

Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya

By Kariuki Muigua

Abstract: *This paper explores the possibility of efficiently accessing justice through alternative dispute resolution mechanisms. Access to justice is now well entrenched in the current constitution of Kenya 2010 (hereinafter the constitution) as one of its fundamental pillars.*

Access to justice by majority of citizenry has been hampered by many unfavourable factors which are inter alia, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow. Alternative Dispute Resolution (ADR) is used to refer to the management of disputes without resorting to litigation.

ADR has the potential to ensure access to justice for the Kenyan people. This potential should be exploited. ADR mechanisms such as negotiation, conciliation and mediation bear certain attributes that can be tapped and lead to justice and fairness. These attributes include party autonomy, flexibility of the process, non-complex procedures and low cost.

The author argues that where they have been used in managing disputes they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective and thus facilitate access to justice by a larger part of the population.

This paper starts with a brief background and then proceeds to examine the effect of Article 159 of the Constitution, the range of alternative dispute resolution mechanisms, implementation of alternative dispute resolution mechanisms, the challenges and opportunities and ends with a short conclusion.

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1.0 Introduction

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Access to justice by majority of citizenry has been hampered by many unfavourable factors which are *inter alia*, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow.² Alternative Dispute Resolution (ADR) is used to refer to the management of disputes without resorting to litigation.

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This paper explores the possibility of efficiently accessing justice through alternative dispute resolution mechanisms. The author argues that where they have been used in managing disputes they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective and thus facilitate access to justice by a larger part of the population.

This paper starts with a brief background and then proceeds to examine the effect of Article 159 of the Constitution, the range of alternative dispute resolution mechanisms, implementation of alternative dispute resolution mechanisms, the challenges and opportunities and ends with a short conclusion.

*FCI Arb, PhD (Nrb), LL.B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); MKIM; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Lecturer at the Center for Advanced Studies in Environmental Law & Policy (CASELAP), University of Nairobi and the Chairperson CI Arb (Kenya Branch).

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¹Articles 19, 22, 48, 159, *Constitution of Kenya*, 2010, Government Printer, Nairobi

²Jackton 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

³*What is Alternative Dispute Resolution (ADR)? - African Mediation And Community Service*, Available at <http://www.metros.ca/amcs/international.htm> Accessed on 27th April, 2013; See also Kariuki Muigua, *Reflections on ADR and Environmental Justice in Kenya*, page 1,

Available at <http://www.chuitech.com/kmco/attachments/article/97/Reflections.pdf>

1.1 Background

Before the advent of the current Constitution of Kenya 2010, justice was perceived to be a privilege reserved for a select few who had the financial ability to seek the services of the formal institutions of justice. This is because in the past litigation has been the major conflict management channel widely recognised under our laws as a means to accessing justice.

Litigation however did not and still does not guarantee fair administration of justice due to a number of factors. Courts in Kenya and even elsewhere in the world have encountered a number of problems related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.⁴

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.⁵ Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world.⁶ Litigation should however not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious. Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).⁷ However, there are also many shortcomings associated with litigation so that it should not be the only means of access to justice. Some of these have been highlighted above. Litigation is not a process of solving problems; it is a process of winning arguments.⁸

⁴ *Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th & 9th March, 2012.

Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>

⁵ Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op cit

⁶ Ibid, page 7; See also Patricia Kameri Mbote et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at <http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011> Accessed on 27th April, 2013

⁷ Chartered Institute of Arbitrators, *Litigation: Dispute Resolution*, Available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation> Accessed on 27th April, 2013

⁸ Advantages & Disadvantages of Traditional Adversarial Litigation, Available at <http://www.beckerlegalgroup.com/a-d-traditional-litigation> Accessed on 27th April, 2013

As recognition of the above challenges associated with litigation, the Constitution under article 159 now provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms shall be promoted as long as that they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.⁹

Globally, the role of alternative dispute resolution mechanisms in the management of a range of conflicts has been noted over time.¹⁰ Courts can only deal with a fraction of all the disputes that take place in society. Courts have had to deal with an overwhelming number of cases and as one author notes ‘one reason the courts have become overburdened is that parties are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity’.¹¹

