Current Status of Alternative Dispute Resolution Justice Systems in Kenya

Kariuki Muigua, Ph.D

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Abstract

This paper is informed by the current ongoing efforts by the Judiciary in Kenya and other stakeholders in the Alternative Dispute Resolution (ADR) sector to entrench these mechanisms as part of the access to justice. The paper adopts a sectoral approach in discussing the current status of the use of ADR in Kenya and offers suggestions on ways through which access to justice through ADR can be enhanced. The recommendations are thus cross cutting, based on the different needs of users in different sectors.

1. Introduction

The current Constitution of Kenya 2010 has seen amendment and enactment of new legislation, in order align them with the Constitution, which introduces the notion of use of alternative forms of dispute management including reconciliation, mediation and traditional conflict resolution mechanisms as part of the legal framework on access to justice across various sectors in Kenya.[1] Notably, the use of Alternative Dispute Resolution Mechanisms (ADR)[2] in dealing with disputes across different sectors is also captured under different laws as captured in this section. There are however no guidelines or policy in place on how these mechanisms should be utilised in enhancing access to justice. As such, the implementation of the various sectoral law provisions on ADR is left to the concerned stakeholders thus presenting uncertainty on procedures or extent of application.

This paper highlights successes, challenges, gaps and opportunities for businesses and investors to better utilize ADR mechanisms for commercial dispute management in the various sectors by offering a review of the existing policies, legislation and administrative procedures relating to

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[1] Article 159 of the Constitution of Kenya 2010.

[2] Also referred to as Appropriate Dispute Resolution.

access to justice in Kenya, with a view to making clear recommendations for action, including necessary legal and policy reforms and strategic roadmap for interventions.

2. Sectoral Approach to the Use of ADR in Kenya

2.1 Electoral Justice and ADR

The Elections Act 2011 envisages Independent Electoral and Boundaries Commission (IEBC) peace committees using mediation to manage disputes between political parties.[3] The Supreme Court Rules 2011 allows the Supreme Court to refer any matter for hearing and determination by alternative dispute resolution mechanisms.[4] These provisions were necessitated by past research in Kenya which shows that election-related violence has claimed many lives and displaced many more.[5]

2.2 ADR in Family Law, Children's Matters and Juvenile Justice

i. ADR in Family Law

Family law in Kenya is mainly governed by the Marriage Act 2014 which recognizes the following marriages; Christian marriages, Civil marriages, customary marriages, Islamic marriages and Hindu marriages.

The Act provides for resolution of matrimonial disputes and specifies the relevant laws to be applied depending on the type of marriage. The Act provides for mediation of disputes in customary marriages. It stipulates that parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage.[6]

[3] Section 17 (3) of the Elections Act 2011.
[4] Rule 11 of the Supreme Court Rules 2011.
[5] Melody Hood, Kenya's National Action Plan: "To Involve Women is to Sustain Peace" (Inclusive Security, August 27, 2015). Available at https://www.inclusivesecurity.org/2015/08/27/kenyas-national-action-plan-to-involve-women-is-to-sustain-peace/
[6] S. 68, Marriage Act, 2014.

The Act is however silent on how the process of ADR under the Act should be carried out or even who should carry out the same. The Act assumes that the parties have access to such forums to attempt and resolve their marital dispute.

Regarding matrimonial property, section 11 of the Matrimonial Property Act provides that during the division of matrimonial property between and among spouses, the customary law of the communities in question should, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives.

Again, while this provision is commendable, there are no clear guidelines on how the application of customary law should be undertaken. The Act also makes an assumption that there exist elders or persons who can competently advise the Court on the relevant and applicable customary law.

ii. Children's Matters and Juvenile Justice System

The *Children Act, 2001*[7] empowers the Director to mediate, in so far as permitted under this Act, in family disputes involving children, and their parents, guardians or other persons who have parental responsibility in respect of the children, and promote family reconciliation.[8]

The Children Bill, 2017 has notably made provision for diversion and if passed into law, it will impact the juvenile system positively. Through diversion, the Children courts seeks to encourage symbolic restitution by the offending child as compensation for the harm caused to the aggrieved person or victim and also promote reconciliation between the child and the victims affected by the delinquent conduct of the child.

The National Council on Administration of Justice (*NCAJ*) Special Taskforce on children matters was gazetted in January 2016[9] to review and report on the status of children in the administration of justice; Examine the operative policy and legal regimes as well as the emerging case law to identify the challenges and make appropriate recommendations; Assess,

[7] No. 8 of 2001, Laws of Kenya.
[8] Sec. 38(2)(m), Children Act, 2001.
[9] The Kenya Gazette Notice, Vol. CXVII-No. 8, Gazette Notice No. 369, 29th January, 2016, p. 154.

review, report and recommend on the service standards of each of the justice sector institutions with respect to children matters; and Prepare draft rules of procedure for enforcement of fundamental rights of children, among other terms of reference.[10]

The Taskforce has been carrying out sensitisation campaigns and awareness creation through such activities as the Annual Judicial Service Week on Children matters aimed at promoting the use of ADR in children matters across the country.[11]

According to the NCAJ Special Taskforce on children matters, there are a number of challenges affecting access to justice through ADR in children matters, and these include but not limited to: lack of proper training of Court User Committees (CUCs) members on plea bargaining agreements; lack of pro bono lawyers; most of the Court Annexed Mediation program accredited ADR practitioners are currently mostly found in Nairobi and Mombasa areas only.[12]

Lawyers have a role to play in enhancing access to justice in children matters and they should continually be sensitised on the need to promote reconciliation in family and children matters and use ADR as the first port of call in order to uphold and protect the rights and best interests of the children.[13]

2.3 ADR in Commerce and Finance

The *Investment Disputes Convention Act*[14] was enacted to give legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States. Section 1 of the Act adopts *Article* 1 of the International Centre for Settlement of Investment Disputes (ICSID) Convention which established the International Centre for Settlement of Investment Disputes whose purpose is provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention.

[10] The Kenya Gazette Notice, Vol. CXVII-No. 8, Gazette Notice No. 369, 29th January, 2016, p. 154.

[11] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

[12] Ibid.

[13] Ibid.

[14] Investment Disputes Convention Act, Cap 522, No. 31 of 1966, Laws of Kenya.

The *Arbitration Act, 1995* also provides for domestic arbitration and international arbitration of mainly commercial nature.[15]

The Court Annexed Mediation pilot project of the Judiciary was set up within the Family and Commercial and Tax Division of the High Court (Milimani Law Courts) to deal with commercial and tax matters to enhance efficiency of the courts in promoting commerce in the country.

