

Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation

Kariuki Muigua

Abstract

In light of the ongoing efforts to enhance the place of mediation in Kenya as a choice mechanism for access to justice across various sectors, this paper offers some thoughts on some viable ways through which the efficiency of mediation can be promoted and realized. The paper looks at law related as well as attitude issues that may affect the effectiveness of mediation as a tool for access to justice.

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Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation

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1. Introduction

This paper offers some reflections on the use of mediation and other traditional conflict resolution mechanisms that have been used by Kenyan communities since time immemorial in conflict management and enhancing access to justice. This is informed by the renewed drive to enhance the use of ADR mechanisms including mediation, as a result of their formal recognition under the current Constitution of Kenya 2010¹ and subsequent statutes.

Ongoing discussions on the role of mediation and other traditional conflict management mechanisms have now been spiced up by the enactment of laws recognizing the role of these mechanisms in enhancing access to justice and peaceful coexistence.² The author looks at where we have been, where we are now and the prospects for the future. The prospects for the future include recommendations and urgent reforms that should be undertaken to reap the benefits presented by mediation and other ADR mechanisms in enhancing access to justice and fostering peaceful co-existence among people in Kenya.

This comes at a time when Judiciary's Court Annexed Mediation Project has been completed and a report by an independent evaluation of the same released and even more recently, the project was extended to stations outside Nairobi on pilot basis.³

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¹ See Art. 60, 67, 159 of the Constitution of Kenya, 2010.

² See sec. 5(1) (f), *National Land Commission Act*, No. 5 of 2012; sec. 4, *Land Registration Act 2012*; Part x, Sec. 68, *Marriage Act 2014*; sec. 15, *Industrial Courts Act, 2011*; sec. 8(f), *Commission on Administrative Justice Act, 2011*; sec. 20, *Environment and Land Court Act, 2011*; sec. 5(1), *Legal Aid Act, 2016*; sec. 40, 41, *Community Land Act, 2016*.

³ See Muigua, K., *Resolving Conflicts through Mediation in Kenya*. (Glenwood Publishers Ltd, Nairobi, 2012), Chap.10, pp. 123-134.

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2. Use of Mediation for Access to Justice in Kenya

Most communities in Kenya have used mediation and other ADR and Alternative Justice Systems in resolving their conflicts for centuries.⁴ It was customary and an everyday affair to see people sitting down informally and agreeing on certain issues, such as the allocation of resources in traditional African societies.⁵ Since conflicts have the potential to break down the economic, social and political organization of a people, most Kenyan communities had certain principles and religious beliefs that they observed and that fostered unity and peaceful coexistence.

It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.⁶

In this way conflicts were shunned and where they arose, there were mechanisms and institutions that were in place to effectively resolve those conflicts. It is for this reason that the author opines that the plethora of principles, mechanisms and institutions that were used and have continued to be used (though rarely) be employed as envisaged in the constitution to enhance access to justice and foster peaceful coexistence. Traditional conflict management mechanisms were resolution mechanisms. Even where mediation was practised, it was in the political process where it was a resolution mechanism. It is imperative that traditional conflict management mechanisms be harnessed in managing conflicts as they are resolution rather than settlement mechanisms⁷.

⁴ Muigua, K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 1, (2017), pp. 74-104.

⁵ Ibid.

⁶ Mwangi, K., *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu. [Accessed on 14/10/2017].

⁷ Resolution of conflicts gives rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power-based outcomes (K. Cloke, *The Culture of Mediation: Settlement vs. Resolution*, The Conflict Resolution Information Source, Version IV, December 2005). A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power (Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 42). Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings (J. Bercovitch, *Mediation Success or Failure: A Search for the Elusive Criteria*, *Cardozo Journal of Conflict Resolution*, Vol.7.289, p.296). Settlement is an agreement over the issue(s) of the conflict which often

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Mediation, if carried out correctly leads to outcomes that are enduring. The parties have autonomy over the process and the outcome. Parties who have a conflict may decide to negotiate. When negotiations hit a deadlock they get a third party to help them continue with the negotiations. The mediator's role in such a process is to assist the parties in the negotiations. He or she does not dictate the outcomes of the negotiations. Parties must have the autonomy of the process and of the outcome.⁸

Mediation is a voluntary process. However, Kenya has introduced court mandated mediation. Although it is a good step, once the voluntariness to go for mediation is lost then the process of mediation is negatively affected. The parties are expected to report back the outcome of their negotiations to court for it to endorse it. It is however important to ensure that the process is not exposed to the vagaries that bedevil the court system including delays, bureaucracy and inefficiency.

Traditional societies have used mediation to resolve conflicts for hundreds of years. It was used informally where disputants could just sit with a third party such as the council of elders who could facilitate the negotiations. The formal legal system has failed to recognize that mediation is not a new concept in Kenya and has thus tried to classify mediation as part of the Alternative Dispute Resolution mechanisms. It views mediation as an alternative to litigation. This view of mediation is flawed as it gives mediation a second place in the conflict settlement continuum. Mediation can stand alone as a method of resolving conflicts. However, care has to be taken to ensure that the parties enter mediation voluntarily, the outcome of the process is respected and the solutions reached are acceptable and enduring.

In order to enhance access to justice, foster peace coexistence, promote the cultural aspects of the Kenyan people and enhance cohesion among communities, traditional concepts of conflict management as envisaged in the law should be applied in that regard. All these can be achieved through resolution of conflicts, including those ones that are caused either by scarcity or abundance of natural resources. In a nutshell, there is a need to enhance the conflict resolution mechanisms and the existing institutional capacity, if resolution of conflicts rather than settlement is to be achieved. A lot of resources and time is expended dealing with conflicts. They

involves a compromise (D. Bloomfield, *Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland*, Journal of Peace Research, vol. 32 no. 2 May 1995, pp. 151-164).