Regionally most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.¹²

Another author confirms that access to justice has always been one of the fundamental pillars of many African societies. He notes that ‘Igbo justice is practised in land matters, inheritance issues, socio-communal development strategies, interpersonal relationships and sundry avenues’.¹³

⁹ Article 159(3)

¹⁰ Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, page 2. Available at <http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf>; See also Sunday E. N. Ebye, The relevance of arbitration in international relations, *Basic Research Journal of Social and Political Sciences* Vol. 1(3) pp. 51-56, November 2012 Available at <http://www.basicresearchjournals.org> Accessed on 15th April, 2013

¹¹ Marc Galanter, ‘Reading the Landscape of Disputes: What We Know and Don’t Know (And Think We Know) About Our Allegedly Contentious and Litigious Society’, page 2, 31 *UCLA L. Review*. 4, October 1983, Available at <http://www.marcgalanter.net/Documents/papers/ReadingtheLandscapeofDisputes.pdf> Accessed on 23rd April, 2013

¹² Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualised Paradigm for Examining Conflict in Africa*, Available at www.payson.tulane.edu,

¹³ Ikenga K. E. Oraegbunam, The Principles and Practice of Justice in Traditional Igbo Jurisprudence, *African Journal Online*, page 53, Available at <http://www.ajol.info/index.php/og/article/download/52335/40960> Accessed on 26th April, 2013

Thus, the recognition given to traditional dispute resolution mechanisms in the said Article 159 (2) (c) of the Constitution is thus a restatement of customary jurisprudence.¹⁴

Under our constitution, there however exists a qualification for the application of Traditional Dispute Resolution mechanisms in that they must not be applied in a way that contravenes the Bill of Rights. For instance, they must not lead to outcomes that are gender-biased or act as barriers to accessing justice. They must also not be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality.¹⁵

Justice and morality are however not defined in the Constitution and therefore it would be difficult to ascertain when a mechanism is repugnant to justice and morality. Alternative and Traditional dispute resolution mechanisms must also not be used in a way that is inconsistent with the constitution or any written law.¹⁶

If ADR mechanisms could be applied in a way that conforms to International Human Rights standards they can play a major role in the management of disputes. ADR mechanisms focus on the interests and needs of the parties to the conflict as opposed to positions, which approach is contrary to the formal common law and statutory law practices.¹⁷ These are capable of ensuring that justice is done to all by addressing the concerns of the poor and vulnerable in the society through legally recognized but more effective means.

1.2 Constitution of Kenya, 2010 and Access to justice

Article 22(1) of the constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 22(3) further provides that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy amongst others the criteria that:

¹⁴ Ibid

¹⁵ Article 159(3) of the Constitution, 2010

¹⁶ Repugnancy and morality qualification clauses were seen as obstacles put in place by the British colonial Law makers to undermine the legitimacy of the African customary laws. See also s. 3(2), *Judicature Act*, Cap 8, Laws of Kenya. Though there are certain aspects of customary laws that do not conform to human rights standards, the subjection of customary laws to the repugnancy clause has been used by courts to undermine the efficacy of these laws. See Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. page 5

¹⁷ See Roger Fisher, William Ury & Bruce Patton, *Getting to Yes-Negotiating Agreement Without Giving in*, (3rd Ed. (Penguin Books, United States of America, 2011) p.42

- a. formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; and
- b. The court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.¹⁸

Clause (4) provides that the absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court. Article 48 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.¹⁹

Article 159(1) echoes the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also reflects the spirit of Article 27 (1) which provides that “*every person is equal before the law and has the right to equal protection and equal benefit of the law*”.

