Court Annexed ADR in the Kenyan Context

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1.0 Introduction

Court annexed ADR arises where after parties have presented their case to court, the same is referred by the court to one of the ADR mechanisms for resolution.

Prior to the enactment of the Constitution of Kenya 2010, Kenya did not have a comprehensive framework for the application of ADR in the resolution of disputes. Recently, the role of ADR in the expeditious resolution of disputes has been recognized and the gamut of legislation that has been passed hitherto makes specific reference to the use of ADR mechanisms to enhance access to justice and reduce backlogs in courts.

Recognizing ADR as a one of the main conflict resolution mechanisms in Kenya is thus encouraging. The status of ADR has been elevated and its applicability to a wide array of disputes will thus be seen in the near future. In the ensuing discussion I will assess court annexed ADR in light of the current legal framework.

2.0 Constitution

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.[1]

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. It is also a clear manifestation of the acceptance of ADR as a means of conflict resolution in all disputes.

2.1 Civil Procedure Act

There are numerous provisions under the Civil Procedure Act, Cap 21, Laws of Kenya, on the use of ADR in conflict management. In July 2009, Parliament passed a raft of proposals for amendment to the Civil Procedure Act to introduce ADR. There were proposed amendments to sections 1 and 81 of the Civil Procedure Act which have so far been enacted into law.[2] The

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[1] Constitution of Kenya 2010, *Government Printer*, Nairobi

[2] Section 1A (1) and section 81 (2) (ff) of Civil Procedure Act, *Government Printer*, Nairobi.

upshot of these provisions is that, once the necessary practice notes and/or directions are issued, the practice of court-annexed mediation may take off in Kenya.

Section 1A (1) of the Civil Procedure Act provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.[3] In effect, this implies that the court in its interpretation of laws and issuance of orders will ensure that the civil procedure shall, as far as possible, not be used to inflict injustice or delay the proceedings and thus minimize the litigation costs for the parties. This provision can also serve as a basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective.

2.2 Court annexed arbitration

Court-annexed arbitration can arise as a result of the application of the Arbitration Act (As Amended in 2009) and also under supervision of the court under the Civil Procedure Act. Under the Civil Procedure Act, the courts involvement in the arbitral process is specifically provided for in Section 59 and Order 46 of the Civil Procedure Rules, 2010. Section 59 of the Act provides for references of issues to arbitration, which references are to be governed in a manner provided for by the rules. Order 46 rule 1 provides that;

> *"Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference."*

Under Order 46 Rule 2, the arbitrator is to be appointed in a manner that the parties have agreed upon. However, where no arbitrator or umpire (under rule 4) has been appointed the court under rule 5 may, on application by the party who gave the notice to the other to appoint, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration and in such case the court shall proceed with the suit.

Where an award has been made pursuant to arbitration under the Rules, rule 10 requires that that the persons who made it shall sign it, date it and cause it to be filed in court within 14 days together with any depositions and documents which have been taken and proved before them.

A court has the power to modify or correct an award under rule 14 if it is imperfect or contains an obvious error, if a part of the award is upon a matter not referred to arbitration or if it contains a clerical mistake or error from an accidental slip or omission. The court also has power to remit an award for reconsideration by the arbitrator under rule 15. Rule 18 provides that the court shall, upon due notice to the other parties, enter judgment according to the award and upon such that judgment a decree shall follow thereof. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

[3] Section 1A (2) of Civil Procedure Act, op. cit.

Order 46 rule 20 of the Civil Procedure Rules provides that;

> *"Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act."*

Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. Court-annexed ADR will thus go a long way in tackling the problem relating to backlog of cases, enhance access to justice, and result in the expeditious resolution of disputes and lower costs.

Under Order 46 rule 20 (2) it is provided that a court may adopt any ADR mechanism for the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be adeptly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism and that will lead to the attainment of the overriding objective under sections 1A and 1B of the Act.

3.0 Mediation and other ADR

The clamor to introduce court-annexed mediation has borne fruit and is now evident under section 81 (2) (ff) of the Civil Procedure Act, as amended by the Statute Law (Miscellaneous Amendment) Act No. 6 of 2009. Section 81 (2) (ff) provides for the selection of mediators and the hearing of matters referred to mediation under this Act. Thus, parties who have presented their cases to court may have their matter referred to mediation by the court for resolution.

