

Enhancing The Court Annexed Mediation Environment in Kenya

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ENHANCING THE COURT ANNEXED MEDIATION ENVIRONMENT IN KENYA

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Abstract

The paper explores the workings of court annexed mediation in Kenya. With the recent entry in force of the Singapore Mediation Convention, the place of mediation has been elevated. Consequently, some of the shortcomings previously associated with mediation such as recognition and enforcement of settlement agreements have now been catered for under the Convention. This has created a conducive environment for the growth of mediation. In Kenya, court annexed mediation was introduced by the judiciary in 2015 and has witnessed notable success. The paper argues that if court annexed mediation is well actualised, it can enhance access to justice in Kenya and enable the country reap the benefits of mediation as a form of Alternative Dispute Resolution (ADR). The paper highlights some of the successes of court annexed mediation. It also pinpoints some concerns and challenges facing court annexed mediation and suggests solutions aimed at enhancing the mediation environment in Kenya in line with the spirit of ADR embraced under the Constitution of Kenya, 2010.

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1. INTRODUCTION

Mediation is a form of alternative dispute resolution where an acceptable, impartial and neutral third party, who has no authoritative decision-making power, assists disputing parties in voluntarily reaching their own mutually acceptable settlement of the issues in dispute.¹ It has also been defined as a voluntary, informal, consensual and strictly confidential and non-binding dispute resolution process in which a neutral third party helps parties reach a negotiated solution.² Mediation flows from negotiation. It arises where parties to a dispute have attempted negotiations but have reached a deadlock.³ As a result, parties agree to involve a third party to assist them continue with the negotiation process with the aim of breaking the deadlock.⁴ This demonstrates the voluntariness of the mediation process since parties have to agree to the mediation process and the mediator.

Mediation is recognised as one of the international conflict management mechanisms by the Charter of the United Nations.⁵ The Constitution of Kenya, 2010, also recognises mediation as one of the guiding principles that is to be promoted by courts and tribunals.⁶ Mediation has several advantages which include, *inter alia*, cost-effectiveness, flexibility, confidentiality, ability to preserve relationships and promoting expeditious resolution of disputes.⁷ Mediation plays an important role in conflict management. The underlying idea behind mediation and other forms of ADR is to promote efficient,

¹ Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, (Jossey-Bass Publishers, San Francisco, 1996, p. 14

² Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Glenwood Publishers, 2nd Ed., 2017

³ Ibid

⁴ Ibid

⁵ Article 33 of the Charter of the United Nations provides that 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'

⁶ Constitution of Kenya, 2010, Article 159 (2) 'In exercising judicial authority, the courts and tribunals shall be guided by the following principles- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

⁷ Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Op Cit

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effective and expeditious management of disputes in order to provide a conducive environment for human growth and development.⁸

However, whereas mediation and other Alternative Dispute Resolution (ADR) mechanisms have been lauded due to the above advantages, there is still a school of thought that is completely against them. Critics of ADR mechanisms have argued *inter alia* that; there is imbalance of power between the parties, there is absence of authority to consent (especially when dealing with aggrieved groups of people), that ADR presupposes the lack of a foundation for continuing judicial involvement and that Adjudication promotes justice rather than peace, which is a key goal in ADR.⁹ It has further been argued that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation.¹⁰ Thus, when parties settle, society gets less than what appears and for a price it does not know; parties might settle while leaving justice undone.¹¹

Such views reflect the shortcomings of mediation and other ADR mechanisms. These include: lack of checks and balances through public scrutiny to determine whether justice was done; surrender of legal rights due to insistence on fairness at the expense of justice; lack of precedents due to the confidential nature of mediation; unequal bargaining power and difficulty in enforcing mediation agreements.¹²

Several measures have been adopted nationally and globally in order to address the challenges related to mediation while promoting the spirit of ADR. In Kenya, Court Annexed Mediation was introduced in 2015 and is conducted under the umbrella of the

⁸ Muigua.K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited, 2015

⁹ Owen Fiss, "Against Settlement", 93Yale Law Journal 1073(1984)