For this constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies*.²⁰

Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.²¹

It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation. Most of these mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the Constitution under Article 11.²²

¹⁸ Article 22(3) (b)(d) *Constitution of Kenya, 2010*

¹⁹ *Ibid.*, Article 159(2) (d)

²⁰ See Maiese, Michelle. “*Principles of Justice and Fairness*,” *Beyond Intractability*, (Eds.) Guy Burgess and Heidi Burgess, Conflict Information Consortium, University of Colorado, Boulder (July 2003) Op cit

²¹ Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, op. cit. page 6

²² *Ibid*

In a report on access to justice in Malawi, the authors rightly note that ‘access to justice does not mean merely access to the institutions, but also means access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values that are in conformity to constitutional values and directives’.²³ If the foregoing is anything to go by, then litigation scores poorly especially in terms of access to fair procedures and affordability.

On the contrary, ADR mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.²⁴ The net benefit to the court system would be a lower case load as the courts’ attention would be focused on more serious matters which warrant the attention of the court and the resources of the State.²⁵ Case backlog is arguably one of the indicators used to assess the quality of a country’s judicial system.²⁶

All the methods that are employed to address conflicts are either “resolving” or “settling” in nature. It is important that we look at each of the concepts closely to decide which of the two approaches is best suited in ensuring an efficient access to justice.

1.3 Resolution and Settlement²⁷

ADR mechanisms seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement. Settlement implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing, the process

²³ Wilfried Schärf, et al., *Access to Justice for the Poor of Malawi? An Appraisal Of Access To Justice Provided To The Poor Of Malawi By The Lower Subordinate Courts And The Customary Justice Forums*, page 4, Available at <http://www.gsdrc.org/docs/open/SSAJ99.pdf> Accessed on 20 April, 2013

²⁴ See Shantam Singh Khadka, et al., *Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs in Nepal*, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights And Justice Initiative, Available at <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-SettlementFair> Accessed on 20th April, 2013

²⁵ Ibid

²⁶ Alicia Nicholls, *Alternative Dispute Resolution: A viable solution for reducing Barbados’ case backlog?* , page 1, Available at <http://www.adrbarbados.org/docs/ADR%Nicholls> Accessed on 22nd April, 2013

²⁷ Kariuki Muigua, *Resolving Conflicts Through Mediation in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012), Chapter six, pp79- 88

becomes a contest of whose power will be dominant.²⁸ It has been observed that a settlement is an agreement over the issue(s) of the conflict which often involves a compromise.²⁹

Settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes. Consequently, the causes of the conflict in settlement mechanisms remain unaddressed resulting to conflicts in future.³⁰ Examples of such mechanisms are litigation and arbitration.

In litigation the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. ADR mechanisms are thus better suited to resolve disputes where relationships matter.

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.³¹

A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.³² Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings.³³ Resolution is usually preferred to settlement for its effectiveness in addressing the root causes of the conflict and negates the need for future conflict or conflict management.³⁴

Furthermore, resolution is arguably more effective in facilitating realization of justice than settlement. This is tied to the fact that in resolution focus is more on addressing the problem than the

²⁸ Ibid, page 80

²⁹ David Bloomfield, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research*, vol. 32 no. 2 May 1995 151-164, Available at <http://jpr.sagepub.com/content/32/2/151.short> Accessed on 18th April, 2013

³⁰ Kariuki Muigua, *Resolving Conflicts through Mediation in Kenya*, *Op cit.*, Page 81

³¹ Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> Accessed on 26th April, 2013; See also Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, *Op cit.* page 7

³² Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42; See generally David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *op. cit.*, p. 153.

³³ J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289,p.296

³⁴ Ibid

power equality or otherwise. This ensures that a party's guarantee to getting justice is not tied to their bargaining power. ADR mechanisms that are directed at dispute resolution should therefore be encouraged.

1.4 Alternative Dispute Resolution Mechanisms

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.³⁵

At an international level, the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they states or individuals is Article 33 of the Charter of the United Nations³⁶ which outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.³⁷ 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.*³⁸ ADR in this era of the 21st Century seeks to find domestically and internationally, a faster, economical and more efficient system that contrasts with litigation which is time consuming and expensive. Concerned about efficiency of national court system in cross border disputes, foreign investors normally prefer mediation or arbitration. Dispute settlement through Arbitration/ADR is not only domestic but also an increasingly growing international phenomenon in the context of cross border transactions.³⁹

