

# Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies

Kariuki Muigua\*

## 1.0 Introduction

With the enactment of the Constitution in 2010, the dream of realizing access to justice has become more evident than ever before. The constitution creates various avenues for enhancing access to justice in Kenya. There are now several provisions specifically providing for access justice, public participation, ADR and traditional dispute resolution mechanisms and the overhaul of the judicial system.

In this paper the author discusses access to justice and how the same can be enhanced through alternative dispute resolution mechanisms and public participation. The obligation of the different arms of government in the enhancing access to justice through public participation will be examined and the key issues the government has to consider in giving effect to the principle of public participation. The author will also outline opportunities for enhancing access to justice through public participation in the judiciary and ADR and the areas in need of reform in that regard.

## 2.0 Access to Justice and Public Participation

Access to justice in Kenya has been hampered by many factors. Some of these factors are the high court fees, geographical location, complexity of rules and procedure and the use of legalese.<sup>1</sup> The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.' There is also lack of awareness of ADR mechanisms. These reasons make access to justice in Kenya difficult to many people.

However with the constitution of Kenya 2010 access to justice is now a right enshrined therein. Under the constitution the State is obligated to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.<sup>2</sup> The content and scope of this right has been said to be far reaching, infinite and encompasses *inter alia*, the recognition of rights, public awareness, understanding and knowledge of the law, protection of those rights, the equal access to all of judicial mechanisms for such protection; the respectful, fair, impartial and expeditious adjudication

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\*Kariuki Muigua, PhD., LL.M, LLB (Hons) Nairobi, FCIArb, FCPSK, MKIM

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<sup>1</sup>*Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol.III, May, 2002; Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29.

<sup>2</sup> Article 48 of the Constitution of Kenya 2010, *Government Printer*, Nairobi

of claims within the judicial mechanism; easy availability of information pertinent to ones rights; equal right to the protection of one's rights by the legal enforcement agencies; easy entry into the judicial justice system; easy availability of physical legal infrastructure; affordability of the adjudication engagement; cultural appropriateness and conducive environment within the judicial system; timely processing of claims; and timely enforcement of judicial decisions.<sup>3</sup>

Access to justice has further been enhanced by the recognition of public interest litigation in environmental matters which overcomes the limitations on showing *locus standi*. Article 70 (3) of the constitution provides that an applicant who alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened does not have to demonstrate that any person has incurred loss or suffered injury in an application to court. Moreover, Article 159 (2) (c) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by certain principles. These principles are that justice shall be done to all irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); justice shall be administered without undue regard to procedural technicalities; and that the purpose and principles of this Constitution shall be protected and promoted.<sup>4</sup>

It can thus be seen that so as to realize access to justice public participation is essential. Concerning public participation Article 10 (1) and (2) (a) obligates all State Organs, State Officers, public officers and all other persons to apply, among others, the national principle of public participation, when developing policy or enacting a law or in the interpretation of laws and the constitution.

From Article 159 (1) it is clear that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In that role therefore, public participation is essential in enhancing access to justice. Mechanisms that involve the public in decision-making processes have to be used in that regard. ADR mechanisms and traditional dispute resolution mechanisms will increase public participation in resolution of their disputes.<sup>5</sup> Article 35 grants every citizen the right of access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom. It also entitles the citizen the right to the correction or deletion of untrue or misleading information that affects the person and also obligates the State to publish and publicise any important information

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<sup>3</sup> <http://kenyanjurist.blogspot.com/2011/07/kituo-cha-sheria-and-access-to-justice.html>

<sup>4</sup> Article 159 (2) (c) of the Constitution of Kenya 2010, op.cit.

<sup>5</sup> Ibid, Article 11

affecting the nation.<sup>6</sup> It is arguable that the right to access information will be essential in the promotion of public participation in decision-making. This right grants the public the right to access all the information they may need so as to institute a suit and in a way is geared towards enhancing access to justice.

### **3.0 ADR and Access to Justice**

The phrase alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. To some writers however the term '*alternative dispute resolution*' is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true.<sup>7</sup> Article 33 of the Charter of the United Nations outlines these conflict management mechanisms in no unclear terms and is the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they States or individuals. It outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.<sup>8</sup> Some conflict management mechanisms are resolution mechanisms while others are settlement mechanisms. Litigation and arbitration are coercive and thus lead to settlements. They are formal and inflexible. Whereas mediation, negotiation and the traditional dispute resolution mechanisms are resolution mechanisms which mean they are informal, voluntary, allow party autonomy, expeditious and their outcomes are mutually satisfying.

