

**Effective Application of Traditional Dispute Resolution
Mechanisms in the Management of Land Conflicts in Kenya:
Challenges and Prospects**

Kariuki Muigua

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Abstract

Land resources are considered as an important part of the social, economic and cultural aspects of the lives of many Kenyan communities especially in the rural areas. However, these resources are finite in nature while the population of these people is growing by the day. This, coupled with other challenges such as poverty and climate change, often leads to conflicts arising from the threatened access and control of the land and its resources. The resultant threat to peace and instability means that these conflicts should be effectively managed. However, due to the sensitive nature of the conflicts, Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms have often been proposed as some of the most viable means of managing the conflicts as their perceived advantages are believed to be capable of balancing the delicate nature of the interests involved. This paper discusses the challenges and prospects involved in the application of these mechanisms in management of land conflicts in Kenya. The author argues that unless these challenges are dealt with first, these mechanisms may not achieve the desired outcome.

1. Introduction

Land is considered to be one of the most important economic resources in Kenya.¹ However, it has not only economic importance attached to it but also has social, cultural and even sentimental value to many people in the country. The fact that Kenya is largely an agricultural based economy with many communities still relying on land to take care of their livelihoods.² This means that the ownership and control of land often comes with conflicts owing to the fact that such land is also a finite resource especially with the ever growing population with non-corresponding national economic growth figures.³ If not well managed, these conflicts are likely

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¹ See Hermunen, T., "Land use policy in Kenya: Experiences from Taita Taveta district," *University of Helsinki, Department of Geography* (2004). Available at http://www.helsinki.fi/science/taita/reports/Land_use_policy_Kenya_Taita_Hermunen.pdf [Accessed on 5/10/2019].

² Ibid; see also Quan, J., Tan, S., & Toulmin, C., "Land in Africa: market asset or secure livelihood?" (2004), *Proceedings and summary of conclusions from the Land in Africa Conference held in London, November 8-9, 2004*. Available at <https://pubs.iied.org/pdfs/12516IIED.pdf> [Accessed on 5/10/2019].

³ Kennedy Jr, B., "Environmental scarcity and the outbreak of conflict," *Population Reference Bureau* (2001). Available <https://www.prb.org/environmentalscarcityandtheoutbreakofconflict/> [Accessed on 5/10/2019]; Republic

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

to not only lead to instability in the country but also may result in casualties as disagreeing factions resort to unorthodox means of dealing with these conflicts.⁴ The law has thus set out mechanisms that should be used in managing these conflicts. The Constitution envisages formal and informal mechanisms to address land conflicts. Chapter Ten (Article 159) of the Constitution designates Judiciary as the main arm of the Government to address civil and criminal matters in the country to ensure that justice is done to all.⁵

The Constitution requires that, in exercising judicial authority, the courts and tribunals must be guided by the principles of, inter alia— promotion of alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms*, subject to clause (3) (emphasis added).⁶ It is noteworthy that these mechanisms form part of the traditional knowledge since when they are applied in the community setting, they mostly rely on such knowledge for their effectiveness.⁷

In addition to this, Article 60 of the Constitution also provides that one of the principles of land holding in the country is encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.⁸ The other principles on how land in Kenya should be held, in addition to being used and managed in a manner that is equitable, efficient, productive and sustainable, are—equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; and

of Kenya, *Kenya Population Situation Analysis*, (National Council for Population and Development (NCPD), July, 2013). Available at https://www.unfpa.org/sites/default/files/admin-resource/FINALPSAREPORT_0.pdf [Accessed on 5/10/2019].

⁴ See Alao, A., *Natural resources and conflict in Africa: the tragedy of endowment*, Vol. 29, University Rochester Press, 2007; Muigua, K., 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 4, No 2, (2016), pp. 1-63; Humphreys, M., "Natural resources, conflict, and conflict resolution: Uncovering the mechanisms," *Journal of conflict resolution*, vol.49, no. 4 (2005): 508-537.