The scope for the application of ADR has been broadly 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 key provisions form the constitutional basis for the application of ADR mechanisms in Kenya; their import is that ADR can apply to all disputes and hence broadening

³⁵ Kariuki Muigua, "Alternative Dispute Resolution and Article 159 of the Constitution of Kenya" Op cit. page 2; See also Alternative Dispute Resolution, Available at http://www.law.cornell.edu/wex/alternative_dispute_resolution Accessed on 23rd April, 2013

³⁶ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> Accessed on 17th April 2013

³⁷ See generally Eunice R. Oddiri, *Alternative Dispute Resolution*, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at <http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm> Accessed on 17 April, 2013; See 'The Role of Private International Law and Alternative Dispute Resolution', Available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html Accessed on 17th April, 2013

³⁸ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

³⁹ Surrige & Beecheno, *Arbitration/ADR Versus Litigation*, September 4, 2006, Available at http://www.hg.org/articles/article_1530.html Accessed on 23rd April, 2013

the applicability of ADR. It is also a clear manifestation of the acceptance of ADR as a means of conflict management in all disputes.⁴⁰

These mechanisms can effectively be applied in resolving a wide range of commercial disputes, family disputes and natural resource based conflicts, amongst others thus easing access to justice.⁴¹

The Ireland Law Reform Commission identifies what they call the main principles of ADR as follows: Voluntariness of the Principle; Confidentiality of the proceedings and outcome; Self-determination/party autonomy; Party empowerment; Neutrality and impartiality of facilitating third parties; Quality and transparency of the Procedure; Efficiency-Cost, time; and Flexibility-Procedural, outcome.⁴²

The above principles generally apply almost equally to most if not all ADR mechanisms as it will be seen in the following discussion below. Each of the major alternative dispute resolution mechanisms are explored here below.

1.4.1 Negotiation

In negotiation, parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. The parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. Negotiation is thus voluntary. It allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties the room to come up with creative solutions.

The Ireland Law Reform Commission in their consultation paper on ADR explores the four fundamental principles of what they call principled negotiation: Firstly, Separating the people from the problem; Secondly, Focusing on interests, not positions; Thirdly, Inventing options for mutual gain; and finally, insisting on objective criteria.⁴³

As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests. Consequently whatever outcome

⁴⁰ Kariuki Muigua, “*Court Annexed ADR in the Kenyan Context*” page 1. Available at <http://www.chuitech.com/kmco/attachments/article/106/Court%20Annexed%20ADR.pdf>

⁴¹ See generally, Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Available at <http://www.lawreform.ie/fileupload/consultation%20papers/cpADR.pdf> Accessed on 18th April, 2013

⁴² Ibid

⁴³ Roger Fisher et al., *Getting to Yes-Negotiating Agreement Without Giving in* Op cit., p. 42; See also Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008 Op cit., page 43

is arrived at in negotiation it is one that satisfies both parties and addresses the root causes of the conflict and that is why negotiation is a conflict resolution mechanism.⁴⁴

It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.⁴⁵

It may be argued that negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.⁴⁶ In appropriate cases courts should be at the forefront in encouraging parties to negotiate so as to come up with mutually acceptable solution and allow for the expeditious resolution of their dispute. This ensures that parties obtain justice without losing other important aspects of their lives like relationships be they business or personal.

Where parties in a negotiation hit a deadlock in their talks, a third party is called in to help them continue negotiating. This process is called mediation. Mediation has been defined as a continuation of the negotiation process by other means where instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties.⁴⁷

1.4.2 Mediation

Mediation is defined as "the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute." Within this

⁴⁴ Ibid

⁴⁵ Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?', Document No.4, December 1994, Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm accessed on 27th April, 2013; See also Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. page 2

⁴⁶ Attorney General's Office, Ministry of Justice, *The Dispute Resolution Commitment-Guidance For Government Departments And Agencies*, May, 2011, Available at <http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf> Accessed on 27th April, 2013; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, page 8, Available at <http://www.chuitech.com/kmco/attachments/article/101/pdf>

⁴⁷ Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), Op cit. pp. 115-116.

definition mediators may play a number of different roles, and may enter conflicts at a variety of different levels of development or intensity.⁴⁸

It is one of the dispute resolution mechanisms known as alternative dispute resolution (ADR), as opposed to the legal mechanisms, such as litigation and arbitration.