The *Consumer Protection Act, 2012*[16] was enacted to promote and advance the social and economic welfare of consumers in Kenya by providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions.[17]

The Consumer Protection Act also provides for class proceedings and states that when a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.[18] A settlement or decision that results from the procedure agreed to under subsection (2) shall be binding on the parties.[19]

The Consumer Protection Act 2012 however has a caveat on limitation of arbitration. It provides that 'any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the High Court given under this Act.'[20]

The Act also established[21] the Kenya Consumers Protection Advisory Committee whose functions include, *inter alia:* creating or facilitating the establishment of conflict resolution mechanisms on consumer issues, investigation of any complaints received regarding consumer issues, and where appropriate, referring the complaint to the appropriate competent authority and ensuring that action has been taken by the competent authority to whom the complaint has been

[15] Arbitration Act, 1995, sec. 3(2)(3).
[16] No. 46 of 2012, Laws of Kenya.
[17] Sec. 3(4) (g), *Consumer Protection Act, 2012.*
[18] Ibid, Sec. 4(2).
[19] Ibid, Sec. 4(3).
[20] Ibid, Sec. 88(1).
[21] Ibid, Sec. 89(1).

referred; and working in consultation with the Chief Justice, County governors and other relevant institutions on the establishment of dispute resolution mechanisms[22].

The *Tax Procedures Act, 2015*[23] allows out of court or tribunal settlement of tax disputes.[24] Where parties fail to settle the dispute within the period specified in subsection (1), the dispute should be referred back to the Court or the Tribunal that permitted the settlement.[25]

The *Tax Appeals Tribunal Act*, 2013[26] provides that 'the parties may, at any stage during proceedings, apply to the Tribunal to be allowed to settle the matter out of the Tribunal, and the Tribunal should grant the request under such conditions as it may impose.[27] However, the parties to the appeal should report to the Tribunal the outcome of settlement of the matter outside the Tribunal.[28]

The Kenya Revenue Authority (KRA) has been settling tax disputes, based on the aforementioned Tax Procedures Act, 2015 and Tax Appeals Tribunal Act, 2013.

2.4 Environment and Land Based Conflicts

The Environment and Land Court Act 2011[29] establishes the Environment and Land Court, as a superior court of record with the status of the High Court.[30] The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya

[22] Sec. 90(f)(g), *Consumer Protection Act, 2012.*
[23] No. 29 of 2015, Laws of Kenya.

[24] Sec. 55(1), *Tax Procedures Act, 2015*.

[25] Ibid, Sec. 55(2).

[26] No. 40 of 2013, Laws of Kenya.

[27] Sec., 28(1), *Tax Appeals Tribunal Act*, 2013.

[28] Ibid, Sec., 28(2).

[29] Act No. 19 of 2011, Laws of Kenya. Preamble: An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

[30] Sec. 4.

relating to environment and land.[31] The Environment and Land Court Act 2011 allows the court to adopt and implement on its own motion with the agreement or at the request of the parties any other appropriate means of alternative dispute resolution including conciliation, mediation, and traditional conflict resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution.[32]

It is worth pointing out that traditional conflict resolution mechanisms have always been employed in resolving environmental conflicts where the council of elders, peace committees, land adjudication committees and local environmental committees play a pivotal role in managing conflicts.[33]

Natural resource-based conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.[34] Conflict resolution mechanisms such as negotiation and mediation afford the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.[35] This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.[36]

In order to realize sustainable, equitable, efficient and productive management of land, the Constitution requires encouragement of communities to settle land disputes through recognized local community initiatives consistent with the constitution.[37] Further, one of the

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[31] Sec. 13(1).

[32] Section 20 of the Environment and Land Court Act, 2011; See *Kennedy Moseti Momanyi v Gilta Investment Co. Ltd & another* [2017] eKLR, Case No. 16 of 2015:

> *Para. 4. I have considered the entire pleadings and the written consent signed by the plaintiff's counsel and defendant's counsel. I am conscious of Article 159 (2) (c) of the Constitution of Kenya 2010 and Section 20 of the Environment and Land Court Act, 2012 on the promotion of alternative forms of dispute resolution. I note that the consent is relevant thereto.*
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> *Para. 5. I accordingly adopt the consent dated 25th February 2015 as the Judgment of this court. The dispute is hereby marked as fully settled.* Per G. M. A. Ongondo, J.

[33] Castro, Alfonso Peter, and Kreg Ettenger, "Indigenous knowledge and conflict management: exploring local perspectives and mechanisms for dealing with community forestry disputes" (2000); Adan, Mohamud, and Ruto Pkalya, "Conflict Management in Kenya-Towards Policy and Strategy Formulation" (2014); Edossa, Desalegn Chemeda, Seleshi Bekele Awulachew, Regassa Ensermu Namara, Mukand Singh Babel, and Ashim Das Gupta, "Indigenous systems of conflict resolution in Oromia, Ethiopia," *Community-Based Water Law and Water Resource Management Reform in Developing Countries* (2007): 146.

[34] FAO, 'Negotiation and mediation techniques for natural resource management,' available at http://www.fao.org/3/a-a0032e/a0032e05.htm [Accessed on 07/02/2016].

[35] Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135*, (Overseas Development Institute, April, 2000), p. 16.

[36] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.

[37] Ibid., Article 60 (1) (g).

functions of the National Land Commission established under Article 67 of the constitution is to encourage the application of traditional conflict resolution mechanisms in land conflicts.[38]

The Land Act 2012 also encourages communities to settle land disputes through recognized local community initiatives and using alternative dispute resolution mechanisms.[39] It promotes the application of ADR mechanisms which include traditional dispute resolution mechanisms within the framework of providing access to justice especially in disputes involving communal land.
The Community Land Act 2016[40] provides for mechanisms for settlement of community land disputes, in accordance with the constitutional provisions.[41] Section 39(1) of the Community Land Act provides that a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.

Natural resource-based conflicts in Kenya are still prevalent and a cause of much concern.[42] The issues of the use of environmental resources underlie the numerous conflicts that have occurred in Kenya.[43] Giving voice to communities and explaining the details of these conflicts helps them regain power in decision-making process and create a model of active democracy enabling them to help protecting their own territory and environment.[44] It is against this background that ADR mechanisms and particularly negotiation and mediation should be explored as they present in realising the goal of effectively managing natural resource-based conflicts in Kenya.

Mediation is applied to the resolution of environmental conflicts, like land boundary conflicts, at a very informal level. Parties with such a conflict will bring it, for instance, to a panel of elders who are respected members of the society. They will listen to the parties and encourage them to come to a consensus on those issues. This ensures access to justice for the aggrieved parties, as the consensus reached is binding and the society has widely accepted internal enforcement mechanisms. This process has been widely applied by many communities in Kenya.