⁵ 159. Judicial authority

(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

⁶ Ibid, Art. 159(2) (c).

⁷ Castro, A.P. & Ettenger, K., 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' *Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry,"* 2000.

⁸ Article 60 (1)(g), Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

elimination of gender discrimination in law, customs and practices related to land and property in land.⁹

These principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.¹⁰

In addition to the foregoing, the functions of the National Land Commission include, inter alia: to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; and to encourage the application of traditional dispute resolution mechanisms in land conflicts.¹¹ This is a significant provision considering that land conflicts form the bulk of natural resource conflicts reported in the country, and the land issue is an emotive one.¹²

This paper mainly focuses on the edict of encouraging communities to settle land disputes through recognised local community initiatives consistent with this Constitution.¹³ The paper discusses the viability of this approach to management of land disputes in Kenya and the practical and legal challenges that are likely to arise in the implementation of these provisions. Considering that these constitutional provisions may be given force by the proposed *Alternative Dispute Resolution (ADR) Bill, 2019*¹⁴ (*ADR Bill, 2019*), this paper makes reference to the Bill in an attempt to point out not only the inconsistencies in the Bill but also to highlight the challenges that arise in applying Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms in management of land conflicts and disputes in the country.

⁹ Ibid, Article 60 (1).

¹⁰ Article 60(2).

¹¹ Ibid, Art. 67(2) (f).

¹² Government of Kenya, *Report on the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer Nairobi, 2002); See also Akiwumi, A.M., et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.

¹³ 60. Principles of land policy

(1) *Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—*

(g) ***encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.***

67. National Land Commission

(2) The functions of the National Land Commission are—

(f) ***to encourage the application of traditional dispute resolution mechanisms in land conflicts;***

¹⁴ Senate Bills No. 19 (Government Printer, Nairobi, 2019).

2. Land Conflicts in Kenya

As already pointed out, land ownership and control is an emotive subject in Kenya which means different things to different people hence more often results in conflicts over control and ownership.¹⁵ People may perceive land ownership and control in accordance with social, cultural, ethnic, class and family dimensions. To farmers and pastoralists land is a source and a key element of living while to the elite land is a marketable commodity and access to profits.¹⁶ The implication of this is that land disputes that arise may take different forms according to the underlying causes.

In many African cultures, the tribe is at the top of the hierarchy of traditional African communities' socio-political organization. It is the custodian of the community land, resources and customary law. It also brokers inter-community peace pacts, negotiate for peace, grazing land, water and other resources and in compensation arrangements.¹⁷

Despite the existence of the formal conflict management mechanisms, there has been perennial land and natural resource conflicts in the country, hence the need to explore the use of ADR and TDR mechanisms in the management of these conflicts in peaceful way owing to the importance of these resources to majority Kenyan communities.

3. Management of Land Conflicts in Kenya

Land conflicts management may either be managed through formal mechanisms such as courts and tribunals or through informal mechanisms which include Alternative Dispute Resolution Mechanisms (ADR) and Traditional Dispute resolution Mechanisms (TDRMs).

Natural resource based conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests, rights, access, use and ownership) and stakes (economic, political, environmental and

¹⁵ See Hermunen, T., "Land use policy in Kenya: Experiences from Taita Taveta district," *University of Helsinki, Department of Geography* (2004), p. 1. Available at http://www.helsinki.fi/science/taita/reports/Land_use_policy_Kenya_Taita_Hermunen.pdf [accessed on 30/9/2019].

¹⁶ Ibid, p.1.

¹⁷ See generally, Rabar, B. & Karimi, M. (Eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities*, (ITDG, Nairobi, 2004), p.45; See also Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965).

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

socio-cultural).¹⁸ As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.¹⁹ Despite this, there are key principles such as, inter alia, participatory approaches²⁰, equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.²¹

This section explores both the formal mechanisms and the informal mechanisms.

