Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms Towards Development and Alignment of Legal & Policy Framework with Aim to Deepen ADR For Access to Justice and Commercial Disputes

Nairobi Centre for International Arbitration (NCIA)
in collaboration with the Judiciary of Kenya and the International Development Law Organization (IDLO)

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ADR	Alternative Dispute Resolution
APSEA	Association of Professional Societies in East Africa
CADR	Centre for Alternative Dispute Resolution
CAMP	Court Annexed Mediation Project
CIArb	Chartered Institute of Arbitrators (Kenya Branch)
CIC	Commission on the Implementation of the Constitution
CS	Cabinet Secretary
CUCs	Court User Committees
FIDA	Federation of Women Lawyers
ICJ	International Commission of Jurists
KEPSA	Kenya Private Sector Alliances
KLRC	Kenya Law Reform Commission
KNCHR	Kenya National Commission on Human Rights
LSK	Law Society of Kenya
NCIA	Nairobi Centre for International Arbitration
NCMG	Negotiation & Conflict Management Group
SDRC	Strathmore Dispute Resolution Centre
TDR	Traditional Dispute Resolution

TDRMs	Traditional Dispute Resolution Mechanisms
TDRs	Traditional Dispute Resolution systems
TJS	Traditional Justice Systems
UNDP	United Nations Development Programme

PART I

A. EXECUTIVE SUMMARY

The Judiciary, NCIA and IDLO has undertaken the review of the current ADR legislative framework to identify the successes, gaps, challenges and opportunities including clear and concise recommendations and implementation strategies.

The assignment has resulted in a baseline assessment and recommendation Consultancy Report documenting the successes, gaps, challenges and opportunities including clear and concise recommendations and implementation strategies.

This Report also includes clear mapping of the gaps and opportunities for ADR as guided by Article 159 of the Constitution in policy, law and regulatory frameworks, as well as mapping of institutions – educational or private – who are undertaking ADR services.

ADR is a useful tool that can enhance access to justice in various sectors, both formal and informal as witnessed in the Judiciary's Pilot Project on Court Annexed Mediation as rolled out by the Commercial and Tax Division of the High Court, Milimani Law Courts. ADR is not really alternative. It is widely used by the ordinary Kenyans. However, ADR mechanisms such as negotiation, mediation, arbitration, amongst others, suffer from challenges.

There are gaps in their application and they are not harmonised. There is a need for the setting up of an enabling legal and institutional framework to facilitate the use of ADR.

Use of ADR in the various sectors needs to be mapped to enhance coordination and efficiency. There is a need for harmonisation of the use of ADR in the various sectors.

ADR should, however, be benchmarked against the Bill of Rights and international best practices on human rights and access to justice.

In the commercial justice sector, mediation and arbitration have been used successfully. Their use should be enhanced and supported. There is thus a need to create awareness as a way of enhancing public embracing and use of ADR mechanisms in dealing with different disputes.

In the analysis and stakeholders' forums, it was established that there is no distinct legal, policy or institutional framework for ADR and TDRs but there are various laws that promote the use of ADR and TDRs and other community justice systems in dispute resolution.

It was also established that most ADR and TDRs mechanisms face almost identical challenges for instance failure to meet constitutional human right threshold, poor documentation, undefined jurisdiction and subjection to formal laws.

There is need to formulate the policy or legislative framework to guide and promote the utilization of these alternative dispute resolution mechanisms to realize their benefit in promoting the access to justice for the majority of Kenyans. By formulating this policy, the potential of these mechanisms will be tapped and harnessed in order to offer support and complement the already overburdened formal court system that cannot reach the far reaching geographical regions of the country.

B. Summary of General Recommendations

The overall objective of the project was to undertake a status analysis of Alternative Dispute Resolution Mechanisms and informal community justice systems and to make recommendations and provide guidelines for formulation of policies and legislation to support ADR strategies. This section only outlines the general recommendations. The specific recommendations are contained in part VI of the Report.