[38] Ibid., Article 67 (2) (f).
[39] Section 4 of the Land Act 2012.
[40] No. 27 of 2016, Laws of Kenya.
[41] Ibid.
[42] Government of Kenya, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.
[43] See Machel, G. & Mkapa, B., *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).
[44] CDCA, 'Why environmental conflicts?' op cit.

2.5 Civil Justice and ADR Mechanisms

The High Court (Organization and Administration) Act, 2015[45] provides that 'in civil proceedings before the Court, the Court may promote reconciliation amongst the parties thereto and shall encourage and permit the amicable settlement of any dispute'.[46] The Court is to, in relation to alternative dispute resolution be guided by the Rules developed for that purpose.[47] Furthermore, 'nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution'.[48] 'Where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court should by order, stay the proceedings until the condition is fulfilled'.[49]

The *Magistrates' Courts Act*, 2015[50] was enacted to enable magistrate courts to facilitate just, expeditious, proportionate and accessible judicial services in exercise of the criminal and civil jurisdiction in this Act or any other written law.[51] In exercise of its judicial authority, a magistrate's court is to be guided by the principles specified under Articles 10, 159 (2) and 232 of the Constitution.[52] Reference of matters for ADR mechanisms as contemplated under the Constitution can go a long way in realizing this objective.

Tribunals are bodies established by Acts of Parliament to exercise judicial or quasi-judicial functions. They supplement ordinary courts in the administration of justice. Tribunals, however, do not have penal jurisdiction. Tribunals, like the courts, have to respect the Bill of Rights in their decisions and not be repugnant to justice and morality or be inconsistent with the

[45] High Court (Organization and Administration) Act, No. 27 of 2015, Laws of Kenya.
[46] Sec. 26(1), High Court (Organization and Administration) Act, 2015.

[47] Ibid, Sec. 26(2).

[48] Ibid, Sec. 26(3).

[49] Ibid, Sec. 26(4).

[50] *Magistrates' Courts Act*, No. 26 of 2015, Laws of Kenya.

[51] Ibid, sec. 4.

[52] Ibid, sec. 3.

Constitution or other laws of the land. Most tribunals are subject to the supervision of the High Court.[53] Although this paper highlights the use of ADR by select tribunals, there are many other tribunals operating under the auspices of Judiciary.[54]

Tribunals such as the Sports Dispute Tribunal established under the Sports Act[55] and the Transport Licensing Appeals Board (TLAB) established under the National Transport and Safety Authority Act, 2012[56], in resolving disputes, may employ alternative dispute resolution methods (ADR) as well as expertise and assistance where necessary.

2.6 Criminal Justice and ADR Mechanisms

The *United Nations Principles on Access to Legal Aid in Criminal Justice Systems*[57] provides for principles and guidelines that are based on the recognition that States should undertake a series of measures that, even if not strictly related to legal aid, can maximize the positive impact that the establishment and/or reinforcement of a properly working legal aid system may have on the proper functioning of the criminal justice system and on access to justice.[58]

Notably, the current law on criminal justice in Kenya has always promoted reconciliation in smaller matters. Arguably, the only challenge was lack of an implementation framework, which lacuna brought about the Criminal Procedure (Plea Bargaining) Rules 2018. The courts have also been using reparation and reconciliation, amongst other forms of ADR, with the only challenge being that parties do not at times understand at what point they should approach the courts for referral to ADR or stay of proceedings to allow for ADR.[59]

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[53] https://www.judiciary.go.ke/courts/tribunals/

[54] https://www.judiciary.go.ke/courts/tribunals/#tribunals

[55] No. 25 of 2013, Laws of Kenya.

[56] The National Transport and Safety Authority Act, No. 33 of 2012, Laws of Kenya.

[57] Resolution A/RES/67/187, December 2012.

[58] Ibid.

[59] See *Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR.* This case captured the two challenges of using ADR in criminal matters, namely, prohibition of ADR in some matters and failure of parties to understand the stage at which they should seek ADR in criminal matters.

Section 176 of the Criminal Procedure Code[60] provides for the promotion of reconciliation. It encourages and facilitates the settlement of criminal disputes in an amicable way. Reconciliation is promoted in proceedings for common assault, any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court. However, such reconciliation efforts must be initiated before the court makes its final decision or discharged its duty in the matter. However, it should be noted that the use of ADR in criminal justice for serious cases involving capital offences is still a matter in contention especially with decision of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, where a murder suspect was set free on the request of the victims' Counsel citing grounds that an out of Court agreement had ensued. The decision has also been cited[61] in the more recent decision of *Republic v Ishad Abdi Abdullahi [2016] eKLR*[62]. These two cases have set the ball rolling and the jury is still out there on the suitability of ADR in serious criminal cases involving capital offences.

The foregoing notwithstanding, the criminal justice system also promotes the use of mediation in the plea-bargaining process. Section 137A of the Criminal Procedure Code provides for, an encourages the prosecutor and an accused person or his representative to negotiate and enter into an agreement in respect of the reduction of a charge to a lesser included offence or the withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges. Also, the parties may negotiate the payment by an accused person of any restitution or compensation to the victim or complainant.

The Criminal Procedure (Plea Bargaining) Rules 2018 gazetted in February 2018 set out the circumstances in which plea-bargaining negotiation can be conducted. However, these rules are yet to be fully adopted within the criminal justice system as they are yet to achieve wide acceptance among the participants within this justice system due to allegations of lack of wider participation by stakeholders. The system also encourages reparations of the victims of crimes

[60] Criminal Procedure Code, Cap 75, Laws of Kenya.

[61] The Prosecuting Counsel urged the court in determining this matter to consider a ruling delivered in Nairobi High Court Criminal Case No. 86 of 2011, Republic -vs- Mohamed Abdow Mohamed, in which the court allowed the discontinuance of criminal proceedings.

[62] Criminal Case No. 32 of 2012.

through compensation from the offenders.[63] There have also been some concerns that some of the provisions therein may not be applicable to the local setup.

2.7 Employment and Labour

The *Industrial Court Act*[64] contains provisions allowing the court to stay proceedings and refer the matter to conciliation, mediation or arbitration.[65] The court may adopt alternative dispute resolution and traditional conflict resolution mechanisms as envisaged in Article 159 of the constitution.[66]

2.8 Energy and Mining Sectors Disputes Settlement

The Energy Regulatory Commission (ERC) was established as the main regulatory body under the Energy Act, 2006, with the objectives and functions of, inter alia, protecting the interests of consumer, investor and other stakeholder interests.