The Statute Law (Miscellaneous Amendments) Act has amended sections 2 and 59 of the Civil Procedure Act to provide for mediation of disputes.[4] Section 2 of the Civil Procedure Act has been amended to define mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings. This definition depicts mediation in the political process but then the context within which mediation is to take place makes the whole process legal.[5]

Section 59 of the Civil Procedure Act has also been amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process. This will involve the establishment of a Mediation Accreditation Committee to be appointed by the Chief Justice which will determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.[6]

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[4] Civil Procedure Act as Amended by The Statute Law (Miscellaneous Amendments) Act No. 12 of 2012, *Government Printer,* Nairobi, 2012, whose date of commencement is 12th July 2012.

[5] Section 2 of the Civil Procedure Act.

[6] Section 59A of the Civil Procedure Act.

The law now requires the court either at the request of the parties, where it deems appropriate to do so or where the law provides so, to refer a dispute presented before it to mediation.[7] Where a dispute is referred to mediation under subsection (1), the parties thereto shall select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee.[8] Such reference is, however, is to be conducted in accordance with the mediation rules.[9] Section 59B (4) provides that an agreement between the parties to a dispute as a result of mediation under this part shall be recorded in writing and registered with the court giving direction under sub section (1), and shall be enforceable as if it were a judgment of that court. No appeal shall lie against an agreement referred to in subsection (4).[10]

Under Section 59C, a suit may be referred to **any other method of dispute resolution** where the parties agree or where the court considers the case suitable for referral.[11] Under Section 59C (2), any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order. Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.[12] No appeal shall lie in respect of any judgment entered under this section.[13] Further, all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court.[14]

Pursuant to Order 46 rule 20 (3) it is only after a court-mandated mediation fails that the court shall set the matter down for hearing and determination.

The aforesaid amendments to the Civil Procedure Act are not, in my view, really introducing mediation *per se,* but merely setting up a legal process where a court can coerce parties to mediate and the outcome of the mediation taken back to court for ratification. These amendments have introduced a mediation process which is formal and annexed to the procedures governing the conduct of cases in the high court. Informal mediation which may not require the use of writing is not provided for. The codification of mediation rules in the Civil Procedure Act merely reflect the concept of mediation as viewed from a westerner's perspective and not in the traditional, political and informal perspective**.**

[7] Section 59B (1) of the Civil Procedure Act

[8] Section 59B (2)

[9] Section 59B (3)

[10] Section 59B (4)

[11] Section 59C (1).

[12] Section 59C (3)

[13] Section 59C(4)

[14] Section 59D of the Civil Procedure Act.

4.0 Challenges and Opportunities

Despite the strides made in coming up with a framework for the use of ADR in Kenya, there still are certain challenges in the effective application of the same to enhance access to justice, reduce backlogs and expedite dispute resolution.

These challenges relate to lack of capacity in terms insufficient personnel who can handle disputes using ADR mechanisms and lack of understanding on the working of some mechanisms such as mediation. Equally, parties may lose their autonomy when ADR is court-mandated; the fundamental quality of mediation, that is, its voluntary nature, is interfered with through the court order calling for mediation; enforcement of mediated agreements entered into with the assistance of unqualified mediators is excluded; the lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to the litigants and there is no provision of taxation of costs even where a mediated agreement is reached.

Mediation in the legal process is temporal and may not deal with the negative elements of the underlying inter-disputant-relationship. Mediation also risks being a court process because even after the parties have negotiated and even reached a solution to the conflict, they nevertheless have to go back to court for enforcement of the mediated agreement. Power imbalances in mediation may cause one party to dominate the process with the result that the outcome largely reflects that party's needs and interest and may also affect the legitimacy of the process itself.

The effective operationalisation of the Arbitration law and court supervised ADR faces challenges as there is an overlap of some provisions. Moreover the public have not been fully made aware of ADR methods of conflict management and their usefulness. Nevertheless, the adoption of ADR may have the effect of lowering the costs of accessing justice as ADR mechanisms are cheaper compared with the court process. Some ADR methods such as negotiation and mediation address underlying psychological dimensions which cannot be addressed in courts and hence where ADR mechanisms are utilized, the dispute may not flare up again.

5.0 Conclusion

There is now in place a comprehensive legal framework governing ADR in Kenya. With the passage of the constitution of Kenya 2010, ADR has now been explicitly recognized by Kenyan law. ADR mechanisms can now be effectively applied in resolving a wide range of commercial disputes, family disputes and natural resource based conflicts, among others thus easing access to justice. It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of rights as enshrined in the constitution must at all times be kept in mind and upheld.

The future of Alternative Dispute Resolution in Kenya is bright and really promising in bringing about a society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements.