

Entrenching Family Mediation in the Law in Kenya

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Abstract

While disputes within family settings are considered a normal occurrence, the law, in many jurisdictions around the world, has always made attempts to provide for specialised procedures and mechanisms aimed at managing such conflicts or disputes in the best ways possible by reducing friction and salvaging future relations where need be. Family mediation is considered to be a viable means of resolving family disputes before and even after divorce, where divorce is the ultimate outcome. Mediation is deemed to have some characteristics that make it suitable in affording the parties involved a forum to discuss and agree on the interests and needs of each party. This paper discusses family mediation in the context of Kenya and how the same can be enhanced through clearer and more effective legal and policy framework to resolve family disputes among Kenyans.

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1. Introduction

Mediation can be defined as a social process in which a third party helps people in conflict understand their situation and decide for themselves what, if anything, to do about it.¹ It has also been defined as a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement. Since mediation is, in essence, a form of “assisted negotiation” it does not have any direct legal basis.² The mediator’s objectives are typically believed to lie in helping the parties search for a mutually acceptable solution to their conflict and to counter tendencies toward competitive win-lose strategies and objectives.³

Notably, mediation has a long history and roots in many cultures.⁴ Mediation comes in many forms, depending on the nature of conflict at hand and the culture within which it is being practised.⁵ Although mediation can be used in dealing with different types of conflicts, this paper

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¹ Della Noce, D.J., Bush, R.A.B. and Folger, J.P., "Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy," *Pepperdine Dispute Resolution Law Journal*, 3, 2002, 39, at 39.

² Bercovitch, J., “Mediation Success or Failure: A Search for the Elusive Criteria”, *Cardozo Journal of Conflict Resolution*, Vol.7, p.289, at p.290.

³ Kressel, Kenneth. "Mediation revisited." *The handbook of conflict resolution: Theory and practice* (2006): "Chapter Thirty-Two", 726-756, at p.726. Available at https://www.researchgate.net/profile/Kenneth_Kressel/publication/232492497_Mediation_revisited/links/550306ca0cf24cee39fd5639.pdf

⁴ Della Noce, D.J., Bush, R.A.B. and Folger, J.P., "Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy," *Pepperdine Dispute Resolution Law Journal*, 3, 2002, 39, at 39.

⁵ There are about four models of mediation that are used in different jurisdictions and subject areas: Facilitative mediation- where the parties are encouraged to negotiate based upon their needs and interests instead of their strict legal rights; Settlement mediation- where parties are encouraged to compromise in order to settle the disputes between them; Transformative mediation- where the parties are encouraged to deal with underlying causes of their problems with a view to repairing their relationship as the basis for settlement; Evaluative mediation- where parties are encouraged to reach settlement according to their rights and entitlements within the anticipated range of court remedies (See Drews, M., ‘The Four Models of Mediation,’ *DIAC Journal- Arbitration in the Middle East*, Vol.3, No. 1(1), 2008, p.44. Available at <http://www.diac.ae/idias/journal/volume3no1/issue1/eng4.pdf>; see also Fenn, P. *Introduction to Civil and Commercial Mediation*, Part 1 (Chartered Institute of Arbitrators), p. 42; See also Alberstein, M., "Forms of Mediation and Law: Cultures of Dispute Resolution," *Ohio State Journal on Dispute Resolution* 22, no. 2 (2007); Goldfien, J.H.,

mainly focuses on the use of mediation in resolving family conflicts, through what is now popularly known as family mediation.

2. Emergence of Family Mediation as a Distinct Area of Practice

Family mediation has been defined as a structured process in which an unbiased mediator enables members of a family in crisis, generally the parents, to speak in a constructive way about their conflict. The goal is to settle the conflict through communication and exchange and discuss how they will continue to parent their children, in order to find solutions that work for all family members that are affected.⁶

Family mediation has emerged as a major conflict management process in many states within the U.S., Australia, Canada, and Scotland. With increasing acceptance, family mediation has broadened to include adoption, child protection, guardianship, juvenile, parent-teen, and probate matters, although divorce mediation remains the predominant practice.⁷ Family mediation is seen as a family-oriented, problem-solving, task completion model that empowers family members to negotiate mutually agreed-on decisions.⁸

In the US, the emergence and growth of family mediation has been attributed to the introduction of no-fault divorce in the 1970s, where family courts and their related professional communities moved steadily, if not swiftly, towards a philosophy that supports collaborative, interdisciplinary, interest based conflict management processes and limited use of traditional litigation.⁹ It has also been observed that divorce mediation arose from widespread, intense dissatisfaction with the negative process and long-term impact of adversarial divorce proceedings on the participants and their children.¹⁰ One of the factors contributing to its growth was the anticipation was that the divorce mediation process, provided by trained, competent mediators, would result in less conflict during and after the divorce process, more parent communication and

and Robbenolt, J.K., "What If the Lawyers Have Their Way-An Empirical Assessment of Conflict Strategies and Attitudes toward Mediation Styles." *Ohio St. J. on Disp. Resol.* 22 (2006): 277.).

⁶ Caratsch, C., *Resolving Family Conflicts: A Guide to International Family Mediation*, (International Social Service, Geneva, 2014), p.6. Available at <http://www.iss-usa.org/uploads/File/Guide%20to%20IFM.pdf>

⁷ Kelly, J.B., 'Issues Facing Family Mediation Field,' *Pepperdine Dispute Resolution Law Journal*, Vol. 1, 2000, pp. 37-44, at p.37.

⁸ Parsons, R.J. & Cox, E.O., 'Family Mediation in Elder Caregiving Decisions: An Empowerment Intervention,' *Social Work*, Vol. 34, No. 2 (March 1989), pp. 122-126, at p.122.

⁹ Salem, P., "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" *Family court review*, 47, no. 3 (2009): 371-388, at 371.

¹⁰ Kelly, J.B., 'Issues Facing Family Mediation Field,' *Pepperdine Dispute Resolution Law Journal*, op cit., , p. 37.

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cooperation post-divorce, and significantly greater client satisfaction with both the process as well as the outcome. Further, it was expected that the negotiated outcomes would not disadvantage either party as compared to the outcomes of couples using the traditional adversarial divorce process.¹¹

Mediation of family disputes is lauded as a tool for promotion of family self-determination, where scholars have argued that ‘if parents are able to participate in mediation, they will be better able to fully explore options, truly hear one another, and ultimately be empowered to make their own decisions that determine their own future. Because parents know the most about their children and their own living situation, their decisions will integrate the needs of all family members better than determinations imposed by judges (perhaps based on the recommendation of another third party, a custody evaluator) or distributive negotiations orchestrated by lawyers.’¹² Furthermore, ‘having fully participated in the process, the parents will experience a greater sense of ownership and satisfaction with the outcomes. Because the agreements they make will reflect the parents’ actual needs and interests, they will, therefore, be more enduring.’¹³

In addition, it has been observed that through reports based on multiple mediation studies, clients indicated they felt heard, respected, and given a chance to say what they felt was important. They also indicated they were not pressured to reach agreements, were helped to work together as parents, and felt that their agreements would be good for children. Moreover, “. . . parents using a more extended mediation process experience a decrease in conflict during divorce. . . are more cooperative and supportive of each other as parents and communicate more regarding their children”.¹⁴

Despite the foregoing perceived advantages, family mediation is however not seen as the panacea for management of all types of family based disputes. For instance, advocates for battered women and feminist scholars have argued that mediation is inherently unfair and may be dangerous for victims of domestic violence and that their participation should not be required.¹⁵

¹¹ Ibid, p.38.

¹² Salem, P., "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" Op cit., at 375.

¹³ Salem, P., "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" Op cit., at 375.

¹⁴ Salem, P., "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" Op cit., at 375.

¹⁵ Salem, P., "The emergence of triage in family court services: the beginning of the end for mandatory mediation?" Op cit., at 372.

The scope of this paper may not allow for a discussion on the philosophical arguments for and against family mediation, and thus, the author dwells on the already identified advantages of using mediation to resolve family disputes. This section has focused on the development of family mediation in other parts of the world. The next section looks at the development and use of family mediation in Kenya.

3. Development and Current Status of Family Mediation in Kenya

Under the Constitution of Kenya 2010, family is treated as the natural and fundamental unit of society and the necessary basis of social order and entitled to enjoy the recognition and protection of the State.¹⁶ Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.¹⁷

Compulsory mediation pilot scheme introduced in Kenya in April 2016 on a pilot program for one year was to run initially in the Commercial and Family Divisions of the High Court in Nairobi. The compulsory mediation scheme is meant to decongest the courts and hopefully encourage members of the public to pursue alternative dispute resolution.¹⁸ As at May 2018, the same has been extended to court stations outside Nairobi.

It is noteworthy that while family mediation in many jurisdictions has been used in a wide range of issues including in separation and divorce actions, the Kenyan family laws only contemplate the use of mediation as a reconciliatory process during the subsistence of marriages and not during the dissolution of marriages.

¹⁶ Art. 45(1), Constitution of Kenya 2010.

¹⁷ Art. 45(3), Constitution of Kenya 2010.

¹⁸ Judge Lee G. Muthoga, "Family Mediation and Court Annexed Mediation," Presented by at Sarova Panafric Hotel on 10th September 2015 at 2:00pm, p. 39. Available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0ahUKEwjv54_HmJjWAhUKvBQKHZVJBtMQFghAMAQ&url=https%3A%2F%2Fwww.icpsk.com%2Fseminar-presentations%2Ffinish%2F10-seminar-presentations%2F939-alternative-dispute-resolution-seminar-2015-family-mediation-court-annexed-mediation-judge-lee-g-muthoga&usq=AFQjCNGWdkV11iusKOSxnIrm7YDAvkxFA

a. Mediation of disputes in Christian marriages

The parties to a marriage celebrated under Part III (Christian Marriages) may seek the services of any reconciliation bodies established for that purpose that may exist in the public place of worship where the marriage was celebrated.¹⁹

b. Mediation of disputes in customary marriages

The parties to marriage celebrated under Part V (Customary Marriages) may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of the marriage.²⁰

c. Mediation of disputes in customary marriages

The process of mediation or traditional conflict resolution in subsection (1) shall conform to the principles of the Constitution.²¹ The person who takes the parties to a marriage celebrated under Part V through the process of conciliation or traditional dispute resolution shall prepare a report of the process for the court.²²

In other jurisdictions, ‘marital reconciliation is encouraged if feasible, but an equally important objective is to help the couple negotiate a workable divorce settlement’.²³ However, mediation is limited to the settlement of child custody and visitation disputes and the justification is that, firstly, divorce does not change parental status or responsibility and secondly, the best interests of children, parents, and society are served by keeping hostilities to a minimum.²⁴ It is therefore important to employ mediation in such matters in Kenya on a larger scale than it may currently be the case.

The foregoing provisions on the use of family mediation in Kenya are a good pointer on the deficiency of the use of family mediation in Kenya. Notably, some of the foregoing provisions generally point to reconciliation and not specifically mediation. There are no clear guidelines on the use of mediation and there are no clear directions on the point at which parties may seek the

¹⁹ Marriage Act, No. 4 of 2014, Laws of Kenya, sec. 64.

²⁰ Marriage Act, 2014, sec. 68(1).

²¹ Marriage Act, 2014, sec. 68(2).

²² Marriage Act, 2014, sec. 68(3).

²³ Bahr, S.J., ‘An Evaluation of Court Mediation: A Comparison in Divorce Cases with Children,’ op cit., p.42.

²⁴ Bahr, S.J., ‘An Evaluation of Court Mediation: A Comparison in Divorce Cases with Children,’ op cit., pp.42-43; Coogles, O.J., *Structured Mediation in Divorce Settlement - A Handbook for Marital Mediators*, (Lexington, Mass, Lexington Books, 1978). Available at <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=92977> [Accessed on 12/09/2017].

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services of a mediator, especially in instances where they have already filed a case in court. Even where the law requires evidence of attempted reconciliation as a prerequisite for filing divorce matters in courts, there is lacking a framework on the possible use of divorce mediation within the Kenyan family law framework, which would allow parties to negotiate, even if with the help of their lawyers, on the important yet contentious issues such as child support. The law as it is, currently, only allows parties and court to use evidence of attempted reconciliation to decide if the marriage has irretrievably broken down for purposes of granting divorce, with little or no regard for the post-divorce phase of the relationship. The other issues that emerge at this stage are also subjected to the adversarial processes of the court. Parties contend on almost everything, and the ‘winner’ takes it all. It is noteworthy that some of these relationships should not be allowed to have win-lose situations, as they do now, and the use of mediation pre and post-divorce to address some of the emerging issues such as parenting disputes can help achieve better results. It has been pointed out that while family mediation is not a substitute for the need for family members to obtain independent legal advice or counseling or therapy, nor is it appropriate for all families, family mediation is a valuable option for many families because it can: increase the self-determination of participants and their ability to communicate; promote the best interests of children; and reduce the economic and emotional costs associated with the resolution of family disputes.²⁵

4. Making Family Mediation Work for the Kenyan Families

Article 45(1) of the Constitution of Kenya 2010 recognises family as the natural and fundamental unit of society and the necessary basis of social order and guarantees that it should enjoy the recognition and protection of the State. In addition to this, Article 45(3) also guarantees that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. These provisions, while acknowledging the importance of family and marriages, and the parties therein, fail to acknowledge the other interested parties such as children. Marriages cannot be treated as any other contract between two people, and thus, special conflict management processes such as family mediation can help in a great way to not only acknowledge this fact but also take care of all the involved parties and their interests.

²⁵ [The Association of Family and Conciliation Courts](https://www.mediate.com/articles/afecstds.cfm), “Model Standards of Practice for Family and Divorce Mediation,” available at <https://www.mediate.com/articles/afecstds.cfm>

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With the increased acceptance and formalization of mediation in Kenya, it is hoped that family mediation will take root in Kenya, based on the many advantages of mediation as discussed in this paper, to an extent of being effectively used in the other areas of family disputes such as divorce, custody matters and matrimonial property division. While it is currently envisaged as a mechanism to be used for marital reconciliation before filing of divorce, it should also be given a chance to salvage relationships through divorce mediation where possible, especially in cases of children custody.

Family mediation has the ability to assist parties to cooperate in post-divorce adjustment, especially where children are involved, due to its many advantages over court process.²⁶ This is especially true in light of the fact that the conventionally, divorce process as currently conducted continues to be structured as a contest between two opponents.²⁷ There is, however, a need for paradigm shift in a number of areas, as discussed herein below by way of possible recommendations.

4.1 Standards of Practice and Skills in Family Mediation

In order to boost effectiveness of family and divorce mediation, it is deemed important for the mediators who wish to specialise in this area to continually acquire skills that are specific to family mediation considering that it is a critical area with possibly more interests at stake compared to the other areas of mediation practice. Caution should especially be taken when dealing with gender issues, the poor and disadvantaged, due to power imbalance. It is a common feature in most marriages to have the man wielding more financial power and this may adversely affect the woman's rights where they are forced to enter into not necessarily favourable compromise through undue influence by the mediator and the man in the dispute.²⁸ This is more likely to happen in unions involving young children and the mediator should thus be conscious of this eventuality.

Notably, family mediation is not a preserve of the lawyers. Other professionals such as Social workers, psychologists and marriage counselors, among others also act as family mediators

²⁶ See generally, Bahr, S.J., 'An Evaluation of Court Mediation: A Comparison in Divorce Cases with Children,' *Journal of Family Issues*, Vol. 2, No.1, March 1981, pp. 39-60.

²⁷ *Ibid*, p. 41.

²⁸ See generally, Noone, M.A., 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance,' *Monash University Law Review*, Vol. 37, No. 1, pp.57-80.

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after acquiring relevant training in the area.²⁹ There are multiple paths to competence as a family mediator. The individual's life skills, knowledge, professional experience working with families, specific training in family mediation, peer consultation, and continuing education all contribute to mediator competence.³⁰

Cross-disciplinary training and knowledge is therefore critical for providing effective family mediation. Practitioners need to retain and reshape the skill, experience, and knowledge of their own professional discipline, while simultaneously integrating new theoretical frameworks, information, and practices which are more specific to providing effective mediation. Thus, for example, family lawyers, more accustomed to giving advice to an individual client and representing only that client's interests, must shift to a different framework which enables two disputing individuals to work together to find their own acceptable solutions without undue influence from the mediator. Further, family lawyers need to develop excellent communication skills starting with the use of neutral language, attentive listening, and the expression of empathy to effective framing of issues.³¹

Some scholars have argued that family mediators should be trained because; (1) this mediation involves new and generally unfamiliar conflict management procedures, and (2) the probability that the parties will reach successful settlement of issues increases as the framing and experience of the mediator increase, and, (3) training provides quality control and regulation of persons entering the profession.³² While some support the training of professionals already engaged in helping families, such as attorneys, social workers, and therapists, others feel that training should be open to anyone interested in learning about family dispute resolution.³³ Such training, it is argued, should include substantive information, negotiation and mediation procedures and skills, conciliation procedures and skills, and ethics.³⁴

²⁹ Severson, M.M. & Bankston, T.V., 'Social Work and the Pursuit of Justice through Mediation,' *Social Work*, Vol. 40, No. 5 (September 1995), pp. 683-691, at p. 688; See also Haynes, J.M., "A conceptual model of the process of family mediation: Implications for training," *The American Journal of Family Therapy*, Vol. 10, No.4, 2007, pp.5-16.

³⁰ Kelly, J.B., 'Issues Facing Family Mediation Field,' *Pepperdine Dispute Resolution Law Journal*, Vol. 1, 2000, pp. 37-44, at p.39.

³¹ Kelly, J.B., 'Issues Facing Family Mediation Field,' op cit., at p.39.

³² Moore, C. W., 'Training mediators for family dispute resolution,' *Mediation Quarterly*, No.2, 1983, pp.79-89.

³³ Moore, C. W., 'Training mediators for family dispute resolution,' op cit.; See also generally, Neilson, L.C., "Mediators' and lawyers' perceptions of education and training in family mediation," *Conflict Resolution Quarterly*, Vol.12, No. 2, 1994, pp.165-184.

³⁴ Moore, C. W., 'Training mediators for family dispute resolution,' op cit.

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It has been suggested that the particular components of family mediation training that are especially important in achieving competence include: communication theories and techniques, conflict theory, research, management, theories of power, empowerment techniques, an exploration of differences in mediation models and their underlying assumptions, and what practices stem from these rationales.³⁵ These components are considered important in enhancing the mediator's ability to relate effectively and impartially with the parties, to initiate and maintain a respectful process, and to understand what is happening and how to react in these often highly charged emotional situations.³⁶

5. Conclusion

While conflicts within family settings cannot be avoided, there is a need to effectively manage them so as to ensure harmony amongst people and to prevent violence and the potential loss of lives and property.

It has been suggested that mediation is better able to deliver authentic access to justice when it builds upon traditional dispute resolution systems and is adopted and promoted as a consensual process.³⁷

ADR and Traditional dispute resolution mechanisms, especially negotiation and mediation, have been effective in managing conflicts where they have been used. Their relevance has been recognized in the constitution.³⁸ They are mechanisms that enhance Access to Justice. Their effective implementation and in line with the constitution will bring about a paradigm shift in the policy on resolution of conflicts towards enhancing access to justice and the expeditious resolution of conflicts without undue regard to procedural technicalities.³⁹ This paper has highlighted the use of family mediation to address family conflicts. Conducted within the bounds of acceptable standards of professionalism and other acceptable values, family mediation is capable of enhancing access to justice when dealing with family conflicts in Kenya.

³⁵ Kelly, J.B., 'Issues Facing the Family Mediation Field,' *Pepperdine Dispute Resolution Law Journal*, Vol.1, No. 1, 2000, pp.37-44, at p.40.

³⁶ *Ibid*, p.40.

³⁷ Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' *Harvard Negotiation Law Review*, Vol. 21, 59, Fall 2015, pp. 59-106, p. 65.

³⁸ See Art. 159.

³⁹ Constitution of Kenya, Art. 159(2).

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