Generally, in order to deepen ADR mechanisms for the sustained economic growth and access to justice, there is a preliminary need to address the definitional issues that arise when dealing with ADR. It is imperative to first define the meaning, context and scope of Alternative Dispute Resolution. In Kenya, ADR is seemingly mysterious and a new concept yet, in reality, ADR is really a combination of mechanisms which have been used in antiquity often involving negotiation, mediation, conciliation and adjudication of disputes which have been among us for ages. There is need to cascade formal ADR dispute resolution mechanisms to the magistrate courts too, rather than leave it within the purview of the High Court's jurisdiction. In defining ADR, the ADR Taskforce will also clarify the ADR roadmap in Kenya.

There is need to come up with an over-arching structural framework for ADR in Kenya**,** and the first step will be to come up with a conceptual framework that guide the policy that can translate into a Draft ADR Bill. There is also a need to come up with an over-arching policy framework for ADR.

This will ensure that stakeholders seeking to employ ADR in dispute resolution within a sector can rely on the over-arching policy to develop further legislation. The ADR taskforce has the mandate to develop and formulate these recommendations. In the formulation of the ADR policy, certain factors that must come into account such as: -

a. Increased mobile courts and community justice days for legal interaction;
b. Continuous legal literacy that focuses on the training TDRMs on extra judicial processes and probation modalities (Paralegal);
c. People centred delivery of justice as promoted by the Judiciary must be seen to embrace TDRMs with the same weight accorded to formal mediation;
d. Roll out ADR & TDRMS in all matters especially in the emerging areas in land and extractives;
e. Implement pro ADR statutes such as the Legal Aid Act; Small Claims Court Act;
f. Enact the Courts of Petty Sessions; and
g. Judiciary to monitor returns on ADR in all government enabled ministries and sectors.

There is need to enhance and promote the continual use of ADR in the dispensation of justice across the justice sector. This can be achieved through the following manner:

a. Documentation and lobbying e.g. monitoring government commitment in ensuring the realization of constitutional provisions on ADR by institutions and civil society;
b. Community justice system campaigns, training and collaborative networking;
c. Lobbying for full implementation of provisions of civil procedure Act 2012 on mediation (ADR), promoting awareness and linkages with existing justice mechanisms e.g. tribunals;
d. there is need to revisit and consider the roll out of court counsel desks in law courts to provide legal aid and mediation services;
e. ADR pilots through Court User Committees;
f. Collaborative partnerships and strategic networking; and
g. Staff training and certification as mediators to meet demand.

In addition, there is need to change the attitudes of practitioners within the ADR dispute resolution systems. The practitioners need to view ADR as complementary to litigation and not an avenue for

loss of revenue. They need to be sensitized and made aware of the ADR process and where is its true end; resolving conflict.

There is also need to have synergies across the sectors that will enhance the access to justice, peace building, development and poverty eradication. There is need to involve the different sectors within the Kenyan economy in deepening and advancing ADR dispute resolution mechanisms.

1. INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

The constitution of Kenya 2010 has recognized and given a life force to the Alternative Dispute Resolution mechanisms within the provisions of Article 159(2) (c). It also sets out the governing principles in which the courts and tribunals should exercise the judicial authority vested upon them by the Constitution. These principles are that: (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3). Article 159 2(c) Clause 3 provides that traditional dispute resolution mechanisms shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law

In addition, the Constitution has provided for the right to access to justice within Article 48 and this right has been echoed in the provisions of Article 159 which sets out principles to guarantee that access to justice for every person is not hindered. Article 2, that sets out the principles of rule of law, when read together with these provisions guarantees that every Kenyan receives equal treatment of the law and derive equal benefit within the courts and tribunals.

In its rigorous protection to the right to access to justice, the Constitution has created a legal environment in which the citizens are empowered to seek redress in instances of violation of their rights before the Courts. It also in effect protects the rights of the economically underprivileged, marginalized and vulnerable groups within the society.

Indisputably, Alternative Dispute Resolution mechanisms have played a critical role in ensuring that there is access to justice among the citizens. This is because a majority of disputes and conflict are settled using these alternative dispute resolution mechanisms and only a small fraction of these

disputes find their way before tribunals or formal courts. The community leadership and religious groups are among the common avenues in which conflict is discussed and resolved through community leaders, elders and other authorized persons who have the duty to maintain law and order within communities and the society.

