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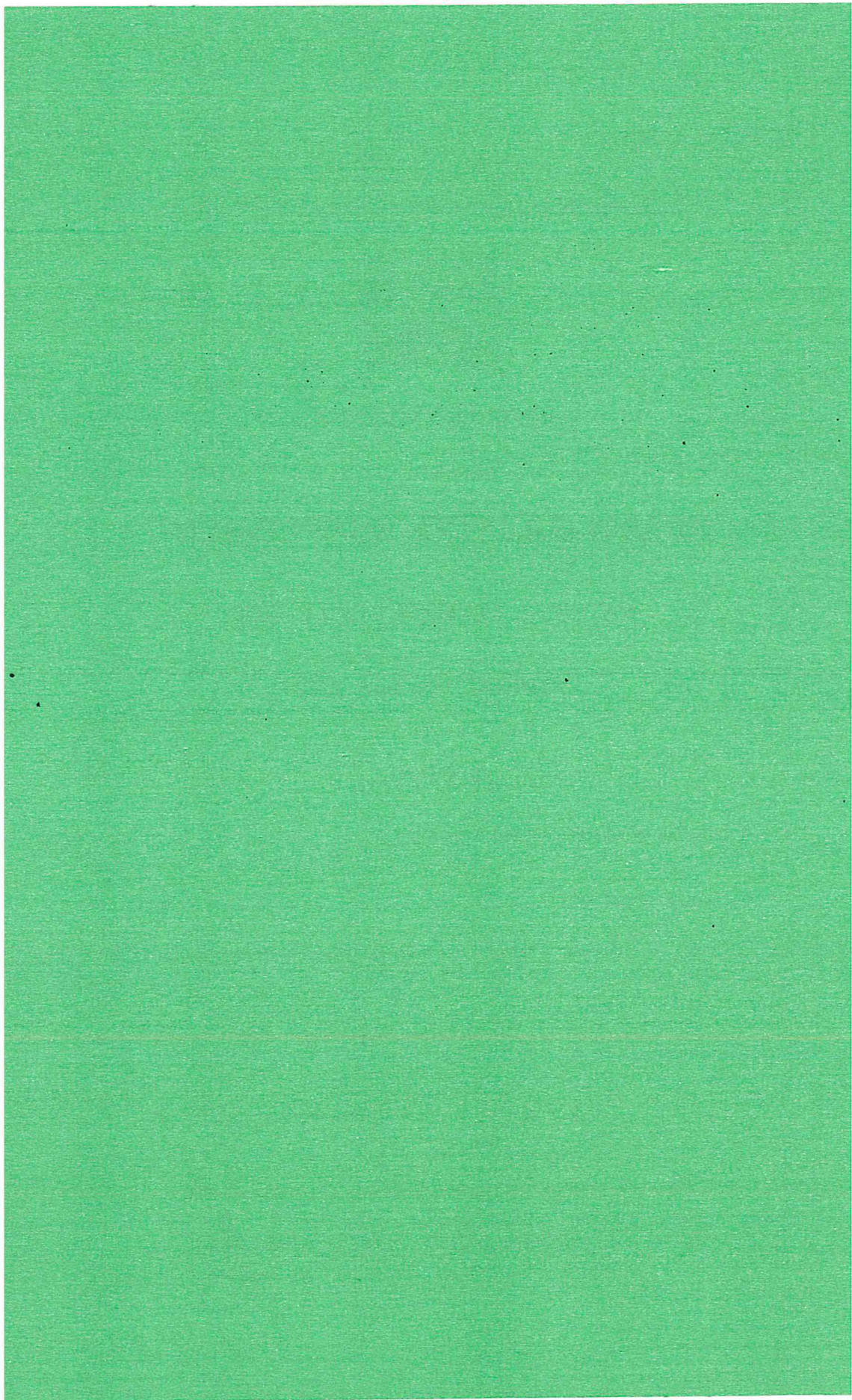
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CONTENT

Bill for Introduction into the National Assembly —

PAGE

The Mediation Bill, 2020601



THE MEDIATION BILL, 2020
ARRANGEMENT OF CLAUSES

Clause

PART I—PRELIMINARY

- 1—Short title.
- 2—Interpretation.
- 3—Object of the Act.
- 4—Application of the Act.
- 5—Principles of mediation.

**PART II—ESTABLISHMENT OF THE MEDIATION
COMMITTEE**

- 6—The mediation committee.
- 7—Functions of the mediation committee.
- 8—The registrar and staff.
- 9—Functions of the registrar.
- 10—Conduct of business and affairs of the mediation committee.
- 11—Sub-committee of the mediation committee.
- 12—Vacation of office.

**PART III—ACCREDITATION AND
REGISTRATION OF MEDIATORS**

- 13—Accreditation and registration of mediators.
- 14—Revocation of a registration.
- 15—Right to appeal against the decision of the mediation committee.
- 16—Code of conduct for mediators.

PART IV — MEDIATION PROCESS

- 17—Submission to mediation.
- 18—Commencement of mediation process.
- 19—the mediation agreement.
- 20—Role of the parties.
- 21—Appointment of a mediator.
- 22—Role of a mediator.

- 23—Disclosure by the mediator.
- 24—Revocation of appointment of a mediator.
- 25—Attendance and representation in mediation process.
- 26—Date, time and place of mediation.
- 27—Identification of issues in dispute.
- 28—Confidentiality of mediation process.
- 29—Settlement agreement.
- 30—End of mediation process.
- 31—Role of a mediator in other proceedings.
- 32—Exclusion of liability.

