

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

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Abstract

Tribunals play an important role within the justice system in Kenya by not only reducing pressure on courts but also assisting the mainly commercial class of people access justice in an expeditious way. However, the ever growing of cases with the relatively fewer number of members in these tribunals means that they can remain effective only for so long. Eventually the challenges of backlog and delayed justice as a result may arise. This paper makes a case for the use of ADR in proceedings before tribunals as one of the ways of easing pressure on the tribunals.

1. Introduction

The Judiciary, comprising of courts and independent tribunals, is the main formal institution in Kenya that is charged with conflict management and the formal administration of justice. The Constitution of Kenya 2010 provides that 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.¹

In exercising judicial authority, the courts and tribunals are to be guided by the following principles—justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of this Constitution shall be protected and promoted.²

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¹ Article 159(1), Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

² Ibid, Article 159 (2).

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

In order to achieve this constitutional mandate, the Judiciary has been concentrating on capacity building as evidenced by setting up more courts across the country, as well as promoting the use of Alternative Dispute Resolution (ADR) mechanisms in order to ease the pressure on courts and enhance expeditious access to justice for all.³

It is against this background that this paper discusses the place of ADR mechanisms in conflict management especially in the context of tribunals, which are in the process of transition to the Judiciary, and how these mechanisms can enhance the tribunals' effectiveness in administration of justice through the active use of ADR mechanisms in conflict management.

2. Conflict Management and Alternative Dispute Resolution Mechanisms in Kenya

There are two main approaches to conflict management.⁴ Traditional theory considers people involved in conflict situations as trouble makers while the modern theory considers conflict as a natural and inevitable outcome of human interaction.⁵

Conflict management is used to refer to the various processes required for stopping or preventing overt conflicts, and aiding the parties involved to reach durable peaceful settlement of their differences.⁶ This definition conceives 'conflict management' as an 'umbrella term' that refers to all the stages of conflict as well as all the mechanisms that are used to deal with conflict.⁷ "Management" in this context is used in a wider meaning than the strict sense of "to manage" or "to cope with" to include the meaning of "to administer".⁸ The discussion herein adopts the term in this context and as such, this section highlights all the approaches employed in dealing with conflict. This is against the narrow view by some scholars that conflict management, as a concept, refers to conflict containment, a view that is based on the belief that

³ The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018*, March 2019. Available at <https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf> [Accessed on 26/4/2019].

⁴ Della, V.E. & Cerizza, LD, *Management of agricultural research: A training manual*, ('Session 5' FAO), available at <http://www.fao.org/docrep/w7504e/w7504e07.htm#reading%20note:%20conflict%20management> [accessed 26/4/2019].

⁵ Ibid.

⁶ Leeds, C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners,' *International Journal of Peace Studies*, Vol. 2, No. 2, 1997.

⁷ Hamad, AA, 'The Reconceptualisation of Conflict Management' (2005) 7 *Peace, Conflict and Development: An Interdisciplinary Journal* 1, pp. 6-7.

⁸ Ibid, p. 11.

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

violent conflicts are ineradicable consequence of differences of values and interests within and between communities.⁹ According to this school of thought, resolving such conflicts is unrealistic: the best that can be done is to manage and contain them, and occasionally to reach a historic compromise in which violence may be laid aside and normal politics resume.¹⁰ It has been argued that if the basic human needs are unfulfilled because the state fails to properly address them, or if a group feels that these needs are unmet, or perceives a threat to these needs, violence can emerge.¹¹ It is against the foregoing background that the author explores the various mechanisms that can be employed in conflict situations especially social conflicts in Kenya.

2.1 Conflict Management Mechanisms

Generally, conflict management mechanisms include any process which can bring about the conclusion of a dispute or conflict, ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive intervention from external sources, to a full court hearing with strict rules of procedure.¹² There is a range of conflict management mechanisms available to parties in conflict or dispute. For instance, Article 33 of the *Charter of the United Nations*¹³ outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.¹⁴ It provides that *the parties to any dispute should, 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* [Emphasis added].¹⁵

Litigation or judicial settlement is a coercive dispute settlement mechanism that is adversarial in nature, where parties in the dispute take their claims to a court of law to be

⁹ Ibid.

¹⁰ Ibid, p. 4.

¹¹ Doucey M, 'Understanding the Root Causes of Conflicts: Why It Matters for International Crisis Management,' *International Affairs Review*, Vol. 20, No. 2, Fall 2011, p. 4.

¹² Sourced from, <<http://www.buildingdisputestribunal.co.nz/.html>> [accessed on 26/4/2019].