⁸ Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 42.

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hamper the economic advancement of a nation since people are not fully engaged in economic activities but have to spend time in court defending suits. Resolution of conflicts removes all underlying causes of the conflict and hence once resolved it cannot flare up again later. This is not the time to procrastinate. The time to search for and adopt an effective conflict resolution mechanism is now.

Mediation is essentially negotiation with the assistance of a third party. Human beings have not lost the capacity to negotiate. Resolution as opposed to settlement of conflicts can assist in healing the wounds caused by conflicts. Mediation can deal with the psychological dimensions of the conflicts. As Martin Luther King Junior said:

*“The time for healing of wounds has come. The time to bridge the chasms that divide us has come. The time to build is upon us”.*⁹

Resolving conflicts in Kenya through mediation is indeed an imperative.

3. Opportunities for Mediation in Kenya

3.1 Mediation and Access to justice

Access to justice is considered to be more than just about presence of formal courts in a country but also entails the opening up of those formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions.¹⁰

Realization of the right of access to justice can only be as effective as the available mechanisms to facilitate the same. For the constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies* (emphasis added).¹¹

⁹ Martin Luther King: Excerpt from acceptance Speech by the 1993 Nobel Peace Laureate, Inaugural Celebration address 1994, sources from, <http://www.goote.htm>, (accessed on 5/08/2012).

¹⁰ Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/>(Accessed on 13/10/ 2017).

¹¹ See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) —Conflict Information Consortium, *Beyond Intractability*, University of Colorado, Boulder (July 2003).

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Marginalised individuals and groups often possess limited influence in shaping decision-making processes that affect their well-being.¹² It is contended that in the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable.¹³

It is often difficult for Kenyans to seek redress from the formal court system especially owing to numerous challenges¹⁴. The end result is that the disadvantaged people may harbour feelings of bitterness, marginalization, resentment and other negative feelings that also affect the stability and peace of the country. Such scenarios have been cited as some of the causes of ethnic or clan animosity in Kenya.¹⁵

In litigation, the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed.¹⁶

Recognition of ADR and traditional dispute resolution mechanisms is predicated on the above cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.¹⁷ Access to justice should thus include the use of informal conflict management mechanisms such as ADR and traditional dispute resolution mechanisms, to bring justice closer to the people and make it more affordable.¹⁸

¹² Gibson, C., et. al., 'Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy,' *Policy research working papers*, Vol. 3713, World Bank Publications, 2005, p.1.

¹³ United Nations Development Programme, 'Access to Justice and Rule of Law,' available at http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/ [Accessed on 14/10/2017]

¹⁴ Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), p. 29.

¹⁵ *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, (the 'Akiwumi Commission') (Government Printer, Nairobi, 1999).

¹⁶ Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 3, No. 2, 2015, pp. 64-108 at p.80.

¹⁷ Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, p. 6.

¹⁸ See Muigua, K. & Kariuki F., 'ADR, Access to Justice and Development in Kenya,' Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd & 4th July, 2014 at Strathmore University Law School, Nairobi.

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**3.2 Mediation, Environmental Democracy, Public Participation and
Community Empowerment**

The process of managing natural resource-based conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy. The right of access to justice is essential as it affords the means by which the public challenge application of and implementation of environmental laws and policies.¹⁹

Environmental democracy which involves giving people access to information on environmental rights, easing access to justice in environmental matters and enabling public participation in environmental decision making, inter alia, is desirable in the Kenyan context.²⁰

With regard to public participation in natural resource management, it has been argued that since most resource issues today are less dependent on technical matters than they are on social and economic factors, if a state is to maintain the land's health, they must learn to balance local and national needs.²¹ It is argued that the state must learn to better work with the people who use and care about the land while serving their evolving needs.²²

In The Matter of the National Land Commission [2015] eKLR, the Supreme Court observed that the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfillment, through an

¹⁹ FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

²⁰ See generally, Hazen, S., *Environmental Democracy*, (<<http://www.ourplanet.com>). [Accessed on 18/01/2016]. Washington DC. Csaba Kiss and Michael Ewing (eds), "Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries." European Regional Report (published by The Access Initiative Europe.) available at <http://www.accessinitiative.org> [Accessed on 18/01/2016]; See also Art. 69(1) (d) of the Constitution of Kenya, 2010. The Constitution supports the notion of environmental democracy by providing that one of the obligations of the State in relation to the environment is to encourage public participation in the management, protection and conservation of the environment.

²¹ Daniels, SE & Walker, GB, 'Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches,' p. 2. Available at <http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf> [Accessed on 3/01/2016].

²² Ibid; Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009, p. 5.

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enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfillment to the concept of democracy.²³

The Constitution of Kenya outlines the national values and principles of governance which must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.²⁴ These values and principles include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and *participation of the people*; human dignity, equity, social justice, *inclusiveness*, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development (emphasis added).²⁵

The Rio Declaration in principle 10 emphasizes the importance of public participation in environmental management through access to justice thus: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.... Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”²⁶ Participatory approaches have been increasingly advocated as effective decision-making processes to address complex environment and sustainable development issues.²⁷

The provision of effective avenues for resolution of natural resource-based conflicts is thus far one of the most practical ways of ensuring access to justice, and by extension adhering to public participation principle. Scholars have asserted that participatory approaches should be thought of as located somewhere on a continuum between consensus-oriented processes in the pursuit of a common interest and compromise-oriented negotiation processes aiming at the adjustment of particular interests.²⁸

It has been suggested that government policies can create opportunities for use of mediation during disputes.²⁹ However, they must include mechanisms for judging the prospects

²³ In the Matter of the National Land Commission [2015] eKLR, para. 21; See also Muigua, K., *et al.*, (2015) *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, 2015, Nairobi).