PART V — RECOURSE TO THE HIGH COURT AND RECOGNITION AND ENFORCEMENT OF A SETTLEMENT AGREEMENT

- 33—Duty of an advocate to advise on mediation.
- 34—Confirmation that mediation has been considered.
- 35—Referral of disputes to mediation by a court.
- 36—Recourse to judicial proceedings.
- 37—Stay of proceedings.
- 38—Recognition and enforcement of a settlement agreement.
- 39—Grounds for refusal of recognition or enforcement of a settlement agreement.

PART VI—PROVISIONS ON DELEGATED POWERS

- 40—Rules and regulations.

PART VII—GENERAL PROVISIONS

- 41—Limitation periods.
- 42—Mediation expenses.
- 43—Offences.
- 44—Consequential amendments.
- 45—Transitional provisions.

SCHEDULE – CONDUCT OF BUSINESS AND AFFAIRS OF THE MEDIATION COMMITTEE

THE MEDIATION BILL, 2020

A Bill for

AN ACT of Parliament to provide for the settlement of all civil disputes by mediation; to set out the principles applicable to mediation; to provide for the establishment of the Mediation Committee; to provide for the accreditation and registration of mediators; recognition and enforcement of settlement agreements; and for connected purposes.

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Mediation Act, 2020.

Short title.

2. (1) In this Act—

Interpretation.

“advocate” has the meaning assigned to it under section 2 of the Advocates Act;

Cap. 16.

“Committee” means the Mediation Committee established under section 6 of this Act;

“mediation” means a facilitative and confidential structured process in which parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable settlement agreement to resolve their dispute with the assistance of an independent third party called a mediator;

“mediation agreement” means a contract clause within a written contract or a separate written agreement entered into by the parties agreeing to submit to mediation a dispute which has arisen or which may arise between them in respect of a defined legal relationship;

“mediation process” means all the steps taken in an attempt to resolve a dispute by mediation from the time a dispute is referred to mediation or a party sends an invitation to submit a dispute to mediation to the other party up to the time the mediation report is drawn up;

“party” means a person who is party to a dispute, and includes a legal person, a national government, a county government or a state organ;

“mediator” means an impartial person accredited and registered to facilitate mediation process and includes a - employees and persons employed by that person;

“Mediation Accreditation Committee” means the Committee established under section 59A of the Civil Procedure Act; Cap. 21.

“Registrar” means the person appointed under section 8 of this Act;

“report” means the mediation report prepared by a mediator at the time of termination of appointment of the mediator or at the end of the mediation process setting out the nature of the dispute, the stage the matter had reached and the outcome, and any relevant matter subject to section 28 of this Act;

“settlement agreement” means a written agreement between the parties to the mediation process and entered into at the end of the mediation process setting out the terms of agreement regarding the disputed issues; and

3. The object of this Act is to – Object of the Act.

- (a) provide an effective mechanism for amicable dispute resolution;
- (b) promote a conciliatory approach to dispute resolution;
- (c) facilitate timely resolution of disputes at a relatively affordable cost;
- (d) facilitate access to justice; and
- (e) enhance community and individual involvement in dispute resolution.

4. (1) This Act shall apply to all civil disputes. Application of the Act.

5. The following principles shall apply to mediation under this Act – Principles of mediation.

- (a) participation in mediation process is voluntary and a party may withdraw from mediation process at any time;
- (b) a party to mediation process has the right to resolve a dispute and be informed of this right before mediation process commences;

- (c) confidentiality of mediation processes in accordance with section 28;
- (d) the parties and the mediator shall seek to complete the mediation process in the shortest time practicable taking into account the nature of the dispute;
- (e) parties shall take reasonable measures in resolution of disputes as provided for under section 22;
- (f) a mediator shall be impartial and disclose to the parties circumstances which may affect the mediator's impartiality;
- (g) a mediator shall facilitate disputes which the mediator is competent;
- (h) a mediator shall not provide legal advice to a party; and
- (i) a mediator shall not use information acquired during the mediation process for personal gain or to the detriment of any person.

PART II—ESTABLISHMENT OF THE MEDIATION COMMITTEE

6. (1) There is established a Mediation Committee which shall be appointed by the Attorney-General.

The Mediation Committee.

(2) The Committee shall consist of—

- (a) nine members nominated by each of the following—
 - (i) the Chief Justice;
 - (ii) the Attorney-General;
 - (iii) the Law Society of Kenya;
 - (iv) Federation of Women Lawyers- Kenya;
 - (v) Dispute and Conflict Resolution International;
 - (vi) the institute of Certified Public Secretaries;
 - (vii) the Kenya Private Sector Alliance;
 - (viii) the Central Organisation of Trade Union; and
 - (ix) the Federation of Kenya Employers.

(b) The Registrar who shall be the secretary to the mediation committee and an *ex-officio* member with no right to vote.

(3) The Attorney-General shall appoint the members of the Committee by notice in the *Gazette*.

(4) The members of the Committee shall serve for a term of three years, renewable once.

(5) The members of the Committee shall serve on part-time basis and shall be paid such allowances as may be determined by the Attorney-General in consultation with the Salaries and Remuneration Commission.

(6) The Attorney-General shall set the date of the first meeting of the Committee not later than seven days from the date of gazettelement of the members of the Committee.

7. The Committee shall regulate, develop and promote mediation as a mechanism for dispute resolution.

Functions of the Committee.

