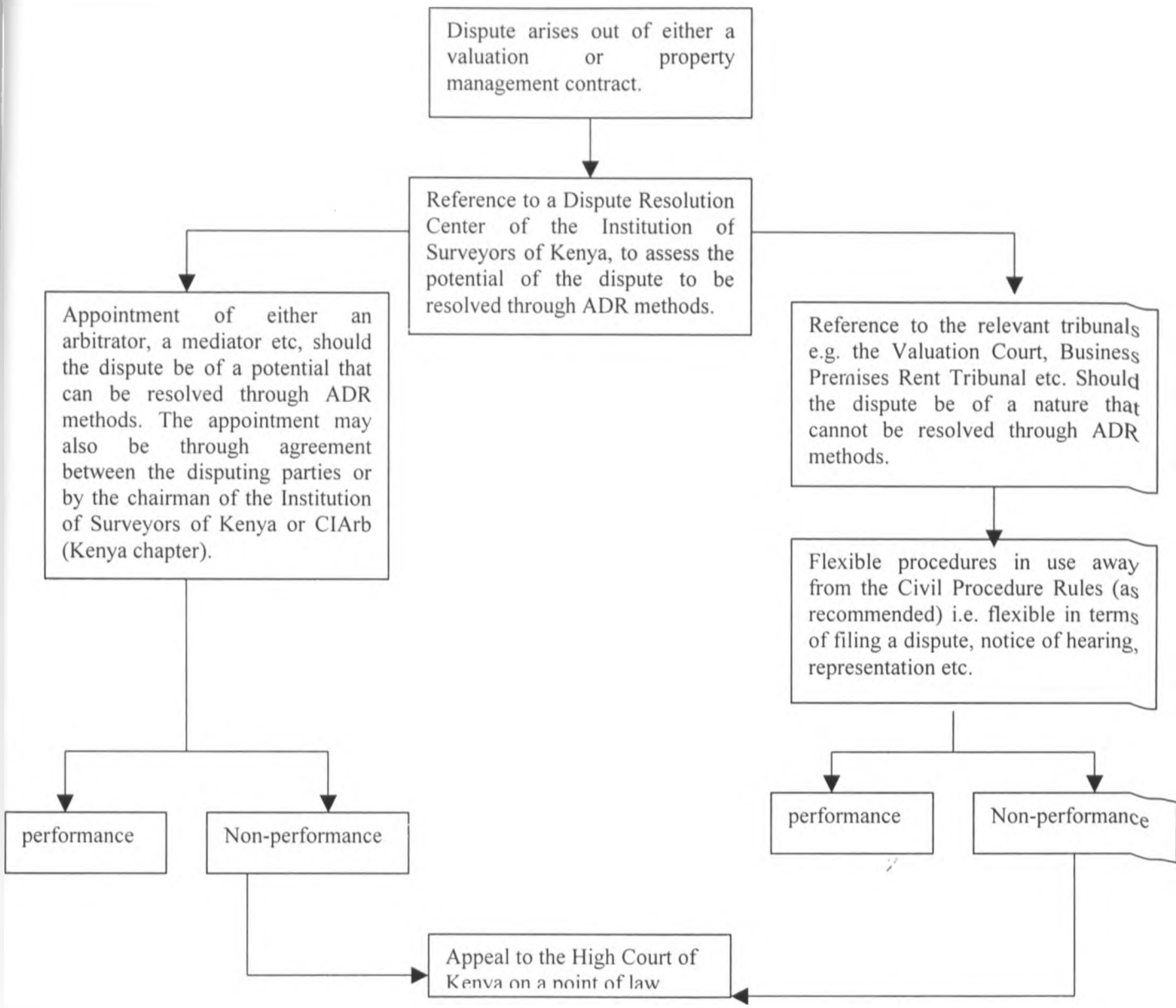
  i) tenancies reduced to writing and for a term more than five (5) years, in commercial premises, and;

ii) tenancies attracting a monthly rental value of more than Kshs. 2,500/=, in residential premises,

a provision facilitating the use of the Alternative Dispute Resolution methods should be incorporated. The clause should go further to identify the authority to appoint the Arbitrator, Mediator, Negotiator etc. Assuming that the Institution of Surveyors of Kenya establishes a Dispute Resolution Service Department, then the clause should identify the chairman of the Institution of Surveyors of Kenya as an appointing authority. In the absence of the Dispute Resolution Service Department, then the clause should identify the appointing authority as the chairman of the Kenya Branch of the Chartered Institute of Arbitrators.

Once the above recommendations have been put in place, then the process of managing valuation and property management disputes would ordinarily take the following process as shown in the following chart No. 6

CHART NO. 7 Showing the Recommended System for Resolving Valuation and Property Management Disputes



Source: Compiled by the Researcher.

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