¹⁰ Ibid

¹¹ Ibid

¹² Clarke. G.R., & Davies. I.T., 'ADR-Argument For and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes' QLD. University of Technology Law Journal, available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=18&ved=2ahUKEwjUqc7M88vnAhVHT8AKHXK5B18QFjARegQICRAB&url=https%3A%2F%2Fflr.law.qut.edu.au%2Farticle%2Fdownload%2F343%2F335&usg=AOvVaw0ZDgE91blBjzwxPAdtHFZ> (Accessed on 12/02/2020)

judiciary. Further, to deal with the problem of enforceability of mediation agreements, the **Singapore Convention on International Settlement Agreements Resulting from Mediation** came into force in August 2019.¹³

The paper briefly analyses salient provisions of the Singapore Convention and how it will change the mediation landscape both nationally and globally. Further, it seeks to examine the workings of court annexed mediation in Kenya and suggest necessary interventions that will ensure that the country reaps full benefits from the programme while promoting the spirit of mediation and Alternative Dispute Resolution in general.

2. THE SINGAPORE CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION

Drafting of the Singapore Convention was informed by a number of factors within the sphere of international trade. There was the recognition by states of the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably.¹⁴ Further, it was noted that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation, and that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.¹⁵

¹³ United Nations Convention on International Settlement Agreements Resulting from Mediation, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf (Accessed on 14/02/2020)

¹⁴ Ibid, Preamble

¹⁵ Ibid, Preamble

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Further, the trend has been that the outcome of a mediation is treated as a *contractual agreement enforced as such* and not as an award as in the case of arbitration (emphasis added).¹⁶ This created a problem in many states in that one party may pull out of such an agreement and seek court intervention as if the mediation never took place. These factors necessitated the drafting of the Singapore Convention in a bid to address this challenge.¹⁷

The convention defines “mediation” as a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) *lacking the authority to impose a solution* upon the parties to the dispute (emphasis added).¹⁸ The convention sets out certain general principles to guide the practice of international mediation. Under the convention, each party shall enforce a settlement agreement in accordance with its *rules of procedure* and under the conditions laid down in the convention (emphasis added).¹⁹ It applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute (“settlement agreement”) which, at the time of its conclusion, is international .²⁰

The convention also lays down certain requirements for reliance on settlement agreements. It requires that a party relying on a settlement agreement under the Convention should supply to the competent authority of the Party to the Convention where relief is sought: the settlement agreement signed by the parties; evidence that the settlement agreement resulted from mediation, such as: the mediator’s signature on the

¹⁶ Muigua. K., ‘The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States’ available at <http://kmco.co.ke/wp-content/uploads/2019/12/The-Singapore-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Kariuki-Muigua-December-2019.pdf> (Accessed on 10/02/2020)

¹⁷ Ibid

¹⁸ United Nations Convention on International Settlement Agreements Resulting from Mediation, ‘Singapore Convention’ Article 2 (3)

¹⁹ Ibid, Article 3 (1)

²⁰ Ibid, Article 1 (1)

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settlement agreement; a document signed by the mediator indicating that the mediation was carried out; an attestation by the institution that administered the mediation; or in the absence of (i), (ii) or (iii), any other evidence acceptable to the competent authority.²¹

It also highlights grounds upon which relief being sought in relation to enforcement of a settlement agreement may not be granted. These include where: a party to the settlement agreement was under some incapacity; the settlement agreement being relied upon is null and void, not binding or is not final according to its terms or has been subsequently modified; obligations in the settlement agreement have not been performed or are not clear or comprehensible; granting relief would be contrary to the terms of the settlement agreement; there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement and there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.²² Grant of relief may also be refused by the Competent Authority on grounds of public policy and where the subject matter of the dispute is not capable of settlement by mediation under the law of that Party.²³

The convention allows for reservations where a party to the Convention may declare that: it shall not apply the Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration; or it shall apply this Convention only to the extent that the parties to the settlement agreement have agreed to the application of the Convention.²⁴

²¹ Ibid, Article 4(1).

