

Reflections on ADR and Environmental Justice in Kenya

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Alternative Dispute Resolution means the resolution of conflicts without taking recourse to courts of law. Alternative Dispute Resolution has a role to play in ensuring environmental justice for all Kenyans. Access to justice in environmental matters has been hampered by many adverse factors *inter alia*, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow.

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

The Constitution of Kenya 2010 now provides for enhanced access to justice and the use of ADR in article 159 (2). Article 159 (2) stipulates that in exercise of judicial authority courts and tribunals should ensure that justice is done to all irrespective of status; that it is not delayed and that in administering justice undue regard should not be had to procedural technicalities. Article 159 (2) also recognizes the place of alternative dispute resolution mechanisms such as reconciliation, negotiation, mediation and arbitration in ensuring access to justice in Kenya. This increased enhancement of access to justice also applies to environmental matters.

Article 42 of the Constitution entitles every Kenyan the right to a clean and healthy environment. This right further ensures access to justice in the environmental context, in that any person whose life is threatened by environmental deterioration or destruction can move to court to seek redress, which would include among other things requiring the State to fulfill obligations in respect of the environment under Article 69 and enforcement of those rights under Article 70 of the Constitution of Kenya.

Perhaps the best indication that environmental justice has been enhanced in Kenya is seen in Article 70 (3) which stipulates that in enforcing environmental rights an applicant does not have to demonstrate that any person has incurred loss or suffered injury. This will ensure many people access justice in environmental matters especially where one has not incurred or suffered injury directly. This is also reflected Section 3 of Environmental Management Coordination Act No. 8 of 1999, where the strict requirement as to *locus standi* in environmental matters has been done away with.

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It is hoped that the Constitution of Kenya 2010 will lead to increased access to justice in environmental issues as it seems to address the abovementioned hindrances in accessing justice in Kenya. As provided in the Constitution, ADR should be encouraged and enhanced through certain practical measures. It should be the first port of call to parties in an environmental conflict and who desire it. The government should also encourage the use of ADR in standard form contracts to which they are a party. Private parties should do likewise.

Public participation in environmental matters and their role in resolving environmental conflicts affecting them could be realized through the use of ADR mechanisms such as negotiation, conciliation and mediation. Public awareness on the efficacy of ADR is therefore essential. This is due to the nature of environmental conflicts. Environmental resources such as land, forests, water and others play a central role in the lives of the Kenyan people.

Above all, Kenyans have not lost the capacity to negotiate their conflicts. Where such negotiation reach a deadlock a mediator should be called in to assist the parties to continue with the negotiations. Where these non-coercive methods fail to achieve the desired results recourse can be had to coercive measures such as arbitration and the courts.

However, not all cases are amenable to resolution by Alternative Dispute Resolution. The opportunities offered by ADR should be used so as to enhance and improve access to justice in environmental conflicts in Kenya. ADR is no longer a pipedream. It is reality that can be harnessed for the good of the Kenyan people.