The *Energy (Complaints and Dispute Resolution) Regulations, 2012*[67] provide the means by which the Commission can help resolve complaints and disputes between a licensee and its customers where any party remains dissatisfied after exhausting the licensee's complaints resolution procedures.[68] Where a dispute has been referred to the Commission under the Rules, the Commission is required to appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment.[69] Regulation 15 thereof requires the Commission to identify and maintain a database of persons who are skilled in alternative dispute resolution techniques and who are experts in various fields relevant to energy matters, from among whom the Commission may from time to time select an expert or constitute a

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[63] See also, Section 3 of the Victim Protection Act, 2014.

[64] No. 20 of 2011, Laws of Kenya.
[65] Section 15 (4) of the Industrial Court Act, 2011.
[66] Ibid, Section 15 (3).
[67] published as Legal Notice No. 42, Kenya Gazette Supplement No.49 (Legislative Supplement No. 15) on May 25, 2012.
[68] Energy Regulatory Commission, 'Electricity Regulations,' available at https://www.erc.go.ke/images/docs/Energy-Complaints%20and%20Disputes%20Resolution-Regulations%202012.pdf
[69] Energy (Complaints and Dispute Resolution) Regulations, 2012, Regulation 7(3).

Dispute Resolution Panel on such terms and conditions as the Commission may determine, to assist it in the resolution of disputes. Under Regulation 16, the Commission may refer the dispute filed with it by experts, expert or to a Dispute Resolution Panel, appointed from among persons in the database maintained pursuant to regulation 15 in the manner described in paragraph (2).

The costs of the dispute resolution process are, unless the Commission decides otherwise, to be borne equally by, the parties.[70]

Under Regulation 21, any party aggrieved by a decision or order of the Commission may, within thirty days from the date of the order or decision appeal to the Energy Tribunal established under section 107 of the Energy Act 2006.

The First Schedule to the *Energy (Complaints and Dispute Resolution) Regulations*, 2012 provides for Guidelines for Complaints Handling Procedures. They provide that procedures for dealing with complaints relating to an) undertaking or activity performed pursuant to a licence or permit under the Act must explain: how other persons can gain access to the procedures; how the procedures work; the timeframes within which the procedures may he carried out; the complainant's right to access the Commission if dissatisfied with the respondent's decision or the way it has been reached; and any other matter of relevant importance.[71] The procedures contemplated should- be simple, quick and inexpensive; preserve or enhance the relationship between the parties; take account of the skills and knowledge that are required for the relevant procedures; observe the rules of natural justice; place emphasis on conflict avoidance: and encourage resolution of complaints without formal legal representation or reliance on legal procedures.[72]

The *Mining Act 2016*[73] provides that 'a mineral agreement shall include terms and conditions relating to, inter alia: the procedure for settlement of disputes; and resolution of disputes through an international arbitration or a sole expert.[74] It also provides that 'any dispute arising as a result of a mineral right issued under this Act, may be determined in any of the following manners: by

[70] Regulation 16(3), Energy (Complaints and Dispute Resolution) Regulations, 2012.
[71] Para.1, First Schedule to the *Energy (Complaints and Dispute Resolution) Regulations*, 2012.
[72] Ibid, Para.4.
[73] No. 12 of 2016, Laws of Kenya.

[74] Mining Act 2016, Sec. 117(2).

the Cabinet Secretary in the manner prescribed in this Act; through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement; or through a court of competent jurisdiction'.[75]

2.9 Public Administration and Intergovernmental Disputes

Article 189 (4) of the Constitution of Kenya provides for the use of alternative dispute resolution mechanisms in settling intergovernmental disputes. Similarly, the commissions and independent offices established under Chapter 15 of the constitution have been clothed with the necessary powers for reconciliation, negotiation and mediation.[76]

The *Commission on Administrative Justice Act, 2011*[77] (CAJ Act) provides for the functions of the Commission to include, inter alia, to— facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs; work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration; and promote public awareness of policies and administrative procedures on matters relating to administrative justice.[78]

The *Intergovernmental Relations Act, 2012*[79] provides for resolution of disputes arising: between the national government and a county government; or amongst county governments.[80]

The national and county governments are required to take all reasonable measures to: resolve disputes amicably; and apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.[81]

Any agreement between the national government and a county government or amongst county governments should: include a dispute resolution mechanism that is appropriate to the nature of

[75] Mining Act 2016, Sec. 154.

[76] Ibid., Article 252.
[77] No. 23 of 2011, Laws of Kenya.
[78] *Commission on Administrative Justice Act, 2011*, section 8.
[79] No.2 of 2012, Laws of Kenya.

[80] Sec. 30(2), Intergovernmental relations Act, 2012.

[81] Ibid, Sec. 31.

the agreement; and provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.[82]

2.10 Initiatives on National Peacebuilding through ADR Mechanisms

The National Steering Committee on Peace Building and Conflict Management was established in 2001 by the Government of Kenya as part of the framework on addressing threats and challenges to national unity which have become increasingly sophisticated and complex over time. The same was informed by the need for meaningful responses to conflict, particularly at a structural level and a viable institutional policy framework to mobilize, coordinate and consolidate various initiatives into a more cohesive and action-oriented mechanism to strategically drive peace-building activities in Kenya.[83] The establishment of this multi-agency peace architecture to coordinate peacebuilding and conflict management in the country was borne out of the need to incorporate traditional justice resolution mechanisms into the formal legal-judicial system of conflict mitigation and partner with Government and Civil Society Organizations (CSOs) in order to engender conflict sensitivity to development as it has been largely accepted that a peaceful, stable and secure society is a prerequisite for sustainable development.[84]

The *National Cohesion and Integration Act*, 2008[85] established the National Cohesion and Integration Commission[86] whose object and purpose is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof.[87] One of the ways of achieving this is through promoting arbitration, conciliation, mediation and

[82] Sec. 32(1), Intergovernmental relations Act, 2012.

[83] National Steering Committee on Peace Building and Conflict Management: Background, available at http://www.nscpeace.go.ke/about-us/background.html

[84] Ibid.

[85] No. 12 of 2008, Laws of Kenya.

[86] Sec. 15, National Cohesion and Integration Commission Act, 2008.

[87] Ibid, Sec. 25(1).

similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace.[88]

The main objectives of the National Policy on Peacebuilding and Conflict Management, 2012 were to, inter alia: promote and establish an institutional framework for peace-building and conflict management that fosters strong collaborative partnerships between the government, the private sector, the civil society, development partners, grass roots communities and regional organizations for sustainable Peace, Conflict transformation and national development.

The policy framework contextualised conflict with regard to its generalities, social, economic, political and environmental dimensions.[89] Social, economic, political and cultural contexts have over time determined the nature of peace-building and conflict management approaches and interventions. These interventions often depend on the availability of external funding.[90]

Some of the civil society interventions focused on reconciliation and building new relationships amongst the warring communities. Such activities include dialogue, negotiations, and problem-solving workshops, information, education and communication.[91]

The Peace Policy also acknowledged that Article 159 (2) of the Constitution also provides for the promotion of Alternative Dispute Resolution (ADR) Mechanism. It thus envisaged that the various community peace agreements formulated from time to time will be anchored on the ADR Mechanism and provide communities with space for dialogue and amicable resolution of conflicts.

The Policy recommended that there is a need to harmonize the operation of the various Acts of Parliament that relate to peace-building and conflict management. There is also need to institute an enduring rather than an ad hoc or time bound legislative framework for addressing issues of conflict. This is particularly so because conflict is recognized as a social justice and human

[88] Sec. 25(2) (g), National Cohesion and Integration Commission Act, 2008.

[89] Para. 45, National Policy on Peacebuilding and Conflict Management, 2012.
[90] Ibid, Para. 68.
[91] Ibid, Para. 86.

development issue that is best addressed through focused and comprehensive legislation and equitable development.[92]

3. Field study on ADR Use among Communities

The Constitution of Kenya, 2010 provides for application of Traditional Dispute Resolution Mechanisms (TDRMs) and ADR mechanisms in dispute resolution.[93] This in turn enhances access to justice.[94] A huge percentage of disputes in Kenya are resolved outside courts or before they reach courts by use of TDRMs or ADR mechanisms. Communities utilize TDRMs systems since they are easily accessible and legitimately relevant.

A field study on ADR was done among select communities in Kenya including the Luhya, Meru, Kikuyu and Kamba community. The main objective of the field research was to carry out the ADR situational analysis in the selected communities and come up with recommendations for legal and policy reforms that would result in the alignment of ADR into a robust component of dispute resolution in the Kenyan justice system.[95]

The study found that men and women generally consider ADR and TDR accessible, affordable and fair. However, as far as outcomes are concerned many women perceive some TDRs biased against women due to the negative perceptions of women as inferior o men in some respects.

The field research revealed that the participants were aware of the existing ADR mechanisms that are available within their communities especially negotiation, mediation, conciliation and traditional dispute resolution mechanisms. The communities also relied on chiefs and other administrative personnel and the police to resolve their disputes.

The gaps identified by the participants while using these ADR mechanisms include the lack of inclusion of women within the council of elders. The female participants did not particularly express interest in being members of the council as they consider and accept this to be a male role within the cultural heritage. The challenges facing ADR mechanisms within the

[92] Para. 138, National Policy on Peacebuilding and Conflict Management, 2012.
[93]Art 159 (2) (c).
[94]Article 48
[95] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

communities are the cultural erosion within the community due to urbanization and the non-coercive nature of these mechanisms.

In most of the foregoing communities, the enforcement of decisions is usually carried out with the backing and reinforcement of the family institution, and the clan system. The fear of spiritual sanctions fosters compliance to the decisions of the elders and there are few cases of people deviating from the decisions of the elders. These spiritual sanctions such as curses, ill luck and pestilence have the effect of making the decisions of elders a communal responsibility among this community.

4. Institutional Framework on Provision of ADR Services in Kenya

Kenya, like other jurisdictions, has seen an explosion of the number of private firms, institutions and outfits offering ADR services. Globally ADR is viewed as a commercial necessity that provides a range of advantages over litigation in resolving both domestic and international commercial disputes.

Due to the costs and time involved in utilizing the formal justice system, there is increased preference to divert cases from the Court to other methods of dispute resolution, including arbitration or mediation.

Often though, there is lack of consistency and standardization of practices and qualifications across ADR mechanisms that instil confidence in the private sector when engaging these actors.

The Judiciary in partnership with the Kenya Law Reform Commission (KLRC) developed a Bill to help bring all tribunals under one administrative regime and streamline their operations in 2015. To this end, Tribunals will be administered by a body to be known as a Council of Tribunals which shall be chaired by the Chief Justice. This will be instrumental in reducing duplication efforts by the tribunals in the area of formulation of ADR rules and the dispensation of justice. The legislature has the role to see that this bill is passed into law. There remains a strong need to revisit these issues and assist in finalizing necessary legislative and policy interventions.

There are a number of institutions dealing with mediation and arbitration in Kenya, some of the institutions are as listed below: The Chartered Institute of Arbitrators (Kenya Branch), Dispute

Resolution Centre (DRC), Nairobi Centre for International Arbitration (NCIA), Strathmore Dispute Resolution Centre (SDRC), Tatua Centre, FIDA and Kituo Cha Sheria.[96]

5. Addressing the Challenges, Gaps and Opportunities

The key guiding principles for successful application of TDRMs among traditional African communities was that the tribunal (chiefs, councils of elders, priests or kings) should be properly constituted. The disputants ought to have confidence in them and submit to their jurisdiction.[97]

The main aspects of TDRMs and other ADR mechanisms which make them unique and community oriented are that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.[98] The main objective of TDRMs in African societies is to resolve emerging disputes and foster harmony and cohesion among the people. TDRMs derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDRMs is to foster peace, cohesion and resolve disputes in the community.[99]

The use of TDRMs in access to justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective. For this reason, most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.[100]

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[96] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

[97]Anjayi, Adenka Theresa, "Methods of Conflict Resolution in African Traditional Society" *An International Multidisplinary Journal*, Ethiopia, Vol. (8) Serial No.33, April, 2014, p.142.

[98] Muigua, K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at

http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pd

[99] Ajayi, A.T. and Buhari, L.O., "Methods of Conflict Resolution in African Traditional Society," op cit., at p. 154.

[100] Ntuli, N.N., 'Policy and Government's Role in Constructive ADR Developments in Africa,' *Presented at a conference "ADR and Arbitration in Africa; Cape Town 28th and 29th November 2013.* pp. 2-3. Available at http://capechamber.co.za/wp-content/uploads/2013/11/POLICY-IN-AFRICA-AND-GOVERNMENT.pdf [Accessed on 30/09/2018].

6.1 Legal and Policy Recommendations

It is suggested that there is a need to clarify the various systems and their relationships as it pertains to commercial justice in Kenya and, establish clear standards for the accreditation and training regarding mediation and arbitration in Kenya.[101]

There is need to cascade formal ADR dispute resolution mechanisms to the magistrate courts too, rather than leave it within the purview of the High Court's jurisdiction.[102]

There is need to enhance and promote the continual use of ADR in the dispensation of justice across the justice sector. This can be achieved through the following manner: Documentation and lobbying e.g. monitoring government commitment in ensuring the realization of constitutional provisions on ADR by institutions and civil society; Community justice system campaigns, training and collaborative networking; Lobbying for full implementation of provisions of civil procedure Act 2012 on mediation (ADR), promoting awareness and linkages with existing justice mechanisms e.g. tribunals; there is need to revisit and consider the roll out of court counsel desks in law courts to provide legal aid and mediation services; ADR pilots through Court User Committees; Collaborative partnerships and strategic networking; and Staff training and certification as mediators to meet demand.[103]

In addition, there is need to change the attitudes of practitioners within the ADR dispute resolution systems. The practitioners need to view ADR as complementary to litigation and not an avenue for loss of revenue. They need to be sensitized and made aware of the ADR process and where is its true end; resolving conflict.[104] This could also be addressed through inclusion in

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[101] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, op cit.