²⁴ Constitution of Kenya 2010, Art. 10(2).

²⁵ Constitution of Kenya 2010, Art. 10(3).

²⁶ United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

²⁷ Hove, S.V.D., ‘Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,’ *Land Use Policy*, Vol. 23, Issue 1, January 2006, p.10.

²⁸ *Ibid*, p.16.

²⁹ Castro, A.P. & Nielsen, E. (eds), ‘Natural resource conflict management case studies: an analysis of power, participation and protected areas,’ *op cit*, p. 272.

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of success at the outset and adopting contingencies to ensure the mediators' security if situations deteriorate.³⁰

ADR mechanisms, and particularly negotiation and mediation, have intrinsic advantages that can facilitate effective management of natural resource-based conflicts. They have the potential to be expeditious, cost effective, participatory and all-inclusive and thus, can be used to manage natural resource-based conflicts in way that addresses all the underlying issues affecting the various parties.

Empowerment is aimed at achieving the following: developing the ability to access and control material and non-material resources and to effectively mobilize them in order to influence decision outcomes; developing the ability to access and influence decision-making processes on various levels (household, community, national, global) in order to ensure the proper representation of one's interests (also described as getting a —voicell); gaining an awareness of dominant ideologies and of the nature of domination that one is subjected to in order to discover one's identity, and ultimately to develop the ability to independently determine one's preferences and act upon them; and developing the ability to trust in one's personal abilities in order to act with confidence.³¹

It has rightly been noted that a right is not just the ability to do something that is among your important interests (whatever they are), but a guarantee or empowerment to actually do it, because it is the correct thing that you have this empowerment.³²

Political empowerment requires inclusion in democratic decision-making processes which is equated to mainly gaining a voice within the local and/or central state.³³

Mediation has been used successfully to manage and resolve conflicts in Kenya. It has been seen, for example, that it was and has been efficacious in resolving environmental conflicts

³⁰ Ibid.

³¹ Oladipo, S.E., 'Psychological Empowerment and Development', *African Journals Online*, Vol. 2, No 1, 2009, p.121.

³² The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen), p. 4. Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [Accessed on 15/10/2017].

³³ Miller, B., 'Political empowerment, local—central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement', *Political Geography*, (Special Issue: Empowering Political Struggle), Volume 13, Issue 5, September 1994, pp. 393–406.

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and lately in resolving family disputes. Because of the myriad causes of these conflicts a mechanism that addresses the underlying causes and that lends a mutually acceptable outcome is the most appealing to the parties. Such a mechanism is mediation.

Arguably, mediation is the best option for resolution of conflicts such as those involving natural resources. The process has to involve all the parties who have an interest in the matter. The mediation process would have to be voluntary and bear all the positive attributes of mediation. The parties have to be autonomous: Autonomy of the process and of the outcome is a prerequisite. A mediation agreement that can be respected by all the parties would lead to enduring outcomes for the present and future generations.

As such, ADR mechanisms such as negotiation and mediation provide an opportunity for empowering the Kenyan people through saving resources such as time and money, fostered relationships and mutually satisfying outcomes.³⁴ It is however noteworthy that adopting a community-based approach to empowerment does not automatically translate into greater participation and inclusion. This is because some of the traditional practices have negative impacts such as discrimination of women and disabled persons.³⁵ In fact, it is against this fact that the Constitution retains the test of non-repugnancy while applying traditional justice systems.³⁶ This is where the Courts come in as the legal guardians of the Bill of Human rights as envisaged in the Constitution.³⁷

³⁴ Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' op cit. p. 84.

³⁵ See generally, Muigua, K., —Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya. Available at <http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf>; See also generally Human Rights Watch, *World Report 2013*, available at http://www.hrw.org/sites/default/files/wr2013_web.pdf [Accessed on 15/10/2017].

³⁶ Constitution of Kenya 2010, Art. 159(3).

³⁷ Constitution of Kenya 2010, Art.23. Article 23 of Constitution of Kenya deals with Authority of courts to uphold and enforce the Bill of Rights:

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

—
(a) a declaration of rights;

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3.3 Mediation and Conflict Management for Sustainable Development

Conflicts do not occur in vacuum, and to a large extent, they are dependent on the context. Indeed, it has been argued that the governance of natural resources is especially important in the context of divided societies because control over the benefits from local natural resources is often a chief motivator of ethnic or identity-based conflicts.³⁸ Natural resource based conflicts also are, directly and indirectly connected to and/or impact human development factors and especially the quest for social-economic development.³⁹

Natural resource-based conflicts continue to negatively affect Kenyans owing to the many weaknesses of the present legal and institutional framework. It is noteworthy that most of the sectoral laws mainly provide for conflict management through the national court system.

National legal systems governing natural resource management are based on legislation and policy statements that are administered through regulatory and judicial institutions, where adjudication and arbitration are the main strategies for addressing conflicts, with decision-making vested in judges and officials who possess the authority to impose a settlement on disputants.⁴⁰ Further, decisions are more likely to be based on national legal norms applied in a standardized or rigid manner, with all-or-nothing outcomes. Thus, contesting parties often have very limited control over the process and outcomes of conflict management.⁴¹ In Kenya, where these conflicts may be clan-based or community based, courts offer little help in terms of achieving lasting peace due to the settlement nature of the outcome. Thus, conflicts are likely to flare up later.⁴²

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- (b) an injunction;
 - (c) a conservatory order;
 - (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
 - (e) an order for compensation; and
 - (f) an order of judicial review.

³⁸ Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' op cit, p. 5.

³⁹ Wilson, C. & Tisdell, C., 'Conflicts over Natural Resources and the Environment: Economics and Security,' *Working Papers on Economics, Ecology and the Environment, Working Paper No. 86*, September 2003; Lumerman, P., et al, 'Climate Change Impacts on Socio-environmental Conflicts: Diagnosis and Challenges of the Argentinean Situation,' (Initiative for Peacebuilding 2011).