ADR dispute resolution mechanisms are as old as the indigenous African communities and societies within Kenya. The formal recognition and constitutional mandate have reaffirmed the need to document and develop a legal and policy framework to streamline ADR in Kenya. This is necessitated by the valuable role played by these dispute resolution mechanisms in the maintenance of social order within the Kenyan communities. These mechanisms include negotiation, mediation, conciliation, adjudication, traditional dispute resolution especially in relation to commercial justice.

The Constitution has guaranteed that in order to promote access to justice, it will call for the appropriate policy, statutory and administrative interventions to guarantee the utility of the formal and alternative dispute resolution mechanisms. It is to this end that the Judiciary, the IDLO and the NCIA engaged the expert to undertake the research whose outcomes form the substance of this Report. This report constitutes a baseline assessment, situational analysis and recommendation on Kenya's ADR Mechanisms towards development and alignment of legal & policy framework with aim to deepen ADR for access to justice and commercial disputes.

The Report highlights successes, challenges, gaps and opportunities for businesses and investors to better utilize for commercial dispute resolution.

1.2 BACKGROUND

This section highlights the background to this Report and the three main stakeholders involved in the activities leading to this Report. Being key stakeholders in the administration of justice and promotion of the rule of law, the Judiciary, the IDLO and the NCIA engaged the expert to undertake the research whose outcomes form the substance of this Report.

The Judiciary is mandated under Article 159(2) (c) of the Constitution to promote the use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms as part of the tools used in enhancing access to justice.

The functions of NCIA as envisaged under the NCIA Act 2013, and which are relevant to this consultancy also include, inter alia, to: coordinate and facilitate, in collaboration with other lead

agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation; and in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data.

IDLO, on the other hand, works to enable governments and empower people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity.

Article 48 of the Constitution of Kenya, 2010 guarantees the right of access to justice. Further, Article 50 guarantees the right of every person to a fair hearing while Article 159 thereof provides for the principles guiding the exercise of judicial authority, and this includes effective access to justice by all and the promotion of ADR.

It is against this background that Judiciary, NCIA and IDLO sought the services of a Consultant to carry out a review of the existing policies, legislation and administrative procedures relating to access to justice and identify the successes, gaps, challenges and opportunities relating to the use of various ADR Mechanisms operative in Kenya with a view to making clear recommendations for action, including necessary legal and policy reforms and strategic roadmap for interventions.

a. About Kenya Judiciary

The Judiciary is the state arm with judicial authority established under Chapter 10, Article 159 of the Constitution of Kenya, 2010.

The Kenyan Judiciary is an independent, impartial, transparent and accountable institution anchored under Article 159 of the Constitution. Article 159(1) empowers the courts and tribunals established by or under the Constitution to exercise judicial authority as derived from the people, and it is bound by the National Values and Principles of Governance as enshrined in Article 10. Its mission is to deliver justice fairly, impartially and expeditiously, promote equal access to justice, and advance local jurisprudence by upholding the rule of law. The 2011 Judicial Service Act governs the administration of the Judiciary as well as its functions.

b. International Development Law Organization (IDLO)

The International Development Law Organization (IDLO) is the only intergovernmental organization exclusively devoted to promoting the rule of law. IDLO works to enable governments and empower people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity. Its programs, research and policy advocacy cover the spectrum of rule of law from peace and institution building to social development and economic recovery in countries emerging from conflict and striving towards democracy. IDLO has its headquarters in Rome, Italy and is pleased to count Kenya among its Member States. IDLO Kenya provided assistance to the Committee of Experts in Constitutional Review during the process to design the Constitution of Kenya, 2010 and subsequently to the now defunct Commission of the Implementation of the Constitution (CIC) in constitutional implementation monitoring and oversight. Currently, IDLO is providing technical support to the Office of the Attorney General and Department of Justice, the Kenya Law Reform Commission, the Judiciary, the Ministry of Devolution and Planning (MoDP), the Council of Governors, the Kenya National Commission on Human Rights (KNCHR), the National Gender and Equality Commission (NGEC), the State Department of Gender and the Ministry of Mining in implementing the Constitution of Kenya 2010 by way of strategic policy development, critical legislative review, expert technical advice, institutional strengthening and capacity building. Some of the key actors within the Judiciary supported by IDLO is the Judiciary Training Institute and the Judiciary Committee on Elections.