[102] See Magistrates' Courts Act, No. 26 of 2015, Laws of Kenya.

[103] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, op cit.

[104] NADRAC, *The Resolve To Resolve — Embracing ADR To Improve Access To Justice In The Federal Jurisdiction*, A Report to the Attorney–General, Commonwealth of Australia, 2009. Available at https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/the-resolve-to-resolve-embracing-adr-improve-access-to-justice-september2009.pdf

curriculum detailed training of young lawyers on ADR, possibly while in Kenya School of Law and other institutions of higher learning offering legal education in Kenya.

Advocates involved with mediation within the legal process ought to receive remuneration in order to promote legal practice within these areas of dispute resolution. Referral to mediation may happen after parties have incurred legal fees in drafting pleadings and filing the same. There is need for a reimbursement system for legal fees and other expenses to ensure that litigants are not resistant to mediation for fear of the extra costs. There could also provision for taxation of costs even where a mediated agreement is reached. There is also a possibility where parties could be allowed to reclaim court fees or part of it. This can be achieved through cooperation amongst Judiciary, LSK and professional ADR training institutions. A harmonised fees scale can also be extended to arbitration since it is now a service industry, and a very profitable one at that, with the arbitral institutions, the arbitrators, the lawyers, the expert witnesses and the providers of ancillary services all charging fees on a scale.[105]

There is a need for close working relations between the commercial sector stakeholders such as the government ministries and departments responsible and the Kenya Association of Manufacturers (KAM) and Kenya Private Sector Alliance (KEPSA), amongst others, to work closely with Nairobi Centre for International Arbitration (NCIA) in sensitising both consumers and service providers on the merits of ADR in resolving commercial disputes. They can achieve this through continuous seminars, workshops and other forums. They could also help institutions set up ADR friendly conflict management mechanisms through such measures as training the personnel responsible for running such dispute management forums in ADR.[106]

There is also need to have synergies across the sectors that will enhance the access to justice, peace building, development and poverty eradication. There is need to involve the different

[105] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

[106] Ibid.

sectors within the Kenyan economy in deepening and advancing ADR dispute resolution mechanisms.[107]

The mediation Taskforce should work closely with the National Legal Aid Service and possibly petition the Parliament to consider funding the mediation programme and even other ADR services carried out under the auspices of the Judiciary perhaps with the exception of arbitration. Such special fund may be channeled through the National Legal Aid Service.

The communities select their AJS agents using criteria such as experience, power, gender, age and stature within the society. The AJS Taskforce ought to come up with a selection criterion of selecting and appointing AJS agents in the future of ADR. There is need to develop a clear legal and policy framework for the application of AJS and TDRMs that that has to guarantee the human rights and interests of the disputants, the victims, offenders, communities with regard to the African customary practices and institutions of the communities. This recommendation can be implemented by the Alternative Justice Systems (AJS) taskforce working in collaboration with the stakeholders and interest groups.[108]

The ADR taskforce as well as the Judiciary ought to continually address the identified gaps within the court annexed mediation pilot scheme through regulation and practice directions. This will ensure efficient and effective justice dispensation once the pilot program is adopted within the court system[109].

There is also a need to set up an overarching body for ADR practitioners to oversee the training and accreditation of mediators, arbitrators, adjudicators, conciliators, facilitators and conveners, amongst other ADR practitioners. Currently, there are different institutions offering the training and accreditation of ADR practitioners. These institutions offer different forms of training to their mediators using different curriculum material in mediation practice.

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[107] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

[108] Ibid.

[109] Tanui.E., "Overview of Ongoing Initiatives by Judiciary Court Annexed Mediation Project." Cultivating A Robust Coordinated Alternative Dispute Resolution (ADR) Framework for Kenya Towards Sustained Economic Growth and Access to Justice forum held on APRIL 12 – 13, 2018 – Crowne Plaza, Nairobi, Kenya.

There is also a need for continued training of CUCs members on plea bargaining agreements.

There should be a framework that recognises traditional norms, laws, customs and institutions that deal with mediation and grants them an equal place in line with the constitution. The way to go is institutionalisation of ADR mechanisms for resolution of all conflicts, to ensure an element of effectiveness in enforcement of the agreed decisions.

By coming up with an Alternative Dispute Resolution Act to provide for the setting up of an institutional framework within which mediation and the other ADR processes would be carried out, the right of access to justice can be actualized. However, caution should be taken to ensure that parties engage in mediation and other ADR mechanisms voluntarily, the autonomy of the process is respected and the solutions reached are acceptable and enduring. Reforms to the current system of conflict resolution would effectively address weaknesses such as delays, costs, backlog of cases and bureaucracy[110].

There is a need for the Mediation Taskforce to work closely with other stakeholders to come up with the code of conduct for mediators and other ADR practitioners. The code should set out principles relating to competence, appointment, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process, fees and confidentiality, which the practitioners should commit to.

The Mediation forums and community ADR practitioners as well, should have a feedback mechanism on the measures they take to support respect for the code through training, evaluation and monitoring of the mediators. Standards of training, practice and codes of ethics should be set and ADR practitioners should be trained through a strategy of participation. Capacity-building requires the transfer of quality skills and knowledge tailored to the needs of a specific group, which is adapted to local practice and benefits from existing capacity, for instance, an established NGO network of community-based paralegals.

The jurisdiction of AJS and TDRMs remain vague due to the different and ununiformed customary laws that are in application within the African communities: The AJS and the Judiciary needs to come up with a policy that identifies, defines and categorizes the kinds of

[110] Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers Limited 2017, pp 173.

cases that ought to be resolved using AJS and TDRMs and those that should be resolved through different dispute resolution mechanisms.

While caution should be taken not to incorporate AJS and TDRM within the formal justice systems, there is need to map out collaboration and opportunities between the courts and these alternative systems: For instance, the courts and the AJS and TDRMS can collaborate in referrals of matters; The AJS may refer matters to the chiefs or police, for instance, serious criminal cases such as homicides or robberies; In cases of appeals or referrals, the file opened for a case at the TJS will be used by the chief, religious leaders or formal court.[111]

Currently, there are no known means of dealing with cases of the different cultures and communities. This has posed great challenges in the past where the court has to in cases that are otherwise suited to be settled through the AJS and TDRM justice systems.[112] The AJS should come up with robust and clear guidelines of dealing with the conflicts involving different cultures and communities in matters of common interest.