¹³ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

¹⁴ See generally Eunice R. Oddiri, *Alternative Dispute Resolution*, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at <http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm> Accessed on 26/4/2019; See 'The Role of Private International Law and Alternative Dispute Resolution', Available at http://www.wipo.int/copyright/en/e-commerce/ip_survey/chap4.html [Accessed on 26/4/2019].

¹⁵ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

adjudicated upon by a judge or a magistrate. The judge or magistrate gives a judgment which is binding on the parties, subject only to statutory right of appeal. In litigation, the parties to the dispute have minimum or no control at all over the forum, the process and outcome of the process and as such the outcome may not satisfy both parties.

The judicial authority in Kenya is exercised by the courts and tribunals.¹⁶ Litigation has its advantages in that precedent is created and issues of law are interpreted.¹⁷ It is also useful where the contract between the parties does not stipulate for a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation, it is possible to bring an unwilling party into the process and the result of the process be enforceable without further agreement.¹⁸ Litigation has its advantages as it comes in handy, for instance, where an expeditious remedy in the form of an injunction is necessary.

The Constitution provides that the national courts and tribunals should do justice to all irrespective of status; justice should not be delayed; alternative forms of dispute resolution should be promoted; and justice should be administered without undue regard to procedural technicalities.¹⁹ Courts in Kenya, however, have encountered many problems related to access to justice, for instance, high court fees, geographical location, complexity of rules and procedure and the use of legalese.²⁰ The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.'²¹ Dispute settlement through litigation can take years before the parties get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice, litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate world. It is against this backdrop that this paper explores how litigation can be complemented with the effective use of ADR

¹⁶ See Art. 159 of the Constitution of Kenya, [Government Printer, Nairobi, 2010].

¹⁷ See the argument by Calkins, R.M., 'Mediation: A Revolutionary Process That Is Replacing the American Judicial System,' *Cardoza Journal of Conflict Resolution*, Vol. 13, No. 1, 2011; cf. Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases,' *Utah Law Review*, No. 3, 2009, pp. 797-843, p. 799.

¹⁸ See generally, *Dispute Resolution Guidance*, available at <http://www.ogc.gov.uk/documents/dispute-resolution.pdf>, [accessed on 26/4/2019].

¹⁹ See Art. 48 & 159 (2) of the Constitution of Kenya.

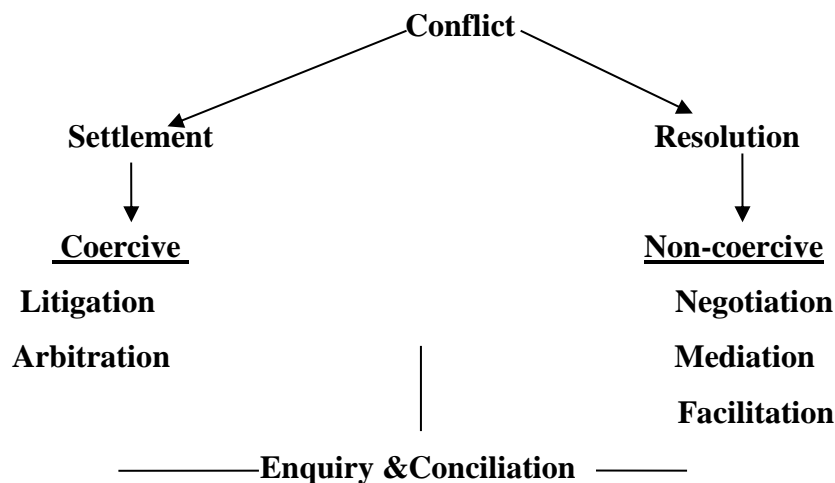
²⁰ *Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002.

²¹ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," *Kenya Law Review Journal*, Vol. 1, No. 19, 2007, pp. 19-29 at p.29.

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

mechanisms in facilitating access to justice especially within tribunals. The diagram below offers a general introduction to conflict management, clarifying issues and concepts that inform various conflict management mechanisms.

Figure 1 Methods of Conflict Management



*Source: The author

Figure 1 shows that there are certain methods of conflict management that can only lead to a settlement. Those that lead to a settlement fall into the category of coercive methods where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive, for example, when the reports are used as the basis for negotiation between the parties.

As Fig. 1 illustrates, there are certain conflict management mechanisms that can lead to a settlement²² only, while others have been effective in bringing about a resolution. A *settlement* is attained when the parties have to come to accommodations which they are forced to live with

²² Bloomfield, D., "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", *Journal of Peace Research*, Vol.32, No. 2 (May, 1995), p. 153. Bloomfield argues that a settlement is temporal and does not eliminate the underlying causes of the inter-disputant relationship whereas a resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

due to the anarchical nature of society and the role of power in relationships. On the other hand a *resolution* prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship.²³ The Conflict resolution methods that lead to a settlement fall into the category of *coercive methods* where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. The *non-coercive methods* (negotiation, mediation and facilitation) lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome.