⁴⁰ FAO, 'Negotiation and mediation techniques for natural resource management,' op cit.

⁴¹ Ibid.

⁴² See generally Mwangi, M., *Conflict in Africa: Theory, Processes and Institutions of Management*, op. cit.

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The Sustainable Development Goals (SDGs) recognise the connection between peace and development and thus provide that sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.⁴³ The SDGs Agenda also recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions. Factors which give rise to violence, insecurity and injustice, such as inequality, corruption, poor governance and illicit financial and arms flows, are addressed in the Agenda. The aim is to redouble the efforts to resolve or prevent conflict and to support post-conflict countries, including through ensuring that women have a role in peace building and state building.⁴⁴

The SDGs Agenda also calls for further effective measures and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation, which continue to adversely affect their economic and social development as well as their environment.⁴⁵ Thus, conflicts management should be one of the key issues that should be addressed in the quest for sustainable development.

Sustainable development is not possible in the context of unchecked natural resource-based conflicts. In recognition of this fact, Sustainable Development Goal (SDGs) 16 aims to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.⁴⁶ It is also noteworthy that SDGs seek to promote participation of local communities in natural resource management.⁴⁷

⁴³ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, para. 35.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

⁴⁷ *Ibid.*, Goal 6b.

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Indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.⁴⁸ Negotiation and mediation have more value to the local communities than just being means of conflict management. At least, they are means of sharing information and participating in decision-making. The two mechanisms have the unique and positive attributes which include their participatory nature that can be used to manage natural resource-based conflicts and ensure that Kenyans achieve sustainable development.

Furthermore, the affected communities, in cases of decision making, can have guaranteed and meaningful participation in the decision-making process by presenting proof and reasoned arguments in their favour, as tools for obtaining a socio-economic justice.⁴⁹

However, even where the use of ADR and TDR mechanisms is contemplated, there barely exists effective framework to oversee their utilisation. There is need to actualise the use of ADR and particularly negotiation and mediation in managing natural resource-based conflicts as envisaged in the Constitution. ADR is not fully utilised in the Kenyan context. Therefore, the attributes of cost effectiveness, party autonomy, flexibility, amongst others, are hardly taken advantage of in the environmental arena. There is need to ensure that there is put in place a framework within which communities are actively involved in achieving peace for sustainable development.

The Government efforts as evidenced by bodies such as the National Cohesion and Integration Commission⁵⁰ should actively involve communities in addressing natural resource-based conflicts in the country. While acknowledging that negotiation and mediation may not provide holistic solutions to the problem, they can still be used in tandem with other methods of conflict management to address problem of natural resource-based conflicts in Kenya.

⁴⁸ Preamble, *United Nations Declaration on the Rights of Indigenous Peoples*. UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

⁴⁹ Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at [https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/\\$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf](https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf) [Accessed on 08/01/2016].

⁵⁰ This is a Commission established under s. 15 of the National Cohesion and Integration Act, 2008, No. 12 of 2008, Revised Edition 2012 [2008]. One of the functions of the Commission is to promote arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace (s.25 (2) (g).

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Natural resource-based conflicts, like all other kinds of conflicts, are inevitable in human interactions and if left unmanaged, they tend to degenerate into disputes that ruin the relations between persons or communities and yield undesired costs. The use of ADR in the resolution of natural resource-based conflicts is viable and should be exploited to its fullest. ADR is not a panacea to all the natural resource-based conflicts and environmental problems as it has many limitations and is also faced with numerous challenges. However, ADR is worth working with in the environmental arena. The benefits accruing from ADR processes should be fully utilised in the Kenyan context to minimise or at least manage natural resource-based conflicts and ensure Kenya realises its goals of sustainable development and the Vision 2030.

4. The Future of Mediation in Kenya: Making Mediation Work for All

4.1 Facilitative Policy, Legal and Institutional Framework

In the short term, there should be ongoing efforts to identify and use mediation in ways that create a bridge between traditional conflict resolution mechanisms and the more formal mechanisms like the courts as recognized in Article 159 (2) (c) of the constitution.

Before the advent of contemporary conflict resolution mechanisms, traditional communities developed and refined, over time, their own mechanisms for resolving local level disputes, both within their communities and with others. These were based on solid traditional institutions such as mediation through a Council of Elders. These institutions were respected by community members and hence those affected generally complied with their decisions.⁵¹

Development, in order to be authentic, must respond to the traditions, attitudes, organisations and goals of the people whose society is under consideration.⁵² Elders are traditionally regarded as experienced, expert custodians of knowledge, diplomacy and the judicial system of their specific society grouping.⁵³ At independence in many African countries (including Kenya) most disputes were resolved using traditional/informal justice. Despite their

⁵¹ Chapman, C. & Kagaha, A., "Resolving Conflicts Using Traditional Mechanisms in The Karamoja and Teso Regions of Uganda", Northern Uganda Rehabilitation Programme (NUREP) Briefing, *Minority Rights Group International*, August 2009, p.1.

⁵² Brainch, B., *ADR/Customary Law*, a paper presented at the World Bank Institute for Distance Learning for Anglophone Africa, November 6, 2003.

⁵³ Ibid.

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popularity, these justice systems were regarded as obstacles to development. It was assumed that as the countries became more and more modernized TJS would naturally die but this, according to a study by Penal Reform International (PRI) has not been the case.⁵⁴

The current land mediation system in East Timor for example, creates a bridge between traditional dispute-resolution mechanisms and the courts.⁵⁵ The need for greater connectivity between the traditional and formal systems has been widely acknowledged and to this end, we must consider the social and economic benefits of incorporating traditional institutions and mediation mechanisms, within the formal mechanisms, to bridge the gap in conflict resolution.