The AJS taskforce should map out and identify the nature and extent of the involvement and participation of lawyers and paralegals with the AJS and TDRMs sessions. The lawyers have a strong influence on their client's willingness to submit and participate in these alternative justice systems. There should be a clear guideline on the extent to which these players in the justice system should be involved so as not to formalize, avoid legalities and technicalities of the systems while taking into account their valuable input.[113]

The AJS Taskforce ought to come up with means to strengthen and enhance the enforcements of the AJS decisions. There is need to establish what kind and to what extent the legal tools can be used to enforce punishment. This enforcement may require input from the ministry for interior and internal coordination whose role should be clearly defined through directives and initiatives.

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[111] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, op cit.

[112] Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another (1987) eKLR: The case of the prominent Nairobi criminal lawyer, Silvano Melea Otieno, popularly known as S M Otieno Case which had a long and twirling history in the Kenyan customary law jurisprudence.

[113] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, op cit.

For example, the cases of a party's non-compliance with the decision of an AJS, the matter may also be referred to the chief. For instance, in South Africa, if a person fails to obey the decision of a traditional elder, the person is reported to a magistrate who gives the person 48 hours to show cause and if he fails to, he is punished.[114]

There is need to introduce some form of documentation in these sessions for record purposes. This might pose a unique challenge as some community's value confidentiality in these proceedings that make the recording of the sessions a taboo. This is founded in the values of dignity, cohesion and forgiveness within these dispute resolution mechanisms. The AJS ought to come up with guidelines to set out the documentation guidelines for these mechanisms.[115]

There is need to establish and enquire on the possible means of promoting the inclusion of women and other marginalized groups within these alternative justice systems. In most TJS membership is open to men only, and women are therefore excluded. In the instances where they are included, their participation is limited to issues involving women's sexuality and social issues such as HIV/AIDS, FGM.[116]

There is a need for the Business Court User Committee to work closely with the other stakeholders such as the AJS Taskforce to create awareness on the need for active and meaningful participation of men and women, as well as children, in the administration of justice.

ADR should be entrenched in all the administration activities of the two levels of government to enable the state to reduce litigation costs that is incurred in the formal court processes. This has been achieved to some extent within the national government but the devolved governments could benefit from a deeper reliance on mediation to resolve conflict. This also solves the problem of lack of capacity to grant the remedies sought by disputants.[117]

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[114] Kariuki, F.,'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities,' Alternative Dispute Resolution,' Vol. 3, No. 2 (2015), pp.30-53 at p.53.

[115] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, op cit.

[116] FIDA – Kenya, 'Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya.'

[117] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, op cit.

This can be effected and enhanced through the Council of Governors through formal adoption in the disputes settlement framework within in the county governments. The draft *Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2018*[118] which are still at the drafting stage is a step in the right direction and will go a long way in enhancing the use of ADR in managing public administration disputes.

It is suggested that there is a need to harness information technology to facilitate expedition and efficient records management relating to judicial services. There is additional need to train ICT staff to be able to operate Information and communications technology or (ICT) equipment effectively. In addition, there is a need for continuous equipping of judges, magistrates and other judicial officers with knowledge and skills in discharging their responsibilities more efficiently. This would include skills and knowledge in emerging areas of law such as ICT and ADR and traditional dispute resolution mechanisms. The Judiciary Training Institute was established towards the realization of this goal, and, working closely with other stakeholders can ensure that this is achieved, working with the ministry incharge of ICT. The training should be preceded by a needs assessment of individual officers, paralegals and the judiciary as an institution. Such training should always be synchronized with the court calendar to avoid disruption of judicial services.[119]

Marriage Act, 2014, should be reviewed to ensure that mediation of disputes in customary marriages and the customary dispute resolution mechanisms provided for in the Act conform to the principles of the Constitution. There is also need to provide special guidelines on the stages at which disputes in customary and indeed other forms of marriages can formally be submitted for mediation before going to Court. Rigorous awareness campaigns should be carried out

[118] These Regulations are to apply to the resolution of disputes arising —(a) between the national government and a county government; or (b) amongst county governments; (c) out of an agreement between the national government and a county government or amongst county governments where- (i) no dispute resolution mechanism is provided in the agreement; or (ii) the agreement provides for a dispute resolution mechanism that does not accord with the provisions of section 32(2) of the Act.

[119] "Judicial Reforms and Access to Justice in Kenya: Realizing the Promise of the New Constitution", A Report by the Kenya Civil Society Strengthening Program, 2011.

sensitise the community leaders on the need to uphold and respect gender equity and equality as envisaged by the Constitution of Kenya 2010.[120]

There is need for fast tracking training and accreditation of more ADR practitioners especially under the Court Annexed Mediation program across the country. This can be done by NCAJ Special Taskforce on children matters working closely with ADR training institutions and family law and children law Non-governmental organizations (NGOs) and practitioners.[121]

Lawyers have a role to play in access to justice in juvenile justice system and they should continually be sensitised on the need to promote reconciliation in family and children matters and use ADR as the first port of call in order to uphold and protect the rights and best interests of the children.[122]

There is a need for the Kenya Revenue Authority and the Tax Appeals Tribunal to ensure that there are no negative perception issues on neutrality/independence of ADR Facilitators/mediators while resolving tax disputes.[123] In addition, there is also a need for them to organize forums for civil education in order to create awareness on the use of ADR to resolve tax disputes by the taxpayers and the general public.

There is a need to set up more regional centres for training of international commercial arbitrators in Africa and Kenya. The Kenyan Chapter of Chartered Institute of Arbitrators trains arbitrators across Africa and has trained arbitrators in countries like Nigeria, Zambia, Uganda and even Malawi. Kenya can indeed play a pivotal role in nurturing international commercial arbitration, not only in Kenya but also across the African continent.[124] NCIA is well placed

[120] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, July 2018.

[121] Ibid.

[122] Ibid.

[123] Ibid.

[124] See CIArb Kenya Website, Op. Cit.

within its statutory mandate to promote training of ADR practitioners as well as cooperation with other arbitral institutions.[125]

To attract foreign parties to arbitration within Kenya, there is need to enhance the institution structures, facilities, staff and amities in order to enhance their capacity to able to host international arbitrations. Currently, there is a challenge on the capacity of existing institutions to meet the demands for international commercial arbitration matters. The arbitration centres in Kenya should invest in ultra-modern facilities and amenities to attract disputants to the centres. NCIA, being an international commercial arbitration centre, should benchmark with other regional and international centres and continually invest in modern facilities and amenities.[126]

Enhancing foreigners' confidence in Kenyan arbitration institutions will subsequently boost the confidence of foreigners in the African Arbitration institutions as well as the role of courts. Effective and reliable application of international commercial arbitration in Kenya has the capacity to encourage investors to carry on business with confidence knowing their disputes will be settled expeditiously. NCIA can work with other stakeholders to market Kenya as a conducive and friendly seat of arbitration.[127]

With increase in globalization, it is important that international trade and investment take place with minimal interference by territorial barriers such as unnecessary domestic courts' intervention. [128]

There is need to address the perception of corruption within the arbitration mechanism in Kenya. This can be achieved through rendering professional services and giving awards based on law by the arbitration practitioners.