(2) Without prejudice to the generality of subsection (1), the Committee shall—

- (a) provide facilities for the settlement of disputes;
- (b) exercise any power for dispute resolution conferred on it by parties to a dispute but shall not be involved in actual resolution of the dispute;
- (c) advise on training of mediators;
- (d) accredit and register mediators;
- (e) keep a register of mediators;
- (f) advise the Government on policy, guidelines, programmes, regulations and legislation on mediation;
- (g) provide guidelines on fees for mediation processes;
- (h) conduct research, provide education and issue specialised publications on mediation;
- (i) protect and assist members of the public in matters relating to mediation including by providing a fair, effective, efficient and transparent procedure for the resolution of complaints against mediators;
- (j) set, maintain and continuously improve the standards of learning, professional competence and conduct for the provision of mediation; and

- (k) do all such other things as shall be deemed beneficial to and in furtherance of mediation.

8. (1) The Attorney-General shall appoint a Registrar and other officers as may be necessary for the effective discharge of the functions of the Committee.

The Registrar and staff.

(2) A Registrar or officer appointed under this section shall serve on such terms as may be specified in the instrument of appointment.

9. (1) The Registrar shall be responsible for—

Functions of the Registrar.

- (a) the day-to-day management of the affairs of the Committee;
- (b) the establishment and maintenance of a register in which all records of the Committee shall be kept;
- (c) the acceptance, transmission, service and custody of documents in accordance with the Rules;
- (d) the enforcement of the decisions of the Committee;
- (e) certifying that any order, direction or decision is an order, direction or decision of the Committee;
- (f) causing to be kept records of the proceedings and minutes of the mediation committee and such other records as the Committee may direct;
- (g) managing and supervising the staff of the Committee; and
- (h) facilitating access to decisions and records of the Committee.

(2) The Registrar may consider and dispose of procedural or administrative matters in accordance with the Rules or on direction of the Committee.

10. The conduct of the business and affairs of the Committee shall be as provided for in the Schedule, but subject thereto the Committee may regulate its own procedure.

Conduct of business and affairs of the mediation committee.

11. (1) The Committee may establish such committees as it may consider necessary for the performance of its functions and the exercise of its powers under this Act.

Sub-committees of the Committee.

(2) The Committee may co-opt into the membership of committees established under subsection (1), other

persons whose knowledge and experience is necessary for the performance of its functions.

12. A person shall cease to be a member of the Committee if such person—

Vacation of office.

- (a) is absent from three consecutive meetings of the Committee without the permission of the chairperson;
- (b) ceases to be an officer, agent or member of staff of the nominating authority;
- (c) resigns in writing, addressed to the Attorney-General;
- (d) is convicted of a criminal offence and sentenced to a term of imprisonment of not less than six months;
- (e) is declared bankrupt;
- (f) is unable to perform the functions of his or her office by reason of mental or physical infirmity; or
- (g) dies.

PART III—ACCREDITATION AND REGISTRATION OF MEDIATORS

13. (1) A person who intends to practice as a mediator shall submit an application in the prescribed form to the Committee for registration.

Accreditation and registration of mediators.

(2) The Committee shall consider the application within a period of thirty days from the date of receipt of the application and—

- (a) register the applicant as a mediator if the applicant meets the requirements; or
- (b) inform the applicant the reasons for rejection where the applicant does not meet the requirements.

(3) A person who wishes to practice as a mediator for court annexed mediation processes shall in addition to registration, apply to the Committee for accreditation.

(4) The Committee shall keep a register of all registered and accredited mediators.

14. The Committee may revoke registration or suspend a mediator if a mediator—

Revocation of registration.

- (a) fails to comply with the terms and conditions of the registration;
- (b) has been adjudged bankrupt; or
- (c) is in breach of the code of conduct and has been found guilty.

15. A person whose application for accreditation or registration has been rejected, or whose registration has been revoked or suspended, may appeal to the High Court within seven days of receipt of the reason for refusal of application for accreditation or registration, or revocation or suspension of registration against the decision of the Committee.

Right to appeal against the decision of the mediation committee.

16. (1) The Committee shall publish a code of conduct for mediators.

Code of conduct for mediators.

(2) Without prejudice to the generality of subsection (1), the code of conduct shall—

- (a) be consistent with this Act;
- (b) where necessary, be consistent with the internationally acceptable standards;
- (c) provide for initial and further or continuous training of mediators; and
- (d) provide for complaints, disciplinary and grievances procedures concerning mediators, and relevant enforcement procedures within professional bodies of which mediators are members.

PART IV—MEDIATION PROCESS

17. (1) Parties may use mediation to resolve a dispute

Submission to mediation.

- (a) on their own initiative; or
- (b) as referred by a court before which a dispute is pending.

(2) Where an agreement makes provision for a mediation clause, a party shall refer a dispute arising from such an agreement to mediation.

(3) A party to an agreement which has not made provision for referral of a dispute to mediation or a dispute

covered under this Act may, with the consent of the other party to the agreement or dispute, submit a dispute arising out of that agreement or covered under this Act to mediation.

18. (1) The resolution of a dispute through mediation commences when—

Commencement of mediation.

- (a) a dispute is referred to mediation by a court; or
- (b) a party accepts an invitation to submit a dispute to mediation from the other party.

(2) The failure by the other party to accept the invitation to mediation within fourteen days after receipt of the invitation or within the period specified in the invitation, shall be deemed as a rejection of the invitation.

19. (1) A mediator appointed to facilitate mediation process shall before accepting the appointment, disclose any circumstance which may affect—

Disclosure by a mediator.

- (a) impartiality of the mediator; or
- (b) the conduct of the mediation process.