Secondly, mediation should be embedded in administration as seen in Article 189 (4) of the constitution where alternative dispute resolution mechanisms including negotiation and mediation are to be used in settling disputes between the two systems of government. Mediation systems should reduce burdens on the court system and broaden the options available to deal with conflicts. Conflict resolution mechanisms such as mediation should be embedded in the devolved administration and in the judiciary. This allows remedies unavailable in the courts and also alleviates problems associated with a lack of capacity in the court system, including minimal facilities in rural areas.⁵⁶ Multi-Door Courtrooms like those in Lagos, Nigeria, which provides a comprehensive approach to dispute resolution within the administrative structure of the court offering a range of options other than litigation should also be considered.

Thirdly, parties should take advantage of no -violence agreements. Due to their very nature conflicts such as the ones involving use of and access to natural resources usually have multiple causes, some proximate, others underlying or merely contributing. The legal and institutional mechanisms in Kenya advocate mostly for settlement procedures dealing with issues only and not the underlying causes of the conflicts and can thus not be suitable in resolving natural resource-based conflicts. Mediation is better suited to deal with conflicts involving groups or individuals from different groups. Where mediation involves interim no-violence and

⁵⁴ See Penal Reform International, "Access to justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems", *PRI*, (2000), pp. 1 - 196. Sourced from <http://www.gsdrc.org/docs>, [Accessed on 03/06/2012].

⁵⁵ Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", in AusAID's *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9, p. 175. Sourced from <http://www.ausaid.gov.au/publications/pdf>, [Accessed on 24/5/2012].

⁵⁶ *Ibid*.

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resource-use agreements, it can successfully manage a number of potentially violent conflicts, pending resolution through agreement or adjudication.⁵⁷

Apart from the above, there are medium term strategies recommended towards achieving resolution of conflicts in Kenya. The mediation of conflicts should be backed by an appropriately comprehensive and effective legislative and administrative infrastructure capable of resolving more stubborn cases and cases that fall outside the jurisdiction of the mediation process. The current institutional and legal framework for the resolution of conflicts in Kenya, which mainly consists of tribunals and courts, has not been very effective in resolving conflicts, for example, those touching on the environment. It should be overhauled after careful scrutiny and after extensive consultation with all stakeholders including communities involved, to provide for mediation.

There may be a need for the drafting of a policy to inform the contents of a legal and institutional framework for mediation. The framework should not be “top-down”. It should be a framework that recognizes traditional norms, laws, customs and institutions that deal with mediation and grants them an equal place in line with the constitution. The way to go is institutionalization of mediation for resolution of all conflicts, to ensure an element of effectiveness in enforcement of the agreed positions/decisions.

A comprehensive Mediation guide would provide for the setting up of an institutional framework within which mediation would be carried out. Care has to be taken, however, to ensure that parties engage in mediation voluntarily, the autonomy of the process is respected and the solutions reached are acceptable and enduring. Reforms to the current system of conflict resolution would effectively address weaknesses such as delays, costs, backlog of cases and bureaucracy.

Another medium-term measure would be establishment of mediation boards and training of mediators. Judges and courts are used to presiding over disputes and rendering verdicts on the disputes brought before them. Equally, lawyers are trained to argue out cases with the best interest of their client at heart and to the best of their ability. These institutions are not best suited to mediate certain conflicts.

A balance needs to be struck between using mediators with local expertise and ensuring objectivity in resolution of conflicts. In striking this balance, important issues need to be

⁵⁷ Fitzpatrick, D., “Dispute Resolution; Mediating Land Conflict in East Timor”, op cit.

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addressed such as providing appropriate training and building transparency and accountability into the mediation system.⁵⁸ Local administration officials involved in peace committees, for example, have local knowledge and expertise but they are more susceptible than outsiders to allegations of bias and partisanship, thus the need to have independent members of the public as commissioners in the mediation boards. There should also be more resources devoted to capacity building programs for mediators.

A code of conduct to regulate the mediation practice should be put in place. The code should set out principles relating to competence, appointment, independence, neutrality and impartiality, mediation agreements, fairness of the process, the end of the process, fees and confidentiality, which mediators should commit to.⁵⁹ The Mediation boards and community mediators as well, should have a feedback mechanism on the measures they take to support respect for the code through training, evaluation and monitoring of the mediators. Standards of training, practice and codes of ethics should be set and mediators should be trained through a strategy of participation. Capacity-building requires the transfer of quality skills and knowledge tailored to the needs of a specific group, which is adapted to local practice and benefits from existing capacity, for instance an established NGO network of community-based paralegals.⁶⁰

The role of women in mediation of conflicts should be institutionalized. The place of women in our society puts them in the most proximate contact. Within the African traditional setting, they played a primary role in resolving conflicts as negotiators. Conflict mediation systems should require specifically that gender issues are given adequate weight and should include some requirement for inclusion of female mediators when appropriate, like when land rights are involved.⁶¹ The constitution now requires gender parity in almost all commissions or organs of government.⁶²

If mediation is to work well in Kenya, there are some long-term strategies that should be considered. There is need for maintenance of political support in the long term. For the proposed reform measures to be effective, there is a need to have political support for them. This shall require monitoring at the local level and goodwill from all state actors to maintain it. The government should for example, pledge use of mediation clauses in all government contracts and

⁵⁸ Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", op. cit., p. 196.

⁵⁹ See generally, The European Code of Conduct for Mediators and Directive 2008/52 [2008] OJL 136/3.

⁶⁰ See Brainch, B., *ADR/Customary Law*, op. cit.

⁶¹ Fitzpatrick, D., "Dispute Resolution; Mediating Land Conflict in East Timor", op. cit., p. 196.