The salient features of mediation are that it emphasizes interests rather than (legal) rights and it is cost - effective, informal, private, flexible and easily accessible to parties to conflicts. An example of the use of mediation informally to resolve conflicts is the peace committees in Northern Kenya among the Pastoralist communities.⁴⁹

1.4.3 Conciliation

This process is similar to mediation except for the fact that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation works best in trade disputes. For instance, Section 10 of *the Labour Relations Act*,⁵⁰ provides that if there is a dispute about the interpretation or application of any provision of Part II of the Act dealing with freedom of association, any party to the dispute may refer the dispute in writing—

- a) to the Minister to appoint a conciliator as specified in Part VIII of the Act; or
- b) If the dispute is not resolved at conciliation, to the Industrial Court for adjudication.

Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power

⁴⁸ Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004). Summary written by Tanya Glaser, Conflict Research Consortium, Available at <http://books.google.com/books/about/The_Mediation_Process.html?id=8hKfQgAACAAJ> Accessed on 17 April, 2013

⁴⁹ Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. page 7; The use of Mediation is envisaged by statute, s. 59A & B of the *Civil Procedure Act*, Cap 21, Laws of Kenya.

⁵⁰ No. 14 of 2007, Laws of Kenya

to impose a settlement.⁵¹ This is a reflection of the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.⁵²

1.4.4 Arbitration

Arbitration is a dispute settlement mechanism. Arbitration arises where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.

The *Arbitration Act*, 1995 defines arbitration to mean —*any arbitration whether or not administered by a permanent arbitral institution*. This definition is not an elaborate one and hence regard has to be had to other sources. Arbitration has also been described as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.⁵³

Lord Justice Raymond defined who is an arbitrator some 250 years ago and which definition is still considered valid today, in the following terms:

An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have arbitrary power; for if they observe the submission and keep within their due bonds, their sentences are definite from which there lies no appeal.⁵⁴

An arbitrator is also defined as a legal arbitrator; a person appointed by two parties to settle a conflict, arbitrate, and decide by arbitration, judge between two parties to a conflict (usually at the request of the two parties).

Arbitration in Kenya is governed by the *Arbitration Act*, 1995 as amended in 2009, the Arbitration Rules, the *Civil Procedure Act* (Cap. 21) and the Civil Procedure Rules 2010. Section 59 of the *Civil Procedure Act* provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before judgment is pronounced,

⁵¹ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Op cit. page 49

⁵² Article 6 (4) of the Model law states that —The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute, UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html Accessed on 23 April, 2013

⁵³ Farooq Khan, *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁵⁴B. Totterdill, *An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques*. (Sweet & Maxwell, London, 2003) p. 21.

interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference. Institutional Rules are also used in guiding the arbitrators as they carry out their work.

Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.

1.4.5 Med-Arb

Med-Arb is a combination of mediation and arbitration. It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator.

Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going into the arbitration process, with the assistance of a trained and experienced mediator.⁵⁵

Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.⁵⁶

1.4.6 Arb-Med

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. For instance in the Chinese case of *Gao Hai Yan & Another v Keeneye Holdings Ltd & Others* [2011] HKEC 514 and [2011] HKEC 1626 (“Keeneye”), the Hong Kong Court of First Instance refused enforcement of an arbitral award made

⁵⁵Mediation-Arbitration (Med-Arb),

Available at <http://www.constructiondisputes-cdrs.com/about%20MEDIATION-ARBITRATION.htm> Accessed on 23 April, 2013

⁵⁶ Edna Sussman, Developing an Effective Med-Arb/Arb-Med Process, *NYSBA New York Dispute Resolution Lawyer*, Spring 2009, Vol. 2, No. 1, page 73,

Available at <http://www.sussmanadr.com/docs/Med%20arb%PDF.pdf> Accessed on 23 April, 2013

in mainland China on public policy grounds. The court held that the conduct of the arbitrators turned mediators in the case would “cause a fair-minded observer to apprehend a real risk of bias”.⁵⁷ Although the decision not to enforce the award was later reversed, the Court of Appeal did not have a problem with the observation on risks involved but with the particular details of that case where the parties were deemed to have waived their right to choose a new third party in the matter.⁵⁸

1.4.7 Adjudication

Adjudication is defined under the CI Arb (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract. Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract), flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation. Adjudication is thus effective in simple construction dispute that need to be settled within some very strict time schedules.