3.1 Management of Land Conflicts through Courts and Tribunals

The Constitution envisaged the establishment of an Environment and Land Court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.²² In order to give effect to Article 162(2)(b) of the Constitution, the Environment and Land Court Act 2011²³ to establish a superior court to be known as the environment and land 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.

Under the Environment and Land Court Act 2011, the jurisdiction of the Court which has and exercises jurisdiction throughout Kenya includes: 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 relating to environment and land.²⁴ In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court has power to hear and determine disputes: relating to environmental planning and protection, climate matters, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other

¹⁸ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' *Annex C - Summary of Discussion Papers*, (FAO), available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 2/10/2019].

¹⁹ Ibid.

²⁰ Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, PP. 10–17.

²¹ Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

²² Article 162 (2) (b).

²³ Act No. 19 of 2011, Laws of Kenya.

²⁴ Sec. 13(1), Environment and Land Court, 2011.

*Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land
Conflicts in Kenya: Challenges and Prospects*

natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.²⁵ In addition to this, the Act provides that nothing in the Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.²⁶

Apart from the matters referred to in subsections (1) and (2), the Court is empowered to exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.²⁷

Furthermore, in exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including— interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution; declaration; or costs.²⁸ Notably, courts have held that ‘under Section 13(7) (a) of the Environment and Land Court Act, this court has jurisdiction to issue preservatory orders relating to both civil and criminal processes. That jurisdiction is however limited to matters relating to environment and the use and occupation, and title to land.’²⁹

The *Community Land Act 2016*³⁰ which was enacted to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes³¹ also specifically provides for judicial proceedings in community land disputes alongside other mechanisms, though as the last resort. Section 42(1) thereof provides that ‘Where all efforts of

²⁵ Sec. 13(2), Environment and Land Court, 2011.

²⁶ Sec. 13 (3).

²⁷ Sec. 13 (4).

²⁸ Sec. 13 (7).

²⁹ Para 10, *National Land Commission v Afrison Export Import Limited & 10 others* [2019] eKLR, ELC Reference No. 1 of 2018; Regarding the possibility of concurrence of High Court and the Environment and Land Court jurisdictions, see *Ifdid Ole Tauta & others vs Attorney General* (2015) eKLR; *Patrick Musimba vs. National Land Commission & 4 others* (2015) eKLR; and *Christopher Ngusu Mulwa & 28 others v County Government of Kitui & 2 others* [2017] eKLR.

³⁰ *Community Land Act, No. 27 of 2016*, Laws of Kenya.

³¹ *Ibid*, preamble.

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

resolving a dispute under this Act fail, a party to the dispute may refer the matter to court'. The Court may- confirm, set aside, amend or review the decision which is the subject of the appeal; or make any order in connection therewith as it may deem fit.³²

3.2 Management of Land Conflicts through Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms

Although the Environment and Land Court Act 2011 establishes the environment and land court, it also provides for the use of ADR in management of land disputes. It provides that 'nothing in the 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.³³ In addition, where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court should stay proceedings until such condition is fulfilled.³⁴

The use of ADR mechanisms in managing land disputes is also provided for under the *Land Act, 2012*³⁵. The Act provides that in the discharge of their functions and exercise of their powers under this Act, the National Land Commission and any State officer or public officer shall be guided by some values and principles which include— encouragement of communities to settle land disputes through recognized local community initiatives; and alternative dispute resolution mechanisms in land dispute handling and management.³⁶

The applicability of ADR and TDR mechanisms in community land disputes is envisaged under the *Community Land Act 2016*³⁷. Section 39(1) thereof 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'.

³² Ibid, sec. 42 (2).

³³ Sec. 20 (1).

³⁴ Sec. 20 (2).

³⁵ No. 6 of 2012, Laws of Kenya.

³⁶ Ibid, sec. 4 (2) (g)(m).

³⁷ *Community Land Act, No. 27 of 2016*, Laws of Kenya.