IDLO has over 34 years of experience in improving the capacity of formal and informal justice systems worldwide, particularly in countries with transition economics, to dispense fair and efficient justice through programming that includes legal training and technical assistance on substantive and procedural issues related to commercial law. IDLO Kenya has been providing critical support to the Judiciary since 2011 towards the implementation of the Judiciary Transformation Framework, the Strategic Plan 2014-2018, as well as the Sustaining Judiciary Transformation: A Service Delivery Agenda (2017-2021). Specifically, on commercial law, it has been working closely with the Commercial and Tax Division of the High Court since late 2015 to date by providing comprehensive technical support towards the operationalization of the Judicial Audio and Visual Transcription System and to the Court-Annexed Mediation Pilot Project in the Commercial Division.

c. About Nairobi Centre for International Arbitration (NCIA)

The Nairobi Centre for International Arbitration (NCIA) was established in 2013 by an Act of Parliament the Nairobi Centre for International Arbitration Act No. 26 of 2013 as a Centre for promotion of international commercial arbitration and other alternative forms of dispute resolution. NCIA is an independent institution administered by a Board of Directors composed of professionals from the East Africa Region. The directors are accomplished practitioners with multiple skills that assure the proper functioning and administration of the Centre. The daily management of the NCIA is tasked to a Registrar/Chief Executive Officer with technical staff of the Secretariat.

The functions of NCIA as envisaged under the NCIA Act and which are relevant to this consultancy include but are not limited to:[1]

a. promote, facilitate and encourage the conduct of international commercial arbitration in accordance with this Act;

b. administer domestic and international arbitrations as well as alternative dispute resolution techniques under its auspices;

c. ensure that arbitration is reserved as the dispute resolution process of choice;

d. coordinate and facilitate, in collaboration with other lead agencies and non-State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation;

e. in collaboration with other public and private agencies, facilitate, conduct, promote and coordinate research and dissemination of findings on data on arbitration and serve as repository of such data;

f. educate the public on arbitration as well as other alternative dispute resolution mechanisms;

g. perform such other functions as may be conferred on it by this Act or any other written law.

[1] Sec. 5, Nairobi Centre for International Arbitration Act, No. 26 of 2013, Laws of Kenya.

1.2.1 Terms of Reference

This consultancy aimed to conduct a baseline assessment of the current status of the various Alternative Dispute Resolution mechanisms in the country and to highlight successes, challenges, gaps and opportunities for businesses and investors to better utilize for commercial dispute resolution.

The outcome of the consultancy would be draft baseline assessment and recommendation report documenting the successes, gaps, challenges and opportunities including clear and concise recommendations and implementation strategies.

Under the overall supervision and direction of the Chief Registrar of the Judiciary, the Chair of the ADR Taskforce and the appointed representative from NCIA, and in consultation with the IDLO Kenya team, the Consultant would:

1. Conduct Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms of the various ADR mechanisms operative in the country, their successes, gaps, challenges and opportunities;
2. Review necessary documentation and conduct robust stakeholder consultation;
3. Submit a draft report noting clear recommendations for action, including necessary legal and policy reforms and strategic roadmap for interventions. This would include clear mapping of the gaps and opportunities for ADR as guided by Article 159 of the Constitution in policy, law and regulatory frameworks, and should also include a mapping of institutions – educational or private – who are undertaking ADR services;
4. Develop a PowerPoint presentation of the assessment, analysis and recommendation report, and present it to an ADR forum and in necessary validation fora;
5. Brief final technical report for IDLO documenting all the support provided within the contracted period, that is, the implementation of the TORs, support provided, key results realized, perceived impact of project, challenges faced and recommendations to IDLO and the Judiciary, other actors; and

6. Perform such other duty as would be assigned in line with the project via IDLO, the Chief Registrar of the Judiciary, the Chair of the ADR Taskforce, appointed members of the Commercial Justice Sector Reforms Committee.

This report is therefore based on these terms of references and makes findings and recommendations based on the same.

1.2.2 Project Objectives

The research and field study undertaken in this Research sought to achieve the following specific objectives:

a) Conduct Baseline Assessment, Situational Analysis & Recommendation Report of Kenya's ADR Mechanisms of the various ADR mechanisms operative in the country, their successes, gaps, challenges and opportunities;

b) Review of the current ADR legislative framework to identify the successes, gaps, challenges and opportunities including clear and concise recommendations and implementation strategies;

c) Identify laws and administrative procedures that need to be reviewed or developed to give effect to Articles 48, 50 and 159 of the Constitution; and

d) Identify laws, regulations and administrative procedures that need to be developed or reviewed to give effect to other constitutional provisions on access to justice and ADR.