²² Ibid, Article 5 (1)

²³ Ibid, Article 5 (2)

²⁴ Ibid, Article 8 (1)

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The Singapore Convention can play an important role in enhancing the mediation environment in Kenya beyond court annexed mediation. With the numerous investment and commercial activities being undertaken in Kenya, commercial and trade disputes are unavoidable.²⁵ Efficient mechanisms for management of such disputes are essential in order to preserve commercial relationships and promote economic growth.²⁶ Mediation is one of the mechanisms that have been used universally in management of such disputes.²⁷ However, the foregoing discussion has shown that mediation suffers from several shortcomings such as enforceability of settlement agreements. Adoption of the Singapore Convention will enhance the mediation environment in Kenya by providing a framework for enforcement of international settlement agreements.

3. UNCTRAL MODEL LAW ON MEDIATION

The Singapore Convention is consistent with the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (Model Law). This is intended to provide parties with the flexibility to adopt either the Singapore Convention or the Model Law as stand-alone legal instruments or both as complementary instruments in order to facilitate a comprehensive legal framework on mediation.²⁸ The Model Law, 2018, amends the Model Law on International Commercial Conciliation, 2002 and applies to international

²⁵ Muigua. K., 'Utilising Alternative Dispute Resolution Mechanisms to Manage Commercial Disputes' available at <http://kmco.co.ke/wp-content/uploads/2018/09/Utilising-Alternative-Dispute-Resolution-Mechanisms-to-Manage-Commercial-Disputes-Kariuki-Muigua-7th-September-2018.pdf> (Accessed on 14/02/2020)

²⁶ Ibid

²⁷ Africa ADR –a new African Arbitration Institution", available at <http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution> (Accessed on 14/02/2020)

²⁸ United Nations Commission on International Trade Law, "United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") Available at https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements (Accessed on 10/02/2020)

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commercial mediation and international settlement agreements.²⁹ It covers procedural aspects of international commercial mediation including *inter alia* appointment of mediators, conduct of mediation, disclosure of information, termination of proceedings and resort to arbitral or judicial proceedings.³⁰ Further, it provides uniform rules on enforcement of settlement agreements and also addresses the right of a party to invoke a settlement agreement in a procedure.³¹ It has been argued that creation of a uniform enforcement process for settlement agreements achieved through international mediation, the Singapore Convention and Model Law will begin to place mediation on an equal footing with arbitration and litigation as a method of international dispute resolution.³² With the increasing commercial and investment activities being undertaken in the country some of which involve multinational corporations, there is need to enhance the international commercial mediation environment in the country. In addition to the Singapore Convention which mainly deals with enforcement of settlement agreements, Kenya can adopt the Model Law to cover procedural aspects of international commercial mediation such as appointment of mediators and conduct of mediation. Adoption of this framework will create an assurance on the enforcement of settlement agreements and will boost the practice of international commercial mediation in Kenya.

²⁹ United Nations Commission on International Trade Law, “UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation 200) Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/annex_ii.pdf (Accessed on 14/02/2020)

³⁰ *Ibid*, S 2

³¹ *Ibid*, S 3

³² Hioureas. C, “The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?” Available at <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1567&context=bjil> (Accessed on 10/02/2020)

4. MEDIATION IN THE AFRICAN CONTEXT

African communities have since time immemorial had their own mechanisms of resolving conflicts as they arose amongst them.³³ These mechanisms were designed to ensure that there was continued co-existence of the communities and that conflicts were fully addressed to prevent their re-emergence in future.³⁴ These mechanisms were designed along principles such as common humanity/communal living, reciprocity and respect.³⁵ The mechanisms employed by indigenous African Communities reflect the present day ADR mechanisms. These included negotiation and mediation where people would sit down informally and agree to resolve their differences on their own or in some instances, with the aid of institutions such as elders or riika (age-sets).³⁶ Mediation is therefore not a novel concept in Kenya since it has been practiced for many centuries.

Thus, while promoting mediation and other ADR mechanisms, it is important that these mechanisms promote the values and cultures that have been embedded in African communities for ages. Conflict management in the African context was designed to promote peace, harmony, co-existence and maintain the social fabric that held communities together.³⁷ It has been argued that culture is an essential part of conflict and conflict resolution.³⁸ Cultures are embedded in every conflict since conflicts arise in human relationships. Further, cultures affect the way we name, blame, frame, and attempt to tame conflicts.³⁹ The mediation environment in Kenya therefore needs to reflect the culture of African communities.