(2) A mediator shall promptly disclose to the parties any circumstance which arises during the mediation process and likely to affect—

- (a) impartiality of the mediator; or
- (b) the conduct of the mediation process.

(3) The parties to mediation process may replace a mediator who makes a disclosure under subsection (1) or (2).

20. (1) The parties may revoke the appointment of a mediator who—

- (a) without reasonable cause fails to—
 - (i) commence the mediation process within the period agreed to by the parties; or
 - (ii) conduct mediation process within the rules of mediation
- (b) no longer possesses the relevant qualifications, special knowledge or experience in mediation; or
- (c) no longer satisfies the professional requirements of a professional body in which the mediator is a member.

Revocation of appointment of a mediator.

(2) A mediator appointed to facilitate mediation may resign at any time.

(3) A mediator who has resigned or whose appointment has been revoked shall, within seven days of revocation of appointment or resignation draw up a report of the progress made in the mediation process and furnish a copy of the report to—

- (a) the parties; or
- (b) the parties and the court, where the dispute was referred to mediation by the court.

(4) The parties shall, within fourteen days from the date of revocation of the appointment of a mediator or resignation of a mediator, appoint another mediator.

21. (1) Upon the commencement of the mediation, the parties shall enter into a mediation agreement.

The mediation agreement.

(2) The mediation agreement shall—

- (a) be in writing and signed by the parties;
- (b) provide for the appointment of a mediator;
- (c) provide for costs of mediation; and
- (d) contain such other matters as the parties may consider appropriate.

22. (1) A party to a dispute shall—

Role of the parties.

- (a) take reasonable measures to resolve a dispute by mediation before resorting to judicial proceedings;
- (b) co-operate with the other party and the mediator;
- (c) participate in good faith in mediation process;
- (d) maintain confidentiality as provided for in section 28; and
- (e) if an agreement is reached, ensure the agreement is written and signed by all parties to the agreement.

(2) A party is considered to have taken reasonable measures to resolve a dispute by mediation by—

- (a) notifying the other party of the issues that are in dispute and offering to settle them;
- (b) responding appropriately to a notification under paragraph (a);

- (c) providing relevant information and documents to the other party to enable that other party understand the issues and how the dispute might be resolved;
- (d) considering whether the issues could be resolved through mediation process;
- (e) where mediation is agreed to –
 - (i) agreeing on a mediator to facilitate the process; and
 - (ii) attending the mediation process.

23. (1) The parties to a dispute are free to appoint a mediator to facilitate the mediation process.

Appointment of a mediator.

(2) The parties may request for assistance from the Committee or any other institution to appoint a mediator or mediators on their behalf.

(3) Unless the parties otherwise agree, there shall be one mediator.

(4) Where there is more than one mediator, the mediators shall act jointly.

24. (1) A mediator shall in an independent and impartial manner help the parties to resolve their dispute.

Role of a mediator.

(2) Subject to subsection (1), a mediator shall –

- (a) on acceptance of the appointment, conduct an assessment of the parties to the dispute and the dispute to determine whether mediation is appropriate;
- (b) facilitate communication, understanding, and assist parties to identify their needs and interests to enable the parties reach a settlement agreement;
- (c) draw up and authenticate a settlement agreement to be signed by all parties excluded.

(3) A mediator may conduct mediation process in a manner that the mediator considers appropriate.

(4) A mediator shall in conducting a mediation process take into account the wishes of the parties including any request by a party that the mediator hears oral or receives written statements and the need for a speedy settlement of the dispute.

25. (1) A person who is not a party to mediation process shall not attend mediation process unless the parties agree and the mediator consents to a request for a person to attend the mediation process.

Attendance and representation in mediation.

(2) A party to mediation process may be represented by an advocate, an expert or any other person chosen by the party.

(3) A mediator may, where necessary and if the parties agree to pay the expenses, obtain expert advice on a technical aspect of a dispute.

(4) A request for the services of an expert may be made by the mediator or by a party with the consent of the other party.

(5) A party shall communicate in writing to the mediator and the other party the name, address and the extent of the authority of any representative at least seven days before the representative's participation in the mediation process.

26. (1) A mediator shall, in consultation with the parties, determine the date, time and place of a mediation session.

Date, time and place of mediation.

(2) Subject to the mediator choosing a convenient place, the parties shall determine the place for mediation session.

27. (1) A party shall submit to the mediator and the other party a statement of issues at least seven days before the first session of the mediation process or within such period of time as the parties may agree.

Identification of issues in dispute.

(2) A mediator may request each party to submit orally or in writing—

- (a) a written or oral statement of that party's position;
- (b) the facts and grounds in support of that position; and
- (c) any documents and evidence the party considers appropriate.

(3) A mediator may request a party to submit additional information at any stage of the mediation process.

28. (1) A record, a report, a settlement agreement and any document required in the course of mediation shall be confidential and shall not be used as evidence or be subject to discovery in any judicial proceedings.

Confidentiality of mediation.

(2) A mediator shall not disclose information submitted in the course of the mediation process to a person who is not a party to the mediation process without the consent of the parties.

(3) Without limiting the effect of subsection (1), a party to mediation shall not rely as evidence in court proceedings—

- (a) the record of the mediation process;
- (b) a statement made at the mediation process; or
- (c) any information obtained during the mediation process.

(4) The parties to mediation process may expressly waive the confidentiality requirement under subsection (1).