⁶² See Constitution of Kenya 2010-Art. 10; Art. 27; Art. 90; 97.

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to resort to mediation in the first instance.⁶³ All other contracts should also make mediation as the first port of call whenever a dispute arises so as to reduce backlog in courts and to arrive at acceptable outcomes that could otherwise not be realized in a court of law.

Further, facilitation of more international links, particularly Pan African and those of jurisdictions with successful mediation regimes, to exchange ideas and experiences will help further the growth of mediation as a conflict resolution mechanism especially in relation to transboundary environmental conflicts. Such links and collaborations will support and conduct research and disseminate information to maintain development of mediation.

Further to the above, there is a need to create awareness and sensitize members of the public how to resolve conflicts using amicable means. Until Koffi Annan appeared on the scene to mediate over the post-election crisis in Kenya, most Kenyans had no clue what mediation was and to date, very few are aware of how it works. Yet, mediation is not alien in Kenya or Africa for that matter as it has been practised for generations. There is a need therefore to create mediation awareness through public education and training of community mediators. This can only be achieved if there is dedicated funding by development partners and public-private sector partnerships, for a continuous training programme.

It is only by training the public, government officials including judicial officers on how to resolve conflicts that occur, that the economic wellbeing of Kenya, access to justice and peace can be guaranteed. Kenya can learn from Malawi whose economic backbone, like Kenya's, is equally agriculture, where the Danish Institute for Human Rights (DIHR) initiated a pilot project to create a community-based mediation scheme aimed at empowering the poor and vulnerable people to access justice.⁶⁴

Mediation is essentially negotiation with the assistance of a third party. The mediator's role in such a process is to assist the parties in the negotiations and he cannot dictate the outcomes of the negotiation. Resolution as opposed to settlement of conflicts can assist in healing the wounds caused by a conflict.⁶⁵

⁶³ Brainch, B., *ADR/Customary Law*, op. cit.

⁶⁴ Sweeney, B., *Training Villagers To Resolve Disputes in Malawi*, an article published on Danish Institute of Human Rights website <<http://www.humanrights.dk/news/training>, (Accessed on 21/5/2010).

⁶⁵ Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 39-43.

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Article 159 (2) (c) of the constitution now provides for the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Research should be geared towards giving parties in mediation autonomy over the process and the outcome. This will be achieved through the enactment of legislation that provides for mediation in the political perspective, which is the true mediation. Such legislation should not kill mediation by annexing it to the court system and making it a judicial process.

4.2 Composition of Mediation Accreditation Committee and Training of Mediators

The Constitution of Kenya 2010 requires that communities be encouraged to settle land disputes through recognised local community initiatives consistent with the Constitution.⁶⁶ If there is a dispute filed in Court by such affected communities and the Court decides to refer the same for ADR and specifically mediation, it is not clear from the law what criteria would be used to decide whether the Community initiative is well equipped to handle the matter and then file their report back to Court. It is also not clear who would handle such cases.

It is commendable that the Mediation Accreditation Committee membership consists of experienced ADR practitioners. However, considering that true mediation also incorporates informal mediation, this composition excludes the real informal mediation practitioners who conduct mediation everyday outside court. The list is arguably elitist and it locks out the mediators at the grassroots level. This is especially reinforced by the encouragement for formal qualifications for mediators.

With the pre-determined qualifications of who can act as a mediator, this effectively bars those mediators who may be untrained in formal mediation, but are experts in informal mediation from being recognised as mediators. It is important to remember that some of the conflicts especially those with a cultural aspect to them may benefit from the vast experience and knowledge of these informal mediators. However, they may not be able to participate citing lack of the formally acceptable qualifications as mediators. Accreditation becomes tricky considering that the current membership of the Committee⁶⁷ may not be well versed with particular

⁶⁶ Constitution of Kenya, Article 60 (1) (g); 67(2) (f).

⁶⁷ The membership consists of: Representatives from the Office of the Attorney General; Law Society of Kenya; Chartered Institute of Arbitrators (Kenya Branch); Kenya Private Sector Alliance; Institute of Certified Public

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traditional knowledge and may therefore leave out those who hold such knowledge when it comes to accrediting mediators. Such mediators may not need any formal training as they may have gained expertise and experience from long practice and their knowledge of traditions and customs of a particular community. Again, if they are to be considered untrained in certain aspects of that community, the question that comes up is whether the Mediation Accreditation Committee has the expertise or capacity to set the relevant level of requisite expertise or even offer training for subsequent accreditation. These issues may require to be comprehensively addressed by policy makers in order to determine how to create a bridge between formal and informal mediation, especially where the two conflict in application.

The use of ADR mechanisms as contemplated under Article 159 of the Constitution of Kenya should be interpreted in broader terms that not only involve the Court sanctioned mediation but also informal ADR mechanisms especially mediation, negotiation and reconciliation, amongst others.

These are some of the concerns that might need to be addressed if the Judiciary ADR Pilot Scheme is to succeed. Mediation conducted within the community context as contemplated under Article 60⁶⁸ of the Constitution of Kenya may necessitate incorporation of the informal mediators into the Committee as they carry with them invaluable experience and expertise that the formal mediators may not possess or even obtain through the formal training.

4.3 Enforcement of Mediation Outcomes

While the formal mediation processes require written mediation agreement or outcome, this may be problematic for informal approaches where these may not take these forms. An informal mediation outcome may take the form of shaking hands, slaughtering a bull or goat, taking solemn oath to keep the promises or just confidential agreements especially between spouses.⁶⁹ Arguably, it should be possible under the legal framework to report back to court

Accountants of Kenya (ICPAK); Institute of Certified Public Secretaries of Kenya; Kenya Bankers Association; Federation of Kenya Employers; International Commission of Jurists (Kenyan Chapter); and the Central Organizations of Trade Unions. (See Kenya Gazette, Vol. CXVII-No. 17, *Gazette Notice No. 1088*, Nairobi, 20th February, 2015, p. 348..)