The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the arbitrator is also crucial as his decision is binding and that it does not enhance relationships between the parties.⁵⁹

2.0 Implementation of Alternative Dispute Resolution Mechanisms

In order to realize access to justice through these mechanisms, they must be effectively entrenched within the justice system. Caution should however be taken in linking these mechanisms to the court system to ensure that they are not completely fused 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. There is thus a need to create

⁵⁷ Mark Goodrich, Arb-med: ideal solution or dangerous heresy? Page 1, March 2012, Available at <http://www.whitecase.com/files/Publication/fb366225-8b08-421b-9777-a914587c9c0a/Presentation> Accessed on 23 April, 2013

⁵⁸ Ibid

⁵⁹ K. W. Chau, Insight into resolving construction disputes by mediation/adjudication in Hong Kong, *Journal Of Professional Issues In Engineering Education And Practice*, ASCE / APRIL 2007, pp 143-147 at Page 143, Available at http://www.academia.edu/240893/Insight_into_resolving_construction_disputes_by_mediation Accessed on 23 April, 2013

awareness especially among the judicial officers on the effective use of these mechanisms to realize access to justice.

The existing framework providing that before parties file a case in court, they should first exhaust alternative dispute resolution mechanisms in appropriate disputes need to be enhanced and enforced by courts so as to ease backlogs in courts. Section 59 of the Civil Procedure Act was 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.⁶⁰

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.

It should be noted that though ADR and Traditional Dispute Resolution Mechanisms have been recognized in the Constitution, they are to operate under the shadow of the law. It can be argued that this denies them the full autonomy which would lead to the enjoyment of the full benefit of the informal mechanisms.

3.0 Demerits/Criticism of ADR Mechanisms

Although the ADR mechanisms are praised as having all the above advantages, there is still a school of thought that is completely against them. One of the known advocates of this school of thought is Owen Fiss. In his work, '*Against Settlement*', Owen Fiss criticises ADR mechanisms and the whole notion of it on the premises that: There is imbalance of power between the parties; There is absence of authority to consent (especially when dealing with aggrieved groups of people); ADR presupposes the lack of a foundation for continuing judicial involvement; and Adjudication promotes justice rather than peace, which is a key goal in ADR.⁶¹

⁶⁰ Section 59A of the *Civil Procedure Act*, Cap 21, Laws of Kenya

⁶¹ Owen Fiss, '*Against Settlement*', 93 *Yale Law Journal* 1073, (1984) pp. 1073-1090. Available at <http://www.law.yale.edu/documents/pdf/againstsettlement.pdf> Accessed on 16 April 2013

He thus argues that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation. Thus, when parties settle, society gets less than what appears and for a price it does not know; parties might settle while leaving justice undone.⁶²

The other demerit is that in mediation power imbalances in the process may cause one party to have an upper hand in the process thus causing the outcome to unfavourably address his/her concerns and /or interests at the expense of the other.⁶³ Regardless of the type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.⁶⁴

The other demerit that affects ADR is that most of the mechanisms under ADR that are voluntary in nature mostly rely on the goodwill of the parties and any withdrawal of such goodwill might result in collapse of such a process.

Contrary to ADR, adjudication through court is usually based on law, rules and regulations provided for, which results in consistent decisions based on law and precedents; Parties are bound by the decision of the court, which can be enforced; Court decisions are appealable and errors can be corrected, reviewed or reversed by the appellate courts.⁶⁵

4.0 Challenges

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

4.1 Mediator, Conciliator and Arbitrator training

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 and/or arbitration. The professional alternative dispute resolvers are overwhelmed by the large number of disputes due to a high population and cannot possibly deal with all the matters suggested by the various laws to be handled using ADR mechanisms and supported by the constitution.