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

Indeed, the Act requires that ‘any dispute arising between members of a registered community, a registered community and another registered community should, at first instance, be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws’.³⁸ Where a dispute or conflict relating to community land arises, the registered community should give priority to alternative methods of dispute resolution.³⁹

In addition, subject to the provisions of the Constitution and of this Act, a court or any other dispute resolution body should apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution.⁴⁰

Apart from the applicability of TDRMs, the Community Land Act 2016 also has specific provisions for the application of mediation⁴¹ and/or arbitration⁴².

The *Draft Alternative Dispute Resolution Policy 2019*⁴³ was meant ‘to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve

³⁸ Ibid, sec. 39 (2).

³⁹ Ibid, sec. 39 (3).

⁴⁰ Ibid, sec. 39 (4).

⁴¹ Ibid, sec. 40.

40. Mediation

- (1) Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation.
- (2) The mediation shall take place in private or in informal setting where the parties participate in the negotiation and design the format of the settlement agreement.
- (3) The mediator shall have the power to bring together persons to a dispute and settle the dispute by—
 - (a) convening meetings for the hearing of disputes from parties and keep record of the proceedings;
 - (b) establishing ground rules for the conduct of parties;structuring and managing the negotiation process and helping to clarify the facts and issues; and
 - (c) helping the parties to resolve their dispute.
- (4) If an agreement is reached during the mediation process, the agreement shall be reduced into writing and signed by the parties at the conclusion of the mediation.

⁴² Ibid, sec. 41.

41. Arbitration

- (1) Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.
- (2) Where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of the Arbitration Act (No.4 of 1995) relating to the appointment of arbitrators shall apply.

⁴³ Draft developed through the joint efforts of the Judiciary, the IDLO, USAID, and the Nairobi Center for International Arbitration (NCIA). Available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

optimal delivery of access to justice for all Kenyans. It is intended to create a well-coordinated, well capacitated and cohesive ADR system that is strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system and providing quality justice services to Kenyans across the country’ (emphasis added).⁴⁴

This Draft ADR Policy 2019 together with the ADR Bill, 2019 are meant to formalize the use of ADR and TDR mechanisms in Kenya in management of conflicts including natural resources and land conflicts.

4. Challenges and Prospects

4.1 Recognition and Enforcement of Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms Outcomes

Considering the diversity of ADR and TDR mechanisms based on the different communities as well as the informality that comes with the, enforcement of their outcomes is going to prove difficult. This is also likely to be complicated by the non-binding nature of these mechanisms such as mediation. For instance, in the case of *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others [2018] eKLR⁴⁵*, the ELC Court at Garissa was called upon by the defendant/applicant to determine an application seeking orders that the proceedings be stayed and that the dispute be referred to the local community elders for resolution.⁴⁶ The Court observed that ‘*Under Article 159 (2) (c) the courts and tribunals are to ensure that there is promotion of Alternative Dispute Resolution mechanism, mediation reconciliation, arbitration and traditional dispute resolution as a means of bringing cohesion and co-existence amongst the people. However, parties have to consent and be willing to be bound by the decision of the decision makers. In this case, the parties had initially agreed to refer the dispute to a panel of elders but the plaintiff later abandoned the process and elected to bring the dispute for resolution to this court’ (emphasis added). This case illustrates the first challenge that arises when applying ADR and TDR*

⁴⁴ Draft Alternative Dispute Resolution Policy 2019 (Zero draft), p.7. Available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf

⁴⁵ *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others [2018] eKLR*, Environment and Land Case 30 of 2017 (Formerly 77 of 2017, Embu).

⁴⁶ *Ibid*, para. 1.

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

mechanisms in land disputes; the unenforceability of the outcomes of mediation outcomes in land matters.