⁶⁸ One of the principles of land management in Kenya is encouragement of communities to settle disputes through ADR.

⁶⁹ See generally J. Kenyatta, *Facing Mount Kenya, The Tribal Life of the Kikuyu*, (Vintage Books Edition, October 1965); See also H.O. Ayot, *A History of the Luo-Abasuba of Western Kenya From A.D. 1760-1940*, (Kenya Literature Bureau, 1979, Nairobi).

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albeit orally such informal mediation outcome for purposes of terminating the conflicts or even enforcing the outcome where such was the agreement between the parties.

This may create difficulties in recognition, enforcement or even execution of such mediation agreements. The question is, therefore, how broadly a mediation agreement can be defined in order to accommodate informally brokered mediation agreements. It is important to assess whether it is possible to accommodate the issues as perceived in informal ADR practice especially informal mediation. The Judiciary could also review the framework as it is and decide whether a mere recording that the matter has been settled can suffice.⁷⁰

5. Conclusion

The constitution now recognizes in Article 48 that realising access to justice for all Kenyans by the enhanced application of the traditional forms of dispute resolution is essential. Access to justice imperatives to wit: expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies are present in mediation in the political perspective. Reforming the judiciary to conform to the spirit of the constitution is also timely and vital. As indicated earlier, Kenyans as a people have not lost the capacity to coexist peacefully, commune together, respect one another, negotiate, forgive and reconcile in resolving their conflicts. This is essential in not only ensuring access to justice but more importantly in promoting peace. We should bear in mind that justice may not necessarily bring peace and coexistence to a people. Traditional dispute resolution mechanisms can achieve both. They are still a part of the Kenyan society and hence their constitutionalisation. Cultural, kinship and other ties that have always tied as together as one people have not died out. In many parts of the country Kenyans still believe in the principles of reciprocity, common humanity, respect for one another and to the environment. This explains why we still have the cooperative movement, *harambee* and other schemes that are a communal in nature.

Negotiation, mediation and reconciliation have been practiced for many years by traditional African communities'. They are not alien concepts. It is thus correct to say that mediation in the African context was and has been an informal process. Informality of mediation as a conflict resolution mechanism makes it flexible, expeditious and speedier, it fosters relationships and is cost-effective. It also means that since parties exhibit autonomy over the

⁷⁰ See *Republic v Mohamed Abdow Mohamed*, [2013] eKLR, Criminal Case 86 of 2011.

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process and outcome of the mediation process, the outcome is usually acceptable and durable. Similarly, mediation addresses the underlying causes of conflicts preventing them from flaring up later on. Mediation is no longer on trial. It has come of age and has the capacity to resolve conflicts in the Kenyan context. Resolving conflicts through mediation in Kenya is possible. It is a goal that should be harnessed and realized.

References

Ayot, H.O., *A History of the Luo-Abasuba of Western Kenya from A.D. 1760-1940*, (Kenya Literature Bureau, 1979, Nairobi).

Bercovitch, J., *Mediation Success or Failure: A Search for the Elusive Criteria*, *Cardozo Journal of Conflict Resolution*, Vol.7, p.289.

Bloomfield, D., *Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland*, *Journal of Peace Research*, vol. 32 no. 2 May 1995, pp. 151-164).

Brainch, B., *ADR/Customary Law*, a paper presented at the World Bank Institute for Distance Learning for Anglophone Africa, November 6, 2003.

Chapman, C. & Kagaha, A., “Resolving Conflicts Using Traditional Mechanisms in The Karamoja and Teso Regions of Uganda”, Northern Uganda Rehabilitation Programme (NUREP) Briefing, *Minority Rights Group International*, August 2009.

Cloke, K., *The Culture of Mediation: Settlement vs. Resolution*, The Conflict Resolution Information Source, Version IV, December 2005.

Commission on Administrative Justice Act, No. 23 of 2011, Laws of Kenya. (Government Printer, Nairobi, 2011).

Community Land Act, 2016, No. 27 of 2016, Laws of Kenya. Government Printer, Nairobi, 2016).

Constitution of Kenya, 2010 (Government Printer, Nairobi, 2010).

Daniels, SE & Walker, GB, ‘Rethinking public participation in natural resource management: Concepts from pluralism and five emerging approaches.’ Available at 15/10/2017]. Available at <http://dev.mtnforum.org/sites/default/files/publication/files/260.pdf> [Accessed on 3/01/2016].

Environment & Land Court Act, No. 19 of 2011, Laws of Kenya, Revised Edition 2015 [2012]. (Government Printer, Nairobi, 2011).

Fitzpatrick, D., “Dispute Resolution; Mediating Land Conflict in East Timor”, in AusAID’s *Making Land Work Vol 2; Case Studies on Customary Land and Development in the Pacific*, (2008), Case Study No. 9. Sourced from <http://www.ausaid.gov.au/publications/pdf>, [Accessed on 24/5/2012].

Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation

Gibson, C. and Woolcock, M., 'Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy,' *Policy research working papers*, Vol. 3713, World Bank Publications, 2005.

Global Alliance against Traffic in Women (GAATW), Available at <http://www.gaatw.org/atj/> (Accessed on 13/10/ 2017).

Haysom, N. & Kane, S., 'Negotiating natural resources for peace: Ownership, control and wealth-sharing,' Centre for Humanitarian Dialogue, Briefing Paper, October 2009.

Hazen, S., Environmental Democracy, (<<http://www.ourplanet.com>). [Accessed on 18/01/2016]. Washington DC. Csaba Kiss and Michael Ewing (eds), "Environmental Democracy: An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries," European Regional Report (published by The Access Initiative Europe.) available at <http://www.accessinitiative.org> [Accessed on 18/01/2016].