³³ Muigua.K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Op Cit

³⁴ Ibid

³⁵ Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Op Cit

³⁶ Ibid

³⁷ Kariuki. F., *African Traditional Justice Systems*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf> (Accessed on 14/02/2020)

³⁸ LeBaron.M., *Culture and Conflict: Beyond Intractability*, available at <http://sociologycultures.pbworks.com/w/file/fetch/101971144/Culture%20and%20Conflict%20print%20friendly%20%20Beyond%20Intractability.pdf> (Accessed on 14/02/2020)

³⁹ Ibid

5. COURT ANNEXED MEDIATION IN KENYA

Court-annexed mediation arises where parties in litigation engage in mediation outside the court process and then move the court to record a consent judgment.⁴⁰ It has also been defined as the mediation of matters which a judicial officer has ordered to go to mediation or which are mediated pursuant to a general court direction (e.g. a procedural rule which states that parties to a matter make an attempt to settle the matter by way of mediation before the first case management conference).⁴¹

In Kenya, Court Annexed Mediation is conducted under the umbrella of the court.⁴² The project commenced in 2015 through legislative and policy reforms to accommodate mediation in the formal court process.⁴³ These included amendment to the Civil Procedure Act to provide for reference of cases to mediation. Under the Act, the court may direct that any dispute presented before it be referred to mediation: on the request of the parties concerned; where it deems it appropriate to do so; or where the law so requires.⁴⁴ Where a dispute has been referred to mediation by the court, parties are required to select a mediator for that purpose whose name appears in the mediation register maintained by the Mediation Accreditation Committee.⁴⁵ Such mediation is conducted in accordance with the mediation rules. An agreement between the parties shall be recorded in writing and registered with the court which referred the dispute to mediation; such an agreement is enforceable as a judgment of the court.⁴⁶ No appeal lies against such an agreement.⁴⁷ The Act also establishes the Mediation Accreditation

⁴⁰ Muigua. K., 'Court Sanctioned Mediation in Kenya-An Appraisal' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf> (Accessed on 10/02/2020)

⁴¹ Ibid

⁴² The Judiciary, 'Court Annexed Mediation: A Solution for You' available at <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf> (Accessed on 10/02/2020)

⁴³ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' available at <https://www.judiciary.go.ke/resources/reports/> (Accessed on 10/02/2020)

⁴⁴ Civil Procedure Act, Cap 21, S 59B (1), Government Printer, Nairobi

⁴⁵ Ibid, S 59B (2)

⁴⁶ Ibid, S 59B (4)

⁴⁷ Ibid, S 59B (5)

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Committee whose functions include *inter alia* maintaining a register of qualified mediators and setting up appropriate training programmes for mediators.⁴⁸

The Civil Procedure Rules also allows the court to adopt and implement, on its own motion or at the request of the parties, *appropriate means of dispute resolution* such as mediation for the attainment of the overriding objective envisaged under sections 1A and 1B of the Civil Procedure Act (emphasis added).⁴⁹ Where a court mandated mediation adopted pursuant to the rule fails, the court is mandated to forthwith set the matter down for hearing and determination in accordance with the Rules.⁵⁰

The Mediation (Pilot Project) Rules, 2015 were enacted to give effect to the amendments made to the Civil Procedure Act and provide a legal framework on Court Annexed Mediation in Kenya. The Rules provide that every civil action instituted in court after their commencement shall be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable may be referred to mediation.⁵¹ Where a case has been referred to mediation after screening, the mediation Deputy Registrar is required to notify the parties of the decision within seven (7) days.⁵² Seven days after receipt of such notification, parties are required to file a case summary in the prescribed form.⁵³ Such mediation is conducted by a person registered as a mediator by the Mediation Accreditation Committee who is selected by the parties from a list of three qualified mediators nominated by the mediation Deputy Registrar.⁵⁴ The rules further prescribe a time limit of sixty (60) days from the date of referral to mediation within which the proceedings should be concluded.⁵⁵