It is therefore to be seen how outcomes in land matters, are to be enforced by the courts. The only exception would be where both parties mutually agree on the outcome under the law of contract or under some other agreed arrangements and then approach the court to record it as consent. In such instances, it would be easier for the courts to record and adopt such agreed outcomes as an order of the court.⁴⁷

4.2 Recourse to Court and Recognition and Enforcement of Settlement Agreement

Clause 32 of the proposed *Draft ADR Bill, 2019*⁴⁸ provides that all the parties and their advocate(s) should file a certificate with the Court for confirmation that ADR has been considered. While this provision is drafted in broad terms, it is silent on what would be the effect of any of the parties or their advocates failing to file the relevant certificate(s) at the appropriate time. It fails to clarify on whether the Court would send them back in order to comply or whether it would invoke clause 28 (2) (a) of the Bill. Considering that land matters are sensitive, it is critical that it is clarified on what the Courts would do in such instances as the one described above in order to avoid an outcome that one of parties/groups consider invalid.

⁴⁷ See Law of Contract Act, Cap 23, Laws of Kenya, sec. 3(3); see also Civil Procedure Rules 2010, Order 13, rule 2.] Judgment on;

“2. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

Civil Procedure Rules 2010, Order 25, rule 5;

[Order 25, rule 5.] Compromise of a suit.

5. (1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.

⁴⁸ Draft Alternative Dispute Resolution Bill, 2019, Senate Bills No. 19 (Government printer, Nairobi, 2019). Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/AlternativeDisputeResolutionBill_2019.pdf

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

Clause 33 of the Bill that provides for resort to judicial proceedings is not clear on whether the decision of the High Court or the Court that referred the dispute for resolution through ADR is final or whether the dissatisfied party may move to Court of Appeal. It is important to clarify this since any party or group losing some rights to what they consider their land may resort to other unconventional and non-peaceful means if they feel that justice was not served by the courts.

Notably, clause 36 of the Bill which outlines the grounds for referral of recognition or enforcement of settlement agreement provides that:

The recognition or enforcement of a settlement agreement may be refused where—

- (a) at the request of the party against whom it is invoked, that party furnishes to the High Court or the court referring the dispute to alternative dispute resolution proof that—*
 - (i) a party to the alternative dispute resolution process was under some incapacity;*
 - (ii) the settlement agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the country where the settlement agreement was made;*
 - (iii) the party against whom the settlement agreement is invoked was not given proper notice of the appointment of a conciliator, mediator or traditional dispute resolver;*
 - (iv) the party against whom the settlement agreement is invoked was not given proper notice of the alternative dispute resolution process or was otherwise unable to present its case;*
 - (v) the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the referral to alternative dispute resolution, or it contains decisions on issues beyond the scope of the referral to alternative dispute resolution, provided that if the decisions on issues referred to alternative dispute resolution can be separated from those not so referred, that part of the settlement agreement which contains decisions on issues referred to alternative dispute resolution may be recognized and enforced;*
 - (vi) the appointment of the conciliator, mediator or traditional dispute resolver was not in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;*
 - (vii) the alternative dispute resolution process was not conducted in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;*
 - (viii) the settlement agreement has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which that settlement agreement was made; or*
 - (ix) the making of the settlement agreement was induced or affected by fraud, bribery, corruption or undue influence;*
- (b) if the High Court or the court finds that—*
 - (i) the subject-matter of the dispute is not capable of settlement by alternative dispute resolution under the law of Kenya; or*
 - (ii) the recognition or enforcement of the settlement agreement would be contrary to the public policy (emphasis added).*

*Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land
Conflicts in Kenya: Challenges and Prospects*