Hove, S.V.D., 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, p.10.
<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>

Human Rights Watch, *World Report 2013*, available at http://www.hrw.org/sites/default/files/wr2013_web.pdf [Accessed on

In the Matter of the National Land Commission [2015] eKLR.

Industrial Courts Act, No. 20 of 2011, Laws of Kenya (Government Printer, Nairobi, 2011).

Kenya Gazette, Vol. CXVII-No. 17, *Gazette Notice No. 1088*, Nairobi, 20th February, 2015.

Kenyatta, J., *Facing Mount Kenya, The Tribal Life of the Kikuyu*, (Vintage Books Edition, October 1965).

Land Registration Act, No. 3 of 2012, Laws of Kenya.

Legal Aid Act, No. 6 of 2016, Laws of Kenya (Government Printer, Nairobi, 2016).

Lumerman, P., Psathakis, J., & Ortiz, M., 'Climate Change Impacts on Socio-environmental Conflicts: Diagnosis and Challenges of the Argentinean Situation,' (Initiative for Peacebuilding, Brussels, 2011).

Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) —Conflict Information Consortium, *Beyond Intractability*, University of Colorado, Boulder (July 2003).

Marriage Act, No. 4 of 2014, Laws of Kenya.

Martin Luther King: Excerpt from acceptance Speech by the 1993 Nobel Peace Laureate, Inaugural Celebration address 1994, sources from, <http://www.goote.htm>, (accessed on 5/08/2012).

Mediation (Pilot Project) Rules, 2015, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9th October, 2015, (Government Printer, Nairobi, 2015).

Miller, B., 'Political empowerment, local—central state relations, and geographically shifting political opportunity structures: Strategies of the Cambridge, Massachusetts, Peace Movement', *Political*

Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation

Geography, (Special Issue: Empowering Political Struggle), Vol. 13, Issue 5, September 1994, pp. 393–406.

Mkangi, K., *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa*, available at www.payson.tulane.edu. [Accessed on 14/10/2017].

Muigua, K. & Kariuki F., ‘ADR, Access to Justice and Development in Kenya,’ Paper Presented at Strathmore Annual Law Conference 2014 held on 3rd& 4th July, 2014 at Strathmore University Law School, Nairobi.

Muigua, K., ‘Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,’ Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 3, No. 2, 2015, pp. 64-108.

Muigua, K., ‘Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework,’ Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 1, (2017), pp. 74-104.

Muigua, K., Kariuki, F., Wamukoya, D., *Natural Resources and Environmental Justice in Kenya*, (Glenwood Publishers Limited, 2015, Nairobi).

Muigua, K., *Resolving Conflicts through Mediation in Kenya*. (Glenwood Publishers Ltd, Nairobi, 2012).

Muigua, K., —Securing the Realization of Environmental and Social Rights for Persons with Disabilities in Kenya. Available at <http://www.kmco.co.ke/attachments/article/117/Securing%20the%20Realization%20of%20Environmental%20and%20Social%20Rights%20for%20Persons%20with%20Disabilities%20in%20Kenya.pdf>

Muigua, K., *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*. Available at

Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006).

National Cohesion and Integration Act, 2008, No. 12 of 2008, Revised Edition 2012 [2008].

National Land Commission Act, No. 5 of 2012, Laws of Kenya.

Ojwang, J.B., “The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development,” 1 *Kenya Law Review Journal* 19 (2007).

Oladipo, S.E., ‘Psychological Empowerment and Development’, *African Journals Online*, Vol. 2, No 1, 2009, p.121.

Penal Reform International, “Access to justice in Sub Saharan Africa: The Role of Traditional and Informal Justice Systems”, *PRI*, (2000), pp. 1 – 196. Sourced from <http://www.gsdr.org/docs>, [Accessed on 03/06/2012].

Republic of Kenya, *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, (the 'Akiwumi Commission') (Government Printer, Nairobi, 1999).

Republic v Mohamed Abdow Mohamed, [2013] eKLR, Criminal Case 86 of 2011.

Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation

Ristanić, A., 'Alternative Dispute Resolution And Indigenous Peoples: Intellectual Property Disputes in the Context of Traditional Knowledge, Traditional Cultural Expressions and Genetic resources,' (Lund University, April 2015), available at [https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/\\$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf](https://www.law.lu.se/webuk.nsf/%28MenuItemById%29/JAMR32exam/$FILE/Alternative%20Dispute%20Resolution%20and%20Indigenous%20Peoples.%20Intellectual%20Property%20Disputes%20in%20the%20Context%20of%20Traditional%20Knowledg.pdf) [Accessed on 08/01/2016].

Sweeney, B., *Training Villagers To Resolve Disputes in Malawi*, an article published on Danish Institute of Human Rights website <<http://www.humanrights.dk/news/training>, (Accessed on 21/5/2010).

The European Code of Conduct for Mediators and Directive 2008/52 [2008] *OJL* 136/3.

The Hendrick Hudson Lincoln-Douglas *Philosophical Handbook*, Version 4.0 (including a few Frenchmen). Available at <http://www.jimmenick.com/henhud/hhldph.pdf> [Accessed on 15/10/2017].

United Nations Conference on Environment and development, *Rio Declaration on Environment and Development*, Rio de Janeiro, Brazil, 1992.

United Nations Development Programme, 'Access to Justice and Rule of Law,' available at http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law/ [Accessed on 14/10/2017]

United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, Resolution adopted by the General Assembly on 25 September 2015.

United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

Wilson, C. & Tisdell, C., 'Conflicts over Natural Resources and the Environment: Economics and Security,' *Working Papers on Economics, Ecology and the Environment, Working Paper No. 86*, September 2003.