⁴⁸ Ibid, S 59A (4)

⁴⁹ Civil Procedure Rules, Order 46, rule 20 (1)

⁵⁰ Ibid, Order 46, rule 20 (3)

⁵¹ Legal Notice No. 197, The Civil Procedure Act (Cap 21), The Mediation (Pilot Project) Rules, 2015, Rule 4 (1), Government Printer, Nairobi

⁵² Ibid, Rule 5

⁵³ Ibid

⁵⁴ Ibid, Rule 6

⁵⁵ Ibid, Rule 7

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Since the inception of Court Annexed Mediation in 2015 via the pilot phase in the Commercial and Family Divisions of the High Court in Nairobi, the program has expanded to 12 other counties.⁵⁶ According to statistics from the judiciary, as at 30th June 2019, 3517 matters have been referred to mediation, 2593 concluded, with 1279 matters settled successfully representing a settlement rate of 50 per cent.⁵⁷ Further, Kshs. 7.2 billion that had been held in litigation has ended up being released through court annexed mediation.⁵⁸ The Mediation Accreditation Committee has also accredited 645 mediators in order to facilitate court annexed mediation.⁵⁹

Court Annexed Mediation has so far played an important role in enhancing access to justice in Kenya. The judiciary acknowledges that for cases that have been referred to mediation, the average time for their conclusion is less in comparison to the time taken under the normal court process.⁶⁰ This reflects the expeditious nature of mediation and the need to enhance its environment in Kenya. Court annexed mediation can be a game changer in the access to justice discourse in the country. By combining the attributes of mediation such as voluntariness, party autonomy and expeditious disposal of disputes with the powers of courts to enforce agreements, court annexed mediation can be an important asset in conflict management in the country. It is therefore imperative to ensure efficiency of the process to enable the country reap from its benefits.

⁵⁶ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

6. COURT ANNEXED MEDIATION IN KENYA: CHALLENGES

While court annexed mediation in Kenya is well underway, it faces several challenges that needs to be addressed in order to enhance its efficiency. Further, various concerns have been raised with regards to the working of court annexed mediation in Kenya. Addressing such challenges and concerns can enable the country achieve the ideal environment for court annexed mediation. Some of these challenges and concerns are discussed below.

a. Voluntariness and Autonomy

Voluntariness and party autonomy are essential characteristics of mediation. It is non-coercive in that parties have autonomy over the forum, the process, and the outcome.⁶¹ However, these aspects are to a large extent defeated in court annexed mediation. The voluntariness and the autonomy over the process and the outcome may be diminished since it is pursuant to an order of the court where the settlement has to be returned back to court for ratification.⁶² To this extent, it has been argued that court annexed mediation does not fully capture the attributes of mediation such as: *voluntariness; autonomy over the forum; choice of the mediator; control over the process and the outcome* (emphasis added).⁶³ Court annexed mediation therefore raises concerns related to the aspects of mediation since the court order referring a matter to mediation interferes with an essential characteristic of mediation being its voluntary nature.

However, coercion into mediation does not deprive the process of its capacity to ensure parties reach a resolution to the dispute. In fact, it is arguable that court annexed mediation brings parties to the table since there are parties who would otherwise be unwilling to negotiate or mediate. It is however imperative to ensure that the voluntariness and autonomy of the process is guaranteed.

⁶¹ Muigua. K., 'Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict Through Mediation' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Addressing-the-Psychological-Aspects-of-Conflict-Through-Mediation-3RD-AUGUST-2018-1.pdf> (Accessed on 12/02/2020)

⁶² Muigua. K., 'Court Sanctioned Mediation in Kenya-An Appraisal, Op Cit

⁶³ Ibid

b. Non-Settlement of Matters Through Court Annexed Mediation

Nearly half of the matters that have been referred to court annexed mediation have ended up not being settled. According to the judiciary, in the financial year 2018/2019, 933 out of the 1879 matters processed through mediation were not settled.⁶⁴ This is attributed to various factors such as parties failing to reach an agreement, non-compliance of parties and termination of matters by the parties.⁶⁵ In some instances, such matters have ended up being referred back to courts for litigation thus defeating the entire purpose of court annexed mediation. This raises concerns as to the efficacy of court annexed mediation.