3. Tracing the Place of Tribunals within Kenya's Justice System

As a way of enhancing the capacity of the formal conflict management institutions in the country, there has been transition of tribunals to the Judiciary. This, it is expected, will streamline their administration and enhance their capacity as important players within the administration of justice. Indeed, the Constitution of Kenya recognises subordinate courts as including the Magistrates courts; the Kadhis' courts; the Courts Martial; and any other court or *local tribunal* as may be established by an Act of Parliament, other than the courts established as required by Article 162(2) (emphasis added). The Constitution thus recognises tribunals as important players in the administration of justice and places them under the Judiciary. Previously, the different tribunals were under the respective ministries.²⁴ The purpose of transitioning tribunals is to ensure they are delinked from the executive and integrated in the court system. The transition is still ongoing, and the Judiciary, in the fullness of time, shall therefore, have an obligation to manage tribunals including their staff in order to effectively and efficiently render services to users.²⁵ Tribunals are now coordinated through the office of Registrar Tribunals established by the Judicial Service Commission.²⁶

²³ Ibid.

²⁴ The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018*, March 2019, op. cit., p. 66.

²⁵ Ibid.

²⁶ <http://kenyalaw.org/kl/index.php?id=9050> [Accessed on 26/4/2019].

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

Tribunals are established by different Acts of Parliament, with about 60 of them in existence, and are mandated to resolve disputes in a fast, simple and speedy manner.²⁷

The *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018* indicates that during the period under review, 5,615 cases were filed while 2,530 cases were resolved.²⁸ These statistics not only demonstrate the important role that these tribunals play but also show that these tribunals also require case management lest they find themselves under the case backlog challenge that is currently facing the courts.

This is why there is a need for enhancing the use of ADR mechanisms by these tribunals where circumstances so allow. It is worth mentioning that many of these tribunals in Kenya play a pivotal role in administering commercial justice, an area where ADR is readily acceptable worldwide.

The next section looks at why and how the tribunals can make more use of ADR mechanisms in order to *boost their effectiveness and achieve a better case turnover which will in turn win them the public confidence* (emphasis added). The ripple effect may not necessarily be fewer appeals to courts but more cases getting the important preliminary determination by the tribunals.

4. Integrating the Use of Alternative Dispute Resolution in Conflict Management through Tribunals

As already pointed out, the Constitution of Kenya, 2010 recognizes the application of Traditional Dispute Resolution (TDR) and ADR mechanisms in conflict management for efficient dispensation of justice since their merits outweigh any disadvantages thereof.²⁹ It is noteworthy that a high percentage of disputes in Kenya are resolved outside courts or even before they reach courts by use of TDR or ADR mechanisms. TDR and other community justice mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility.

²⁷ For the full list of the tribunals and their mandate, see Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017 – 2018*, March 2019, op. cit., Chapter Three.

²⁸ Ibid, p.73.

²⁹ See Art. 159 (2) (c) of the Constitution of Kenya 2010.

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms that are utilized to manage disputes without resort to the often costly adversarial litigation.

The main disputes that may be resolved by way of ADR and Traditional Dispute Resolution Mechanisms (TDR) mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, cattle rustling, debt recovery, overall community conflicts and resolution of political disputes in the community, and welfare issues such as nuisance, child welfare and neglect of elderly in a community amongst others.³⁰

The main aspects of TDR and other ADR mechanisms which make them unique and community oriented is 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.³¹ The main objective of TDR in African societies is to resolve emerging disputes and foster harmony and cohesion among the people.³² ADR is mainly concerned with enabling parties take charge of their situations and relationships.

Generally, many cases are resolvable through TDR, except for serious criminal offences that require the intervention of the courts. Where attempts have been made to subject the matters that were previously believed to fall within the exclusive ambit of criminal law, it has led to heated deliberations as to whether the same should be allowed.³³

³⁰ Kenyatta, J., *Facing Mount Kenya: The Tribal life of the Gikuyu, op cit*; See also Lenkinski, E.L. & Mehra, M., 'Are 'We Counsel or Counsellors? Alternative Dispute Resolution & the Evolving Role of Family Law Lawyers in Canada,' available at https://www.iaml.org/cms_media/files/are_we_counsel_or_counsellors.pdf [Accessed on 26/4/2019].

³¹ 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.pdf> [Accessed on 26/4/2019].

³² Hwedie, K. O. & Rankopo, M. J., "Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana," available at <http://home.hiroshima-u.ac.jp/heiwa/Pub/E29/e29-3.pdf> [Accessed on 26/4/2019], p. 33.