The underlined portions raise a number of concerns. To begin with, it is notable that in the definitions/interpretation section, the definitions of the terms ‘conciliation’ ‘mediation’ and ‘traditional dispute resolution’ do not mention anything on the potential international nature of these processes. Unlike the Arbitration Act which defines arbitration to include both domestic and international arbitration, the current ADR Bill 2019 is quiet on this as far as the said processes are concerned. It is therefore questionable whether the given definitions should be inferred to include the international aspects of these processes, especially conciliation and mediation. Secondly, the scope of the Bill as envisaged under clause 4(1) is that Bill shall apply to certain civil disputes including a dispute where the National government, a county government or a State organ is a party. What is not clear is whether this includes disputes involving foreign parties transacting with the National government, a county government or a State organ. Considering that there may be other laws that may oust the jurisdiction of this Bill in as far as resolving disputes with foreign parties is concerned, the Bill should not include the international aspects of the processes in question. Thirdly, it is an established fact TDR mechanisms *are highly subjective and unique to communities and cultures* (emphasis added). It is therefore not viable to contemplate an international TDR decision under the Bill. It may be imperative to reconsider these provisions to avoid the obvious challenges in attempting to enforce such decisions, even assuming that they may exist.

In ADR or TDR referrals which were done by the Court and/or parties filed their respective certificates as contemplated under clause 32 of the Bill, it is not clear as to whether a party would still have the liberty to challenge the decision under some grounds such as “*the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the referral to alternative dispute resolution, or it contains decisions on issues beyond the scope of the referral to alternative dispute resolution*”. The Bill is also silent on what happens where the referring court and the parties in their certificates agreed that the dispute in question could be referred for ADR or TDR. It does not address the question on whom the error, if any, is to be revisited. Arguably, it is possible for a ‘losing’ party to avoid filing the certificate or challenging the decision to refer the same for ADR or TDR at the relevant stage and wait until the outcome

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

and use these provisions to delay the process of recognition and enforcement. Again, the Bill does not have any provisions on how these issues are to be reconciled.

Again, even though the outcome of ADR and/or TDR process is binding on the parties, where parties challenge the enforcement and recognition, clause 36 of the Bill is silent on whether a dissatisfied party may appeal the decision of enforcement and recognition to a higher court. This may present challenges as has been the case with arbitration outcomes.

4.3 Determination of the Expertise of the ADR and TDR Practitioners

The formal recognition of traditional dispute resolution mechanisms in the *Draft ADR Bill, 2019* is commendable as these mechanisms have often faced challenges in their application as they mostly depend on particular and differing customs of the different communities. Having a formal basis for their application as envisaged in the Constitution is thus to be lauded.

However, TDR mechanisms still have to face one more hurdle: determination of the expertise of the practitioners. It is assumed that it is under the provisions of this Bill, once enacted that the constitutional provisions on application of ADR and TDR mechanisms to land disputes will be applied.

Clause 27 of the Bill which provides for the competence of a traditional dispute resolver provides at sub clause (1) that “A person shall not act as a traditional dispute resolver unless acquainted with the customary law to be applied in resolving the dispute”. Sub clause (2) (ought to be corrected on the bill to read (3) provides that “the Committee may, in as far as is reasonably practicable, prepare and maintain a list of traditional dispute resolvers”. These provisions may present a challenge to the Committee. For instance, it is not clear on the criteria to be used when determining whether the potential candidate is acquainted with the customary law to be applied in resolving the dispute. The law has been that anyone who seeks to rely on customary law especially in African customary marriages has the onus of proving the same as was held in the celebrated case of *Kimani v. Gikanga [1965] EA 735*, where *Duffus JA* explained the position thus:

“To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case” (emphasis added).

The question that arises therefore is how, under the above provisions of the Bill, the Committee will decide that an applicant is competent and acquainted with the customary law to be applied in resolving the dispute. It is possible that in the Committee, there may be nobody acquainted with the customary law in question. In ensuring that the Committee does not face challenges in coming up with the register, these clauses may need to be reconsidered. The other potential risk is locking out potential candidates where the process and criteria of selection is too formalized. It is possible that the most qualified candidates may not have the formal education or the ‘requisite papers’ to put in during application. It is not clear how the Committee will overcome this potential hurdle. What makes TDR mechanisms attractive is their informality and this ought to be preserved as much as possible in legislating on these processes. It should also not be lost on the drafters that TDR mechanisms include a number of processes just as is the case in ADR mechanisms and various communities may use different approaches or processes in dealing with diverse cases.