⁶² Ibid

⁶³ Kariuki Muigua, "Court Annexed ADR in the Kenyan Context" Op cit. page 5

⁶⁴ Shokouh Hossein Abadi, The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, page 3, *Effectius Newsletter*, Issue 13, (2011) Effectius: Effective Justice Solutions, Available at

http://effectius.com/yahoo_site_admin/assets/docs/Effectius_Theoleofdisputeresolutionmechanisms

⁶⁵ Surrige & Beecheno, *Arbitration/ADR versus Litigation*, Op cit

There are few institutions that train ADR practitioners in the entire country. The most significant one is the Chartered Institute of Arbitrators (Kenya Chapter), which provides training to its members. The Dispute Resolution Centre also deals with its members only without necessarily offering courses in mediation to the general public. These institutions cannot possibly meet the needs for training and therefore, more institutions ought to take up the training of ADR practitioner, more so the several middle level university colleges spread all over the country.

4.2 Code of Ethics

There is likelihood that there is going to be a flood of mediators, arbitrators and conciliators if training efforts are enhanced. This is against a background of the fact that the code of ethics in place is specific to arbitrators and the provisions in the *Arbitration Act* provide for removal or disqualification of arbitrators only.⁶⁶ The major challenge will be regulating Independent practitioners unless it is made compulsory that every practitioner must belong to a professional body. This way it will be easier to come up with an effective code of ethics and with better mechanisms of enforcement for their regulation.

4.3 Acceptance by the society

Our society still believes in seeking justice through courts. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce, rather than a negotiated agreement that is wholly dependent of parties' goodwill. Even where the law has put in place enforcement mechanisms for negotiated settlements, people still desire the coercive nature of courts and other tribunals, as opposed to all the cordial talks that are ADR. The society has become so litigious that to convince disputants to embrace ADR becomes an uphill task.

4.4 Institutional capacity

There is the need to enhance the capacity of various institutions to meet the demands for ADR mechanisms introduced by the constitution. These institutions include: Chartered institute of Arbitrators (Kenya Chapter) established in 1984, Dispute Resolution Centre, a non-profit organisation established in 1997. There is need to enhance the capacity of these institutions as well as

⁶⁶ Kariuki Muigua, "*Overview of Arbitration and Mediation in Kenya*"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011. Page 11, Available at [http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation Kenya.pdf](http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation%20Kenya.pdf)

putting in place mechanisms to establish more institutions. This will greatly improve the rolling out of ADR services to a larger group of citizens.

4.5 The changing face of arbitration

The major selling point of the ADR approaches of dispute resolution is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court.⁶⁷ When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings.

This challenge also brings in the other factor that is changing the face of arbitration; interference by courts. Ordinarily, courts are not supposed to inquire into the arena of the arbitral proceedings, even where the same are court mandated. Courts are entertaining all manner of applications by parties' intent on derailing the arbitral proceedings and thus delaying justice for all concerned. This means then that parties are slowly losing confidence in the arbitral process as it makes no sense to engage in arbitration for years only for the dispute to end up in courts of law for determination. This comes at a time when the constitution is trying to do the opposite.

5.0 Prospects

Alternative dispute resolution mechanisms have been effective in administration of justice where they have been used. The constitutionalisation of these mechanisms means that there will be a paradigm shift in the policy on resolution of conflicts towards encouraging their use to enhance access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities.

A comprehensive policy and legal framework to operationalise alternative dispute resolution mechanisms is needed. It should be realized that most of the disputes reaching the courts should never have reached there in the first place and can be resolved without resort to court if alternative dispute resolution mechanisms were to be applied and be treated not as inferior alternatives to litigation but as equally appropriate means to realization of justice. Where they have been used in managing conflicts and seeking justice they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective.