c. Costs of Mediation

While ADR mechanisms have generally been hailed as being cost effective, this characteristic may be defeated in court annexed mediation. In court annexed mediation, referral of a case to mediation may happen after parties have incurred costs such as legal fees through drafting pleadings and filing the same.⁶⁶ Currently, there is no framework for recovery of costs where a case has been referred to mediation. Thus, parties may end up incurring further costs in the process. Further, where parties fail to reach a settlement agreement and such case reverts back to the court, the costs of the entire process ends up being higher than what parties had intended. There is need to ensure efficiency of court annexed mediation to enable parties benefit from the attributes of mediation.

⁶⁴ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

⁶⁵ Ibid

⁶⁶ Muigua. K., 'Court Sanctioned Mediation in Kenya-An Appraisal, Op Cit

d. Lack of Awareness of Court Annexed Mediation

Since its roll out in 2015 at Nairobi, court annexed mediation has expanded to 12 other counties in Kenya.⁶⁷ It can therefore be argued that more than half of the country is not aware of the process. Further, most court users are not aware or are yet to fully embrace mediation and other ADR mechanisms. This demonstrates the reason why a high number of matters are still being filed in courts necessitating screening and referral of some of them to mediation. There is need to create public awareness on the presence and operation of court annexed mediation and other ADR mechanisms to enable Kenyans embrace these mechanisms and reduce backlog in courts.

e. Lack of Efficient Negotiation Skills by the Parties

Mediation flows from negotiation since the mediator merely facilitates discussions between the disputing parties.⁶⁸ Negotiation skills are thus of utmost importance in the process. Statistics from the judiciary show that nearly half of the matters that have been referred to court annexed mediation have ended up not being settled.⁶⁹ This can be attributed to among other factors, the lack of efficient negotiation skills by the parties. There may be need to provide basic negotiation skills to parties before they set down for court annexed mediation.

f. Capacity of Mediators

Court annexed mediation deals with various disputes including commercial matters. Some of the mediators may not have the necessary skills and expertise in such areas making them ill equipped to facilitate the process. There is need for capacity building through training programmes for mediators to ensure that they are well informed and able to efficiently discharge their duties.

⁶⁷ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

⁶⁸ Muigua. K., 'Resolving Conflicts Through Mediation in Kenya' Op Cit

⁶⁹ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

7. ENHANCING ACCESS TO JUSTICE IN KENYA THROUGH COURT ANNEXED MEDIATION: WAY FORWARD

a. Early Referral of Disputes to Mediation

The Mediation (Pilot Project) Rules, 2015 provide for a system of screening of civil actions and referral to mediation for those cases that are found suitable.⁷⁰ The judiciary through the Office of the Mediation Deputy Registrar should ensure that this process is done early enough to avoid instances where cases are referred to mediation after significant steps have already been taken by parties in the litigation process. This would enable parties minimise costs of the process while contributing to expeditious disposal of disputes.

b. Implementing the Ideals of the ADR Policy

The ADR policy is intended 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.⁷¹ The policy proposes a number of recommendations aimed at enhancing the practice of ADR in Kenya which include *inter alia* enactment of an Alternative Dispute Resolution Act and establishment of an ADR division of the High Court to be the focal point for linkage and coordination of the ADR sector.⁷² The policy recognises the importance of ADR mechanisms and their role in promoting access to justice.⁷³ Implementing the ideals of the policy will be mark an important milestone in enhancing the ADR environment in Kenya including mediation.