This process of determining the applicability of TDR mechanisms may also arise under Clause 28 (2) (a) which provides that “A court before which a dispute is filed or pending may refer a dispute for resolution through a traditional dispute resolution process at any time where— (a) the court determines that traditional dispute resolution will facilitate the resolution of the dispute or a part of the dispute”. Again, the Bill is silent on what procedure or evidence the Court will rely on to assist it in making this decision. It is not yet clear whether the communities involved, in the case of community land under *Community Land Act 2016*⁴⁹, will have a chance to appoint the preferred experts in such TDR process.

Clause 29 (2) of the Bill provides that the traditional dispute resolver must submit to the court a written down settlement agreement as well as a report at the conclusion or termination of the

⁴⁹ Act No. 27 of 2016, Laws of Kenya.

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

TDR process. Considering that some of the customary experts (mostly elders) may not have formal knowledge of reading and writing, it is debatable as to whether there should be a provision for them to work with an assistant or a court appointed clerk to assist them in coming up with the settlement agreement or the report. Alternatively, they can appear in open court to ‘report’ on the outcome and the magistrate or judge puts it down in writing and records it as the decision of the Court. In other words, such settlements or reports can be treated the same way as provided under clause 29 (3) which states that “Except where a dispute was referred for resolution through traditional dispute resolution or at the request of the parties, a settlement agreement need not be in writing”. The drafters and policy makers may include other viable options to address such challenges. The Bill can include court appointed assistant(s) to work with the resolvers in order to capture in writing what the dispute resolvers conclude.

5. Making Traditional Dispute Resolution Mechanisms work in Managing Land Conflicts in Kenya

ADR and TDR mechanisms when applied in management of disputes and conflicts can create viable channels for public participation in meaningful decision-making processes. Notably, the objects of the devolution of government are, inter alia— to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their development; and to protect and promote the interests and rights of minorities and marginalised communities.⁵⁰

While the foregoing provisions are laudable in view of the fact that they have envisaged traditional knowledge in terms of traditional dispute resolution mechanisms within the legal framework, the real task lies in implementing these provisions and creating opportunities for incorporation of such knowledge in decision-making and conflict management as far as land is concerned. There is a need to move beyond the formality of the proposed Bill to come up with procedures that can actually work. This is especially important in the application of traditional dispute resolution mechanisms in land conflicts (Art. 67) as well as dealing with the inter-community and intra community conflicts that are mostly natural resource based.

⁵⁰ Art. 174.

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

Traditional conflict resolution practices reflect principles of reconciliation based on long-standing relationships and values.⁵¹ They tend to be effective in addressing intra-community and even inter-community conflict, where relationships and shared values are part of the reconciliation process.⁵²

However, there is a need to integrate traditional and formal approaches to conflict management in a way that ensures that the informality of these mechanisms is not lost. Including communities and the affected parties in appointment of these traditional dispute resolvers may help in not only lending credence to the process but also may help in repositioning the traditional authority especially as far as resolution of land conflicts within communities, as contemplated under Article 60(1) (g) of the Constitution, is concerned.

There is also a need to consider and carefully capture the spirit of the *Alternative Dispute Resolution Policy (Zero Draft), 2019*⁵³ which may be useful in capturing the spirit of the Constitution, ADR and TDR mechanisms as well as the other relevant laws that deal with these mechanisms. The policy-makers are wary of the risks involved in formalization of ADR processes and the implementation of the ADR Policy which include: over-formalisation of the ADR sector which will undermine its utility as a more flexible, faster, informal mechanisms for justice; technology disruption of working models in ADR; resistance to change by stakeholders and users of ADR; inadequate resources to implement the policy; and competition between formal and ADR mechanisms, and legal and non-legal practitioners.⁵⁴ These precautions are necessary considering that the ADR and TDR mechanisms are perceived to be better off than formal approaches in managing some disputes due to the advantages that they have over the formal processes. Any formalisation approach that takes away these advantages thus defeats the very essence of their use in managing disputes.