(5) The confidentiality requirement under this Act shall not apply where the disclosure is—

- (a) required by law;
- (b) necessary to protect a child or a vulnerable person;
- (c) necessary to report or lessen a serious and imminent threat to the life, health or property of a person;
- (d) necessary to report the commission or prevent the likely commission of an offence;
- (e) necessary for the purpose of implementation and enforcement of the settlement agreement; or
- (f) necessary to prove or disprove a claim or complaint concerning negligence or misconduct of a mediator based on conduct ensuing during the mediation process.

(6) The evidence submitted or relied upon in the mediation process which is admissible or subject to discovery in proceedings outside of the mediation shall not be inadmissible or subject to confidentiality solely because it was submitted or relied upon in mediation process.

29. (1) A mediator may formulate terms of a possible settlement if it appears to the mediator that there exist issues to a dispute to which the parties are agreeable and submit them to the parties for adoption and signature.

Settlement
agreement.

(2) A mediator shall, if the parties reach an agreement on a settlement of the dispute, draw up a settlement agreement setting out the terms of the agreement.

(3) A settlement agreement, upon execution by the parties to the dispute, shall be binding on the parties and persons claiming under them respectively.

(4) A mediator shall authenticate a settlement agreement and furnish a copy of the settlement agreement to –

- (a) each of the parties; or
- (b) each of the parties and to the court where a dispute was referred to mediation by the court.

30. (1) The mediation process ends when—

End of mediation
process.

- (a) the parties execute a settlement agreement;
- (b) a mediator, after consultation with the parties, makes a declaration that further mediation is not feasible;
- (c) the parties jointly address a declaration to the mediator that the mediation process is terminated; or
- (d) a party makes a declaration to the mediator and the other party that the mediation process is terminated.

(2) At the end of the mediation process—

- (a) where a settlement agreement is reached, the mediator shall furnish a copy of the settlement agreement and a report to the parties, or to the parties and the court where the dispute was referred to mediation by the court; or
- (b) where mediation process is terminated, furnish a copy of a report to the parties, or to the parties and the court where the dispute was referred to mediation by the court.

31. A mediator shall not unless with the consent of the parties or as required by law—

Role of mediator in other proceedings.

- (a) act as an arbitrator or as a representative or an advocate of a party in any judicial proceeding in respect of a dispute facilitated by the mediator; and
- (b) be presented by a party as a witness in any judicial proceedings arising out of or in connection with the mediation process facilitated by the mediator.

32. (1) A mediator shall not be a party in any judicial proceedings relating to mediation under this Act in which the mediator facilitated.

Exclusion of liability.

(2) A mediator is not liable for any act or omission in the discharge of the functions of a mediator unless the mediator is proven to have acted fraudulently, negligently or in bad faith.

PART V—REFERRAL OF A DISPUTE TO MEDIATION, RECOGNITION AND ENFORCEMENT OF A SETTLEMENT AGREEMENT

33. An advocate shall, prior to initiating judicial proceedings, advise a party to consider mediation.

Duty of an advocate to advise on mediation.

34. (1) A party shall file with the court a mediation certificate, at the time of commencing judicial proceedings, stating that mediation has been considered.

Confirmation that mediation has been considered.

(2) A party entering appearance shall file with the court a mediation certificate, at the time that party enters appearance or acknowledges the claim, stating that mediation has been considered.

(3) An advocate shall file with the court a mediation certificate, at the time of instituting judicial proceedings, stating that the advocate has advised a party to consider mediation.

(4) A court may take into account the fact that a party has considered or participated in mediation when making orders as to costs, case management or such orders as the court may determine.

35. (1) A court before which a dispute is filed or is pending may refer the dispute to mediation at any time before final judgment is made if—

Referral of disputes to mediation by court.

- (a) the dispute is with respect to a mediation agreement;
- (b) the court is of the view that mediation shall facilitate the resolution of the dispute or a part of the dispute; or
- (c) a party to the dispute, with the consent of the other party, apply to the court to have the whole or part of the dispute referred to mediation.

(2) A court shall not refer a dispute to mediation if –

- (a) there is no dispute between the parties;
- (b) there is no dispute between the parties with regard to the matter agreed to be referred to mediation or covered under this Act;
- (c) the mediation agreement is inoperative, incapable of being performed or void;
- (d) previous mediation attempts were made and failed;
- (e) substantial public interest involving constitutional, environmental, or occupational health and safety issues are involved;
- (f) costs are likely be disproportionately high;
- (g) there is a likelihood of delay;
- (h) a binding judicial precedent is required; or
- (i) a party is likely to be prejudiced as a result of power imbalances.

(3) A court shall specify the time within which a report shall be filed with the court.

36. (1) A party may apply to the High Court or the court that referred the dispute to mediation –

Recourse to
judicial
proceedings.

- (a) for an interim measure of protection;
- (b) to challenge jurisdiction of the mediation process;
- (c) to challenge the appointment or impartiality of the mediator;
- (d) to challenge referral of the dispute to mediation; or

- (e) to challenge the settlement agreement if obtained fraudulently or unlawfully.

(2) A decision of the court in respect of a matter under this section shall be final and not be subject to appeal.

37. (1) A referral to mediation under section 35 of this Act shall serve as a stay of proceedings.

Stay of proceedings.

(2) A court before which proceedings are brought in a dispute which is the subject of mediation agreement or pending before mediation process may, if a party so applies not later than the time when that party enters appearance or acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to mediation.

(3) The proceedings before the court shall not be continued after an application under subsection (2) has been made and the matter remains undetermined.