³³ See the case of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, High Court at Nairobi (Nairobi Law Courts) Criminal Case 86 of 2011, where the learned Judge of the High Court upheld a community's decision to settle a murder case through ADR. It is also important to point out that the *National Cohesion and Integration Act*, No. 12 of 2008 [2012] under S. 25(2) thereof states that the National Cohesion and Integration Commission 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. To achieve this, the Commission should *inter alia* promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace. What remains to be seen is how the Commission will handle any cases which, just like the *Mohamed case*, the involved communities or families feel that they can be handled locally but the Commission feels that the same should go to courts owing to their magnitude.

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

Increased application of ADR is considered as one of the measures that will lead to faster dispensation of cases, particularly in tribunals.

The Kenyan populace is still a believer in getting their day in court. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce, rather than a negotiated agreement that is wholly dependent of parties' goodwill. Even where the law has put in place enforcement mechanisms for negotiated settlements, people still desire the coercive nature of courts and other tribunals, as opposed to all the cordial talks that are ADR. This should however not discourage tribunals.

With adequate legal and policy framework on the application of ADR in Kenya, it is possible to create awareness on ADR mechanisms for everyone, including the poor who may well be aware of their right of access to justice but lacking means of realizing the same. Continued sensitization of the key players in the Government, the judiciary, legal practitioners, business community and the public at large will also boost support for ADR mechanisms in all possible aspects as contemplated under the Constitution and various statutes. A full appreciation of the workings of ADR mechanisms is key in achieving widespread yet effective use of ADR and TDR mechanisms for access to justice especially in matters within the jurisdiction of tribunals.

While carrying out their administrative or quasi-judicial functions, tribunals should strive to encourage parties to make more use of ADR mechanisms. Article 47(1) of the Constitution of Kenya guarantees the right of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In addition, Article 48 provides for State's obligation to ensure access to justice for all persons and, if any fee is required, it should be reasonable and should not impede access to justice.

The Fair Administrative Action Act, 2015³⁴ interprets "administrative action" to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals.³⁵ While this Act has no express provision requiring tribunals to use ADR within their procedures, Article 159 (2) (c) of the Constitution obliges courts and tribunals, in the exercise of judicial authority, to encourage parties to endeavor to resolve their disputes through ADR. It is on the basis of this

³⁴ Fair Administrative Action Act, No. 4 of 2015, Laws of Kenya.

³⁵ Ibid, sec. 2.

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

provision that tribunals can competently employ the use of ADR mechanisms in discharging their constitutional and statutory mandate.

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

There is thus a need for an increased use of ADR mechanisms in matters before tribunals in order to fully enjoy the main objective of tribunals: expeditious, efficient, lawful, reasonable and procedurally fair proceedings.

Even as the Judiciary seeks to entrench the use of ADR mechanisms within the country's justice system, it should not treat the transition process as a separate process and then later embark on streamlining the ways these tribunals operate. As they get absorbed into the judiciary, the tribunals should be reminded to encourage those who seek justice before them to explore ADR not only to fulfil the constitutional requirements but also to enjoy the potential benefits of ADR.

It must however be appreciated that the tribunals' jurisdiction is as varied as the statutes that donate such jurisdictions. Admittedly, some matters may not be ideal for management through ADR processes. However, this is a matter that can be decided on a case to case basis depending on the issues that arise from the case. Any legal and institutional framework to facilitate the use of ADR before tribunals should therefore consider the possibility of such differences arising and should thus be broad enough to distinguish between the matters.

Encouraging a higher uptake of ADR before tribunals will be a step in the right direction in a bid to enhance access to justice in Kenya and creating a culture of using ADR in the country. This will streamline the judicial system by minimising appeals from these tribunals to the Courts, eventually aiding in reduction or elimination of the backlog.

5. Conclusion

Tribunals are an important part of the justice system in Kenya. This is not only because of their potential to facilitate faster management and settlement of disputes but also their ability to deal

Tribunals within the Justice System in Kenya: Integrating Alternative Dispute Resolution in Conflict Management

with specialized matters under different statutes. This puts them at a better place to decide which specialized matters would ideally be resolved using ADR.

These tribunals are however at a high risk of suffering from the challenges bedeviling the formal courts, such as high caseload leading to backlog and consequently delayed justice. Even as their oversight is transited to judiciary, there is a need to rethink their modes of operation by, inter alia, encouraging greater use of ADR mechanisms. This will go a long way in reducing the pressure on the tribunals and make them more accessible to a greater number of people. There is a need to integrate ADR in conflict management especially within the tribunals so as to enhance access to justice.

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