In a bid to strengthen the legal framework for ADR in the country, the Draft ADR Policy recommends that there be enacted an Alternative Dispute Resolution Act, which shall be

⁵¹ Myers, L.J. & Shinn, D.H., 'Appreciating Traditional Forms of Healing Conflict in Africa and the World,' *Black Diaspora Review*, Vol. 2(1), Fall 2010.

⁵² Ibid.

⁵³ Draft developed through the joint efforts of the Judiciary, the IDLO, USAID, and the Nairobi Center for International Arbitration (NCIA). Available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf

⁵⁴ *Alternative Dispute Resolution Policy (Zero Draft), 2019.*

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

the framework legislation for ADR in the country. The Act should among other things: provide for establishment of mechanisms for linkage and coordination between the formal justice system and ADR system; sector governance; regulation; standards setting; enforcement of decisions; among other things.⁵⁵ The National Council (to be established under the Act) in liaison with stakeholders should promote the full implementation of existing laws that promote ADR, and advocate for similar legal provisions in other needy sectors.⁵⁶ The assumption is that various laws require different mechanisms as well as varying procedural needs. The Council is thus expected to work closely with other stakeholders to identify and address the special needs under each of the laws and approaches.

As a way of strengthening linkages, coordination and harmonisation in the ADR sector, the Draft Policy also: adopts the principle of subsidiarity in regard to linkage between the ADR systems and the formal court system. This is intended to stem the hegemony of the judiciary, and to allow autonomous operation and growth of ADR without the trappings of judicial conceptions of justice, procedures, retributive approaches, and the individual interests that underpin the method and goals of the formal justice sector; The linkage between the formal justice system and non-court ADR mechanisms are therefore meant to be in areas of mutual benefit such as enforcement, research, and accountability systems; mechanisms and modalities are also to be developed for promotion of coordination and harmonisation between the formal justice system and the ADR sector, and also between actor in the ADR sector itself.⁵⁷

As already pointed out, there is a need to ensure that the legislation process does not defeat the merits of the ADR and TDR processes thus rendering them inapplicable or ineffective when it comes to the specific disputes and conflicts. The drafters of the ADR Bill 2019 should thus revisit the above listed aims of the draft Policy to ensure that they capture these goals and aspirations.

Some of the above listed potential challenges in the application of TDR mechanisms in management of land conflicts can be overcome if these policy goals are well captured and

⁵⁵ Ibid, p. 41.

⁵⁶ Ibid, p.41.

⁵⁷ Ibid, p.42.

Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects

implemented through the ADR Bill. It is important to ensure that the informality and potentially inexpensive and/or cost effectiveness of the ADR and TDR is preserved.

The purpose of the ADR policy is to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans. It is intended to create a well-coordinated, well capacitated and cohesive ADR system that is strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system and providing quality justice services to Kenyans across the country.⁵⁸ It is important that the legal framework on ADR and TDR mechanisms not only captures but also promotes this purpose of the policy framework. This is especially important in order to ensure that communities appreciate and remain in touch with the legal framework on the regulation and application of ADR and TDR mechanisms in management of their everyday disputes and conflicts such as the ones that relate to land and natural resources.

6. Conclusion

ADR and TDR mechanisms are associated with many advantages when appropriately used in management of land and other natural resource conflicts. However, as discussed in this paper, while these processes may have many intrinsic values that make them preferable to the formal mechanisms in management of land conflicts and disputes, there are procedural and appropriateness challenges that should be addressed to make them legally and practically applicable. It is hoped that the challenges discussed in this paper will be considered by the Kenyan policy and decision makers in mainstreaming the use of ADR and TDR in management of land conflicts and disputes in the country.

Effective application of TDRMs in the management of land conflicts in Kenya is possible. However, a lot needs to be done before this goal is realised.

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⁵⁸ *Alternative Dispute Resolution Policy (Zero Draft)*, 2019, p. 7.

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