(4) If the court declines to stay judicial proceedings, any provision of the mediation agreement to the effect that a settlement agreement is a condition precedent to the bringing of judicial proceedings in respect of any dispute is of no effect in relation to those proceedings.

38. (1) Where a referral to mediation leads to settlement of a dispute or part of the dispute the settlement shall be –

Recognition and enforcement of a settlement agreement.

- (a) drawn up and filed in court;
- (b) recorded by the court as a judgment of the court; and
- (c) enforced by the court as its judgment.

(2) Where the referral does not lead to a settlement, the court shall continue with the proceedings from the point when the referral was made to mediation.

(3) A settlement agreement, shall be recognized as binding and, upon application in writing to the High Court or the court that referred the matter to mediation, shall be enforced subject to section 39.

(4) Unless the High Court or the court referring the dispute to mediation otherwise orders, a party relying on a

settlement agreement or applying for its enforcement shall furnish —

- (a) the original settlement agreement or a duly certified copy of it; and
- (b) the original report or a duly certified copy of it.

39. The recognition or enforcement of a settlement agreement may be refused if —

Grounds for refusal of recognition or enforcement of a settlement agreement.

- (a) at the request of the party against whom it is invoked, that party furnishes to the High Court or the court referring the dispute to mediation proof that —

- (i) a party to the mediation process was under incapacitated;
- (ii) the settlement agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the settlement agreement was made;
- (iii) the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the reference to mediation, or it contains decisions on issues beyond the scope of the reference to mediation,

provided that if the decisions on issues referred to mediation can be separated from those not so referred, that part of the settlement agreement which contains decisions on issues referred to mediation may be recognised and enforced;

- (iv) the appointment of the mediator or the mediation process was not in accordance with the mediation agreement or this Act or the law of the country where the mediation took place;
- (v) the settlement agreement has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which that settlement agreement was made; or

- (vi) the making of the settlement agreement was induced or affected by fraud, bribery, corruption or undue influence;
- (b) if the High Court or the court finds that—
 - (i) the subject-matter of the dispute is not capable of settlement by mediation under the law of Kenya; or
 - (ii) the recognition or enforcement of the settlement agreement would be contrary to the public policy of Kenya.

PART VI—PROVISIONS ON DELEGATED POWERS

Power of the Attorney-General to make rules and regulations.

40. (1) The Attorney-General may make rules of practice and procedure and regulations generally for the better carrying into effect of any provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the Attorney-General may make rules and regulations to provide for—

- (a) submission and referral of a dispute to mediation;
- (b) appointment of a mediator;
- (c) the conduct of mediation process;
- (d) the forms to be used for submission or referral of a dispute to mediation, filing of a settlement agreement, or any matter to be filed;
- (e) the requirements and the process of application for accreditation or registration of mediators, and related activities;
- (f) training including continuous training for mediators;
- (g) grounds for and the procedure relating to suspension or expulsion a mediator;
- (h) professional conduct and etiquette of members;
- (i) any fee which may be charged for anything done under this Act; and
- (j) any other matters as may be necessary for the promotion of the objects of this Act and the regulation of mediation.

(3) For the purpose of Article 94(6) of the Constitution —

- (a) the purpose and objective of the delegation under this section is to enable the Attorney-General to make Rules and regulations to provide for the better carrying into effect the provisions of this Act
- (b) the authority of the Attorney-General to make Rules and regulations under this Act shall be limited to bringing into effect the provisions of this Act and fulfilment of the objectives specified under this section;
- (c) the principles and standards applicable to the Rules and regulations made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act.

Cap. 2,
No. 23 of 2013.

PART VII—GENERAL PROVISIONS

41. Where the subject matter of mediation involves a dispute to which any limitation period under the Limitations of Actions Act applies, the parties to the mediation process may agree in writing to suspend the running of the limitation period from the date of commencement of the mediation process to the end of the mediation process.

Limitation
periods.

Cap. 22.

42. (1) Unless the parties agree otherwise, the parties shall equally pay mediation expenses including the fees and expenses of—

Mediation
expenses.

- (a) the mediator;
- (b) any administrative assistance received;
- (c) experts called; and
- (d) any expenses incurred in connection with the mediation process and the settlement agreement.

(2) The mediation expenses shall be on the basis of a written agreement entered into between the parties and the mediator at the commencement of the mediation process.

(3) The mediation expenses shall be reasonable and proportionate to the complexity and value of the issue or issues at stake and to the amount of work carried out by the mediator.

43. A mediator—

Offences.

- (a) who facilitates mediation without being accredited or registered by the Committee as required under section 13;
- (b) who is in breach of the prescribed code of conduct;
- (c) who fails to make disclosures contrary to section 19;
- (d) who acts in an impartial manner in resolving disputes contrary to section 24;
- (e) who discloses information submitted in the course of the mediation process to a person who is not a party to the mediation process without the consent of the parties,

commits an offence and shall be liable upon conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding two years or to both.

44. (1) Section 2 of the Civil Procedure Act is amended by deleting the definition of the terms “mediation” and “mediation rules”.

Consequential amendments.

Cap. 21.

(2) Section 59A of the Civil Procedure Act is amended by deleting sub-section (4) and substituting therefor the following new sub-section—

(4) The function of the Mediation Accreditation Committee shall be to oversee the conduct of the court annexed mediation processes.

(3) Section 81(2) of the Civil Procedure Act is amended by deleting paragraph (ff).

(4) Section 5 of the Nairobi Centre for International Arbitration Act, 2013 is amended—

No. 26 of 2013.