Under article 159 of the Constitution, it is provided that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.<sup>9</sup> The scope for the application of ADR has also been extensively widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These are the key provisions that form the constitutional basis for the application of ADR in dispute resolution in Kenya, whose import is that ADR can apply to all disputes and hence broadening the applicability of ADR

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<sup>6</sup> Ibid, Article 35 (1), (2) and (3).

<sup>7</sup> P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp. 50-52

<sup>8</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>9</sup> Constitution of Kenya 2010, op.cit

and enhancing access to justice. It is also a clear manifestation of the acceptance of ADR as a means of conflict resolution in all disputes.

Alternative dispute resolution mechanisms such as mediation, negotiation and conciliation allow maximum party autonomy and are flexible, informal and leave room for parties to find their own lasting solutions to their problems.<sup>10</sup> For example in environmental conflicts mediation encourages public participation and “environmental democracy” in the management of environmental resources. Conflict management mechanisms such as mediation encourages “win-win” situations, parties find their own solutions, they pursue interests rather than strict legal rights, are informal, flexible and attempts to bring all parties on board.<sup>11</sup> Mediation is democratic and ensures public participation in decision making, especially in matters relating to natural resources management. Public participation is a tenet of sound environmental governance and is envisaged in the constitution. Mediation in the informal context leads to a resolution (court-annexed mediation as envisaged under Section 159A-159D of Cap.21 is a settlement process) and in environmental management it involves parties’ participation in development planning, decision making and project implementation. The parties must be well informed so as to make sound judgements on environmental issues.

As such inclusion of ADR mechanisms as some of the mechanisms to be employed by courts in the exercise of the judicial authority is thus a recognition of the role of public participation towards realizing access to justice in Kenya. This is because ADR mechanisms such as arbitration, mediation and negotiation are predicated on the principles of party autonomy and voluntariness which give the parties wider roles in decision-making and in resolution of their disputes. Alternative dispute resolution, and particularly mediation, is a reflection of customary jurisprudence and under customary law conflict resolution was people driven and a consensual process involving a party, usually an elder, who acted as a mediator. In this way ADR mechanisms have a lot to do with the public participating at the making of decisions affecting them. This is unlike in the formal court process.

As such ADR mechanisms allow public participation in enhancing access to justice as they bring in an element of efficiency, effectiveness, flexibility, cost-effectiveness, autonomy, speed and voluntariness in conflict management. Some like mediation and negotiation are informal and not subject to procedural technicalities as does the court process. They are thus effective to the extent that they will be expeditious and cost-effective compared to litigation.<sup>12</sup>

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<sup>10</sup> P. Fenn, “Introduction to Civil and Commercial Mediation”, op. cit, p.10.

<sup>11</sup> Ibid.

<sup>12</sup> Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

Traditional dispute resolution mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result to mutually satisfying outcomes. They are thus most appropriate in enhancing access to justice as they allow the public to participate in the managing of their conflicts. This way less disputes will get to the courts and this will lead to a reduction of backlog of cases. Traditional dispute resolution mechanisms include informal mediation, negotiation, problem-solving workshop, council of elders, consensus approaches among others. The council of elders is a common institution in almost all communities in Kenya. Some refer to it as the institution of *Wazee*. It is ordinarily the first point of call when any dispute arises in a community and since most Kenyans' lives are closely linked to environmental resources, it is not surprising that most of the issues the elders deal with touch on the environment.<sup>13</sup> In light of Article 159 (2) and in relevant cases the institution of council of elders should be used in resolving certain community disputes such as those involving use and access to natural resources among the pastoral communities in Kenya.

#### **4.0 Challenges and Opportunities for enhancing Access to Justice through Public Participation and ADR**

Before the promulgation of the Constitution of Kenya 2010, it used to be contended that one of the main barriers to accessing justice in Kenya was the lack of awareness and recognition of ADR and traditional dispute resolution mechanisms.<sup>14</sup> Traditional dispute resolution mechanisms are now recognized by the constitution and as such most disputes will be effectively managed using these mechanisms which encourage public participation rather than taking them to court. So as to realize access to justice these mechanisms must be effectively embedded within the justice system. A legal and policy legal structure should be developed to effectively link these mechanisms with the formal court systems. Caution should be taken in linking these mechanisms to the court system to ensure that they are not completely merged with the formal system as is the case with arbitration.