⁷⁰ Legal Notice No. 197, The Civil Procedure Act (Cap 21), The Mediation (Pilot Project) Rules, 2015, Rule 4, Government Printer, Nairobi

⁷¹ Alternative Dispute Resolution Policy (Zero Draft), available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf (accessed on 14/02/2020)

⁷² Ibid

⁷³ Ibid

c. Maintaining of Quality Standards in Mediation

While mediation is generally understood to be an informal process, there is need to maintain quality standards in court annexed mediation. This relates to the fact that since the process is conducted under the auspices of the court, there may be *perception on the part of the parties that the court in some way exercises control over the process (emphasis added)*. Thus, if a mediator is incompetent or if the process falters, the reputation of the court and the entire judicial system stands to suffer.⁷⁴ The Civil Procedure Act establishes the Mediation Accreditation Committee whose functions include *inter alia* enforcing a code of ethics for mediators as may be prescribed and setting up appropriate training programmes for mediators.⁷⁵ The Committee needs to step up its mandate in order to promote quality of the practice of court annexed mediation in Kenya.

d. Enhanced Support for Court Annexed Mediation

While there has been notable success with court annexed mediation since its roll out in the country, there are notable challenges such as non-compliance by advocates and parties and resistance from legal practitioners.⁷⁶ The judiciary has proposed measures to curb these challenges such as streamlining and integration of court annexed mediation into the justice system.⁷⁷ It also plans to establish mediation rooms in courts under construction.⁷⁸ Sensitisation exercises should also be conducted targeting the public, advocates and other stakeholders. The challenge on non-compliance with directions of mediators needs to be addressed through measures such as summons, citation for contempt and injunctions which can only be enforced by courts. There should also be sustainable funding by the judiciary to support the process. The programme also needs

⁷⁴ F. Kirkham, "Judicial Support for Arbitration and ADR in the Courts in England and Wales", 72 (1) *Arbitration* 53, (2006).

⁷⁵ Civil Procedure Act, Cap 21, S 59 A (4)

⁷⁶ The Judiciary, State of the Judiciary and the Administration of Justice: Annual Report 2018-2019, Judiciary Innovativeness in Access to Justice: Unlocking the Potential of Court Annexed Mediation' Op Cit

⁷⁷ Ibid

⁷⁸ Ibid

to be rolled out to the rest of the country in a progressive manner in order to enhance its impact.

e. Capacity Building

There is need to enhance capacity building through training new mediators and enhancing the efficiency of those already accredited by the Mediation Accreditation Committee. Under the Civil Procedure Act, the functions of the Committee include setting up appropriate training programmes for mediators.⁷⁹ The committee needs to further this function to enhance capacity building that will facilitate court annexed mediation. Mediators need also to learn some basic principles of law such as commercial law principles of 'liability' and 'quantum' in addition to understanding mediation. This will in turn enhance their capacity to facilitate the mediation process.

f. Embracing the Spirit of Mediation in Court Annexed Mediation

Court annexed mediation needs to reflect the true attributes of mediation which include voluntariness, privacy, confidentiality and party autonomy. Thus, the courts through the Mediation Deputy Registrar should not coerce parties into mediation. The process should be voluntary and where parties intend to litigate their dispute, they should not be forced to undertake court annexed mediation through mandatory screening of their cases. As a suggestion, the consent of parties should be sought before their matter is referred to mediation. Further, the mediator in charge of the proceedings should not impose his/her decision on the parties in the name of reaching a settlement and enhancing expeditious disposal of the parties. The mediator should merely facilitate the process and any decision or agreement should come from the parties themselves. Where parties fail to agree, the mediator should file a report to that effect rather than

⁷⁹ Civil Procedure Act, Cap 21, S 59 A (4) (e)

suggesting or imposing solutions to the parties. Through this, the true spirit of mediation can be reflected in court annexed mediation.

8. CONCLUSION

The importance of mediation continues to be realised across the globe. With the recent enactment of the Singapore Convention, the future of mediation looks bright. Kenya can borrow from the Model Law on Mediation to create a legal and institutional framework that supports mediation. However, it should be borne in mind that conflict management is culture specific. The best practices from the African culture can be distilled and incorporated into a mediation and ADR framework. In Kenya, entrenchment of mediation in the judicial system through court annexed mediation offers viable opportunities for the country to benefit from the positive aspects of the process. The programme has so far witnessed significant success and promises a brighter future for the country in its journey towards enhancing access to justice for all. However more needs to be done to enhance the court annexed mediation environment in Kenya and ensure the country fully benefits from such a noble idea.

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