(a) by deleting the words “and mediation processes” appearing in paragraph (d) and substituting therefor the words “process”;

(b) by deleting the words “mediators and” appearing in paragraph (m).

45. Any rules of practice and procedure for mediation processes issued before the commencement of this Act

Transitional provisions.

shall, as long as they are not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall, for all intents and purposes be deemed to have been made under this Act.

FIRST SCHEDULE**(s. 10)****CONDUCT OF BUSINESS AND AFFAIRS OF THE COMMITTEE**

1. (1) The Committee shall meet at least once every month to conduct its business. Meetings.

(2) The first meeting of the Committee shall be convened by the Attorney-General and the Committee shall meet subsequently at such a time as it shall determine.

(3) At the first meeting of the Committee, the members of the Committee shall elect the chairperson and the vice-chairperson of the Committee.

(4) Despite the provisions of sub-paragraph (1), the chairperson shall, upon a written request signed by at least five members of the Committee, convene a special meeting of the Committee at any time where it is considered expedient for the transaction of the business of the Committee.

(5) A meeting of the Committee shall be presided over by the chairperson, in the absence of the chairperson, the vice-chairperson and in the absence of both the chairperson and vice-chairperson, by a member elected by the members of the Committee present.

(6) The Committee may invite any person to attend any of its meetings and to participate in its deliberations but such person shall not have a vote in any decision of the Committee.

(7) The proceedings of the Committee shall not be invalidated by reason of a vacancy within its membership.

2. (1) Subject to sub-paragraph (2), the quorum of a meeting of the Committee shall not be less than half of the members. Quorum.

(2) Where there is a vacancy in the Committee, the quorum of the meeting shall not be less than three members.

3. Unless a unanimous decision is reached, a decision on any matter before the Committee shall be by a simple majority of the votes of the members present and voting. Decisions of the Committee.

and in the case of an equality of votes, the chairperson or person presiding over the meeting shall have a casting vote.

4. (1) A member of the Committee who has a direct or indirect personal interest in any matter being considered or to be considered by the Committee shall, upon the relevant facts concerning the matter having come to his or her knowledge, disclose the nature of his interest to the Committee.

Conflict of interest.

(2) A disclosure of interest made by a member of the Committee under sub-paragraph (1) shall be recorded in the minutes of the meeting of the Committee and the member shall not, unless the Committee otherwise determines-

- (a) be present during the deliberation on the matter by the Committee; or
- (b) take part in the decision of the Committee on the matter.

(3) A member of the Committee who makes a disclosure under sub-section (1) shall not-

- (a) be present in the meeting of the Committee held to determine whether or not the member shall take part in the deliberations or decision of the Committee in relation to the matter; or
- (b) influence any other member of the Committee in arriving at a particular decision in relation to the matter.

(4) A member of the Committee who contravenes subparagraph (1) commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand shillings.

5. (1) Subject to the provisions of this Schedule, the Committee may determine its own procedure and the procedure for any committee established under section 11.

Rules of Procedure and minutes.

(2) The Committee shall cause the minutes of all proceedings of its meetings to be recorded and kept, and the minutes of each meeting shall be confirmed by the Committee at the next meeting of the Committee and signed by the chairperson or the person presiding at the meeting.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons of the Bill

The principal object of this Bill is to—

- (a) provide for the settlement of all civil disputes by mediation;
- (b) set out the principles applicable to mediation;
- (c) provide for the establishment of the Mediation Committee; and
- (d) provide for the accreditation or registration of mediators and recognition and enforcement of settlement agreements among other things.

Part I of the Bill contains preliminary provisions which include the short title, interpretation clause, the objects and purpose of the Bill, the application clause and the principles of mediation.

Part II of the Bill provides for the establishment of the Mediation Committee, the functions of the Committee, the appointment of the registrar and staff, the functions of the registrar, the conduct of business and affairs of the Mediation Committee, establishment of sub-committees and grounds upon which a member of the Mediation Committee shall cease to be a member.

Part III of the Bill contains provisions on accreditation or registration of mediators, spells out the grounds for revocation of registration as a mediator, the right to appeal against the decision of the Mediation Committee and the code of conduct for mediators.

Part IV of the Bill contains provisions relating to the mediation process and provides for the use of mediation to resolve disputes, the commencement of the mediation process, the revocation of appointment of a mediator, the mediation agreement, the role of the parties in mediation process, the appointment of a mediator and the role of a mediator among other things.

Part V of the Bill contains provisions on referral of a dispute to mediation, recognition and enforcement of settlement agreement and in particular provides for the duty of an advocate to advise parties to consider mediation, provides for the referral of disputes in court to mediation, provides for recourse to judicial proceedings, stay of proceedings and spell out the grounds for refusal of recognition or enforcement of a settlement agreement.

Part VI of the Bill contains provisions on delegated powers by providing that the Attorney-General may make rules of practice and

procedure and regulations generally for the better carrying into effect of any provisions of the Act.

Part VII of the Bill contains general provisions which include provisions on mediation expenses and on suspension of running of limitation period from the date of commencement of the mediation process.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill delegates legislative powers to the Attorney-General to make Rules of practice and procedure and regulations generally for the better carrying into effect of any provisions of this Act but it does not limit fundamental rights and freedoms.

Statement on whether the Bill concerns county governments

The Bill does not concern county governments in terms of Article 110 of the Constitution.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 24th May, 2020.

ADEN DUALE,
Leader of the Majority.