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[125] Muigua, K. and Maina, N., "Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration." (2016). Available at https://s3.amazonaws.com/academia.edu.documents/44254108/Opportunities_for_the_Nairobi_Centre_for_International_Arbitration.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1538357666&Signature=NPqKzSL6jzO66UZQUJGKDJsDVsk%3D&response-content-disposition=inline%3B%20filename%3DEffective_Management_of_Commercial_Dispu.pdf

[126] Muigua, K., "Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration," *Alternative Dispute Resolution* 3, no. 1 (2015).

[127] Ibid.

[128] Ibid.

Environment and Land Court should work closely with National Land Commission and community elders to realise and enhance management of community land disputes through ADR and TDRMs and subsequently adopt the outcomes of such processes as court orders to enhance enforcement and compliance.[129]

Courts and judicial tribunals should be obligated by policy and legislation to interpret laws in a manner that promotes substantive justice rather than the dictates of procedural technicalities.

The use of Alternative Dispute Resolution (ADR) mechanisms in conflict management and dispute resolution should be encouraged by all relevant stakeholders.

The various administrative authorities mandated to promote access to justice need to work on a consultative and co-operative basis. This is imperative in resolving emerging institutional conflicts due to overlapping mandate and multiplicity of institutions. They need to consult and agree on how to execute the shared mandate in a way that minimizes conflicts.

The establishment of the National Council on the Administration of Justice (NCAJ) under the Judicial Service Act, 2011 goes a long way in facilitating such cooperation and consultation among state and non-state agencies in the administration of justice. However, there is need to strengthen the Council by conferring on it corporate status with defined linkages with court user committees in all judicial stations. This will facilitate effective response to the needs and concerns of all court users by the Council in consultation with the relevant state departments. It is unlikely that this would be achieved for as long as NCAJ remains as a consultative forum, whose recommendations are left to the discretion of various bodies represented in the Council.[130]

Regarding the Use of Alternative Dispute Resolution in Tribunals, there is need for the following: Appointment of more members with arbitration/ mediation qualifications and experience; The ADR in the tribunals should be incorporated in the main ADR frame work of the Judiciary and arbitrators compensated adequately to entrench the practice; There should be

[129] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, op cit.

[130] Ibid.

public awareness creation so as to exploit the use of ADR in matters taken before tribunals; Training is required for Boards/Tribunals on ADR mechanisms.[131]

Judiciary should work closely with other stakeholders to roll out awareness creation campaigns aimed at educating parties to understand at what point they should approach the courts for referral to ADR or stay of proceedings to allow for ADR. Sometimes, the parties approach the courts with the request too late in the process.[132]

The Criminal Procedure (Plea Bargaining) Rules 2018 should be reviewed and revisited to ensure wider acceptance and also ensure that the same are fully applicable to the local scenario.[133]

6. Conclusion

The Constitution of Kenya 2010 specifies the fundamental rights and freedoms to which every Kenyan is entitled. It empowers courts to enforce human rights and interpret the law in a way that gives effect to a right of a fundamental freedom. To ensure full enjoyment of rights, the Constitution guarantees the right of access to justice under Article 48. Further, the Constitution widens the doors of access to justice by promoting the access through formal and informal processes. To this end, Article 159 (2) (c) and (3) brings on board other justice mechanisms such as ADR and TDR to ensure wide access to justice. For TDRs to be applicable, they must not be inconsistent with the Constitution, justice or morality or any other written law.

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDRs, there is no elaborate legal or policy framework for their effective application. This is the situation despite the fact that a great percentage of disputes in Kenya are resolved through mediation, conciliation, negotiation and traditional processes. Currently, the legal

[131] IDLO, *Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR for Access to Justice and Commercial Disputes*, Op cit.

[132] Ibid.

[133] Ibid.

framework does not provide for linkage of TDRs with the formal court process. In most instances, courts have undermined the awards reached through TDRs terming them as informal and not founded on any law. This has further frustrated the utilization of TDRs in Kenya.

Kenya's Vision 2030 seeks to ensure that Kenya achieves and sustains an average economic growth rate of over 10% per annum over the next 12 years; build a just and cohesive society with equitable social development, clean and secure environment; and, ensure a democratic political system that nurtures issue-based politics, the rule of law, and protects all the rights and freedoms of every individual and society.

Alternative justice systems and other alternative community justice systems have an inherent traditional value which is part of the cultural heritage of the local communities in Kenya. These systems have potential to deepen the access to justice due to their proximity to the people, their affordability, their legitimacy entrenched in the cultural heritage that enables them to promote cohesion and harmony within their communities. These can be achieved through the foregoing related recommendations.

Mediation has unlimited potential in the promotion of the right to access to justice, this is because this mechanism is speedy, cost effective, confidential and takes into the account the interests of the parties over their rights. It also has the ability to mend the pre-existing relationships between the parties. The Sustainable Development Goals (SDGs) have linked the peace with development, thus, Kenya cannot achieve developmental goals without peace. These SDGs also opine that in order to obtain peace, there must be access to justice and respect the human rights for all citizens. Mediation is one of the dispute resolution mechanisms that promote both peacekeeping and access to justice which makes it a potent tool in the hands of the judicial systems to achieve these goals.

From the findings of the research and study conducted in a Baseline Survey by the IDLO, there is a need for enactment and implementation of a sound legal and policy framework for effective utilization of TDRMs and ADR to ensure full access to justice for Kenyans. The study has revealed that ADR and TDRMs are widely used by communities to resolve a myriad of disputes and therefore cannot be wished away. Therefore, it is imperative that the ADR and TDR mechanisms be anchored in the legal and policy framework. The framework should harness the

recommendations made in this report for effective incorporation of TDRs and other community-based process into the justice system. An integrated approach to ADR legal and institutional framework with synergies across different sectors will go a long way in deepening access to justice for commercial and non-commercial disputes in Kenya.

There is thus a need for continuous evaluation of the law and practice of ADR in enhancing access to justice in Kenya to ensure continued improvement and appreciation of the same. A continuous monitoring and evaluation programme should be undertaken to appraise the implementation of the law, policy and administrative procedures and programmes on access to justice.

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