The legal environment has swallowed arbitral practice in Kenya. It has become a court process in which lawyers use court technicalities to derail the process. The same is true of the practice of mediation in Kenya which has become a court process. There is thus a need to create awareness especially among the judicial officers on the effective use of these mechanisms to realize access to justice. Judges, magistrates, lawyers and even the public need to be made aware that ADR mechanisms are effective and that their application will enhance access to justice. They will need training on ADR mechanisms and operationalisation of the same. As such the decisions, negotiated settlements and awards made by ADR practitioners should be given a similar publicity to that given to court

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<sup>13</sup> Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," *IELRC Working Paper 2005-1*, p. 3, available at <http://www.ielrc.org> (accessed on 30/08/2012). p. 8.

<sup>14</sup> Ibid

judgments by the National Council for Law Reporting to promote public confidence in these mechanisms.

A framework should also be formulated providing that before parties file a case in court, they should first exhaust ADR and other traditional dispute resolution mechanisms in appropriate disputes. This way there will be enhanced access to justice as courts will have fewer matters to handle. For instance a boundary dispute should first be looked into at the local level by the elders or recognized council of elders through negotiations and informal mediations before they are brought to court. Mediations conducted in such a forum are distinguishable from court-annexed mediation as envisaged in section 59A-59D of the Civil Procedure Act. Whereas court-annexed mediation is a legal process leading to a settlement, informal mediations result in a resolution because of their flexibility, informality, voluntariness, autonomy and the fact that they foster rather than destroy relationships.

The policy and legal framework on the use of traditional dispute mechanisms should also come up with a criterion for the selection and accreditation of traditional dispute resolution practitioners, their areas of jurisdiction and the types of disputes that they are to handle and community dispute resolution committees. Such dispute resolution committees should take cognizance of the devolved units.

Laws and regulations on the effective implementation of ADR and traditional dispute resolution mechanisms should be developed, designed and entrenched well to ensure public participation and enhance access to justice. They should be well linked with the courts to avoid conflicts. As such mapping ADR mechanisms and all traditional dispute resolution mechanisms should be done to be able to determine the most applicable ones in the circumstances.

Funding from the government and the development partners should be directed towards operationalisation of Article 159 of the constitution and implementation of ADR and traditional dispute resolution mechanisms due to their suitability to enhance access to justice and involve the public in decision-making processes. In this regard guidelines should be developed on the best way forward on working ADR to ensure adequate training of arbitrators and mediators. This could also include accreditation of ADR practitioners to ensure quality control, disciplinary mechanisms and the necessary accreditation of institutions thereof. The Ministry of Justice should also come up with an ADR curriculum for arbitrators, mediators and negotiators locally who shall be involved in conflict management across the 47 counties. In this regard, funding should also be directed towards creating public awareness on the ADR mechanisms and the opportunities they offer in enhancing access to justice and public participation. This does not mean that funding should not be directed towards the setting up of courts in rural areas to address the geographical limitations that hinder access to justice.

The laws contemplated by Article 189 (4) should be well designed and entrenched in the national and county systems to facilitate the expeditious resolution of disputes therein with maximum participation of the public at both levels of government.

## **5.0 Conclusion**

ADR and Traditional dispute resolution mechanisms have been effective in managing conflicts where they have been used. Their relevance in the conflict continuum has been recognized in the constitution. They are mechanisms that enhance access to justice. Some like mediation and negotiation bring about inclusiveness and public participation of all members of the community in decision-making. Their effective implementation as suggested herein and in line with the constitution will be a paradigm shift in the policy on resolution of conflicts towards enhancing access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities.

A comprehensive policy and legal framework to operationalise ADR mechanisms is needed. It should be realized that most of the disputes reaching the courts can be resolved without resort to court if members of the public are involved in decision-making and resolution of their own disputes using ADR and traditional conflict resolution mechanisms. These mechanisms should thus be applied and linked up well with courts and tribunals to promote access to justice and public participation.