⁶⁷ Ibid. Page 11

The Investment Climate Advisory Services of the World Bank Group while making their recommendations in their work ADR guidelines recommended that providing free ADR services could to an extent help in building up a culture of employment of ADR services in a society. They observe that when first developing ADR services in a jurisdiction, stakeholders may consider providing the service for free to encourage parties to use the process. They go further to suggest that newly trained and enthusiastic ADR practitioners who want to be involved in the project may offer to do this for a while⁶⁸.

This, with proper infrastructure in place, could be tried as part of the legal aid programmes in place. However, the above World Bank group also observes that if disputants become accustomed to receiving a service for free, it will be very difficult later to collect a fee for that service⁶⁹. Therefore, this can only be done with very appropriate measures in place to decide when such services should be sought and by which class of people.

Alternative dispute resolution has also been said to have indirect benefits. As already noted elsewhere in this paper it can increase the effectiveness of courts by reducing backlog. This can in turn improve trust in the country's legal system, which may increase foreign investment.⁷⁰

Another viable recommendation is the adoption of Village Mediation Programmes. The Village Mediation Programme (VMP) is a model of mediation established first in Africa by the Paralegal Advisory Services Institute (PASI) in Malawi.⁷¹ The VMP introduces a village-based diversion and mediation scheme that can assist poor and vulnerable people to access justice in civil and some minor criminal cases. The Programme is inspired by the *Madaripur Mediation Model* in Bangladesh and other village-based mediation programmes around the world.⁷²

6.0 Conclusion

The direct inclusion, as opposed to inference, of ADR mechanisms as part of the means of conflict management in the Constitution and in Acts of Parliament is a bold ground breaking move.

⁶⁸World Bank Group, *alternative dispute resolution guidelines*, page 44, Available at http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf Accessed on 18 April, 2013

⁶⁹ Ibid

⁷⁰ Inessa Love, *Settling Out of Court: How Effective Is Alternative Dispute Resolution?*, page 1, The World Bank Group Financial and Private Sector Development vice presidency, o c t o b e r 2 0 1 1. Available at <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Sector> Accessed on 22 April, 2013

⁷¹ Paralegal Advisory Services Institute (PASI), *Village Mediation Programme*, page 2, Available at <http://www.afrimap.org/english/images/documents/PASI-VMP-booklet-Oct09.pdf> Accessed on 20 April, 2013

⁷² Ibid

However, there is need for caution so that this effort is not defeated by capacity challenges, some of which are discussed above.

The Law Commission in Dublin observes that ‘Alternative dispute resolution must be seen as an integral part of any modern civil justice system. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like what, if any, expert evidence is required.’⁷³ They go on to state that while litigation must always remain available for clients, this can be a very stressful undertaking and should be seen as the final place for resolving a dispute.⁷⁴

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.⁷⁵

The future of ADR in Kenya is bright and really promising in bringing about a just society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements. Finally, a party who wishes to avoid the complexities of litigation can seek the services of ADR mechanisms experts and do so legally.

There may come a time when ADR becomes the norm rather than the exception in dconflict management in our fast growing country and one embracing globalisation where court systems differ significantly.

ADR mechanisms can rightly be referred to as Appropriate Dispute resolution mechanisms instead of alternative as the use of the word ‘alternative’ makes them appear inferior to litigation while this is not the case. The reality is that these mechanisms should at least be treated as equal if not better mechanisms when compared to litigation. These have the potential for being made applicable in all walks of life wherever there exist possibilities of any dispute, a potential only waiting to be tapped. This is the time to recognize that alternative dispute resolution mechanisms stand independently and not as an alternative to any adjudicatory process.⁷⁶

It is possible to herald a new dawn and achieve justice through the effective Application of ADR in Kenya.

⁷³ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Op cit. page 34

⁷⁴ Ibid

⁷⁵ Articles 19-51, Constitution of Kenya, 2010

⁷⁶ Laxmi Kant Gaur, *Why I Hate ‘Alternative’ in “Alternative Dispute Resolution”*, page 4, Available at http://delhicourts.nic.in/Why_I_Hat1.pdf Accessed on 22 April, 2013

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