Section 59A of Cap. 21 which the Bill proposes to amend—

59A. Establishment of Mediation Accreditation Committee

- (1) There shall be a Mediation Accreditation Committee which shall be appointed by the Chief Justice.
- (2) The Mediation Accreditation Committee shall consist of—
 - (a) the chairman of the Rules Committee;
 - (b) one member nominated by the Attorney-General;
 - (c) two members nominated by the Law Society of Kenya; and
 - (d) eight other members nominated by the following bodies respectively—
 - (i) the Chartered Institute of Arbitrators (Kenya Branch);
 - (ii) the Kenya Private Sector Alliance;
 - (iii) the International Commission of Jurists (Kenya Chapter);
 - (iv) the Institute of Certified Public Accountants of Kenya;
 - (v) the Institute of Certified Public Secretaries;
 - (vi) the Kenya Bankers' Association;
 - (vii) the Federation of Kenya Employers, and
 - (viii) the Central Organisation of Trade Unions.

(3) The Chief Justice shall designate a suitable person to be the Mediation Registrar, who shall be responsible for the administration of the affairs of the Committee under this Act.

(4) The functions of the Mediation Accreditation Committee shall be to—

- (a) determine the criteria for the certification of mediators;
- (b) propose rules for the certification of mediators;
- (c) maintain a register of qualified mediators;
- (d) enforce such code of ethics for mediators as may be prescribed; and
- (e) set up appropriate training programmes for mediators.

[Act No. 12 of 2012, Sch.]

Section 81 of Cap. 21 which the Bill proposes to amend—

81. Rules Committee

- (1) There shall be a Rules Committee which shall consist of —
 - (a) the following members appointed by the Chief Justice —

- (i) one judge of the Court of Appeal;
 - (ii) one judge of the High Court;
 - (iii) a judge of the Environment and Land Court;
 - (iv) one judge of the Employment and Labour Relations Court who is a member of the Employment and Labour Relations Court Rules Committee;
 - (v) two Magistrates, one of whom shall be the Secretary to the Committee;
 - (vi) eight advocates nominated by the Law Society of Kenya to represent each of the branches of the Society established under section 24 of the Law Society Act, 2014; and
 - (vii) one representative from the Kenya Law Reform Commission; and
- (b) the Attorney-General or a designated representative.
- (1A) A person shall be qualified to be nominated to the Committee by the Law Society of Kenya if that person —
- (a) has been a member in good standing of the Law Society of Kenya for at least ten years; and
 - (b) holds a current practising certificate at the time of his or her nomination.
- (1B) A person nominated by the Law Society of Kenya under subsection (1) may be nominated more than once to serve on the Committee.
- (1C) The Chief Justice may elect to be a member of the Committee, in which case he or she shall be the Chairperson, but where he elects not to be a member, the Chief Justice shall appoint one of the other members to be the Chairperson.
- (1D) The Committee may co-opt other persons whose knowledge and experience may assist the Committee in the discharge of its functions.
- (1E) The function of the Committee shall be to—
- (a) propose rules not inconsistent with this Act or any other written law to provide for any matters relating to the procedure before courts and tribunals; and
 - (b) advise the Chief Justice on such rules as may be necessary under this section.

(2) In particular, and without prejudice to the generality of the powers conferred by subsection (1), such rules may provide for all or any of the following matters namely—

- (a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service;
- (b) the maintenance and custody, while under attachment, of livestock and other movable property, the fees payable for such maintenance and custody, the sale of such livestock and property, and the proceeds of such sale;
- (c) procedure in suits by way of counterclaim and the valuation of such suits for the purposes of jurisdiction;
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts;
- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person, whether a party to the suit or not;
- (f) summary procedure—
 - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising on a contract express or implied; or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only or on a trust; or
 - (ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined for non-payment of rent, or against persons claiming under such tenant;
- (ff) the selection of mediators and the hearing of matters referred to mediation under this Act.
- (g) procedure by way of originating summons;
- (h) consolidation of suits, appeals and other proceedings;
- (i) delegation to any registrar or other official of the court of any judicial, quasi-judicial and non-judicial duties; and

- (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of civil courts.

(3) The Chief Justice may, in consultation with the Rules Committee, issue practice notes or directions to resolve procedural difficulties arising under this Act, in order to facilitate the attainment of the overriding objective of this Act as specified in section 1A.

Section 5 of No. 26 of 2013 the Bill proposes to amend-

Functions of the Centre

5. The functions of the Centre shall be to—

- (a) promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;
- (b) administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;
- (c) ensure that arbitration is reserved as the dispute resolution process of choice;
- (d) develop rules encompassing conciliation and mediation processes;
- (e) organize international conferences, seminars and training programs for arbitrators and scholars;
- (f) coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation;
- (g) maintain proactive co-operation with other regional and international institutions in areas relevant to achieving the Centre's objectives;
- (h) in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data;
- (i) establish a comprehensive library specializing in arbitration and alternative dispute resolution;
- (j) provide *ad hoc* arbitration by facilitating the parties with necessary technical and administrative assistance at the behest of the parties;

- (k) provide advice and assistance for the enforcement and translation of arbitral awards;
- (l) provide procedural and technical advice to disputants;
- (m) provide training and accreditation for mediators and arbitrators;
- (n) educate the public on arbitration as well as other alternative dispute resolution mechanisms;
- (o) enter into strategic agreements with other regional and international bodies for purposes of securing technical assistance to enable the Centre to achieve its objectives;
- (p) provide facilities for hearing, transcription and other technological services;
- (q) hold, manage and apply the Fund in accordance with the provisions of this Act; and
- (r) perform such other functions as may be conferred on it by this Act or any other written law.