1.2.3 Scope of the Assignment

The baseline assessment provides an all-inclusive, detailed and unbiased overview assessment of Kenya's use of Alternative resolution mechanisms. This is meant to provide a credible basis of evidence-based decision making in the administration, legislation, policy formulation and advocacy of ADR mechanisms. The scope of the baseline assessment is guided by the rights- based approach that offers a realistic, measurable and area specific scope of this area of law. Therefore, the baseline focuses on two main perspectives that ultimately affect the perceived level of access to justice in any society: the claimholder's and the duty bearer's perspective.

In addition to the foregoing, specific objectives for the research and field study, the report incorporates the following tasks;

(a) identify gaps in policy, legislation and administrative procedures required to give effect to Article 159(2)(c) of the Constitution;

(b) make recommendations to address gaps in policy, legislation and administrative procedures required to promote ADR strategies;

(c) facilitate consultative technical meetings, stakeholder forums and validation workshops; and

1.2.4 Description of Inputs

This Report contains the findings and analysis of the outcomes of the research and field study undertaken for alternative dispute resolution mechanisms in Kenya. Part I contains the executive summary whereas Part II forms the substantive report containing (i)an analysis of the status of ADR dispute resolution systems, (ii) a status analysis of the existing policies, legislation and administrative procedures designed to facilitate the promotion and support of ADR resolution systems; (iii) the gaps that require immediate intervention;(iv) recommendations for policy formulation towards the implementation of Article 159(2) and (3) of the Constitution; and (v)legislative proposals to address gaps in legislation and regulations to implement Article 159(2) (c) and (3) of the Constitution for deepening access to justice through ADR.

In addition, the report incorporates the presentations made during the National ADR stakeholders' forum as well as the outcome of the field study. The stakeholders involved in the consultative forums included, amongst others, the Judiciary, LSK, ICJ, CIArb, FIDA-Kenya, KEPSA, Tatua Centre, KLRC, Legal Resource Foundation, NCIA, Strathmore Dispute Resolution Centre (SDRC), ODPP, KNHCR, Kenya Land Alliance (KLA), COTU, University of Nairobi, Kenyatta University, Riara University, PILPG, National Police Service Commission, National Land Commission (NLC), the Ministry of Lands, PPDT, IEBC and Kituo cha Sheria.

1.2.5 Methodology and Research Design

This consultancy set out to conduct a baseline assessment and situational analysis of the current status of the various Alternative Dispute Resolution mechanisms in the country, and to highlight successes, challenges, gaps and opportunities for ADR for businesses and investors to better utilize them for commercial dispute resolution.

The Report provides a clear mapping of the gaps and opportunities for ADR as guided by Article 159 of the Constitution in policy, law and regulatory frameworks; a mapping of institutions – educational

or private – who are undertaking ADR services; and the recommendations are based on the baseline assessment and stakeholders' forums report.

This included conducting desk review of the current ADR legislative framework to identify the successes, gaps, challenges and opportunities including clear and concise recommendations and implementation strategies.

This Report therefore focused on identifying gaps in the existing policies, legislation and administrative procedures for facilitating equal access to justice as envisaged under Articles 48, 50 and 159 of the Constitution.

The Report contains recommendations on the various ADR mechanisms operative in the country, their successes, gaps, challenges and opportunities with an aim to enhance their use among the citizenry in dealing with commercial and non-commercial disputes.

It also includes a clear mapping of the gaps and opportunities for ADR as guided by Article 159 of the Constitution of Kenya in policy, law and regulatory frameworks.

In addition, the Report includes a mapping of institutions-educational or private-which are undertaking ADR services.

The research was conducted using three approaches; secondary research, survey questionnaires and multiple dialogues and forums with stakeholders.

The secondary research touches on the existence of rights by examining the written literature and laws available on the normative protection of the right to access to justice within the domestic sphere. It examines the adherence of the principles and standards of the right to access justice as espoused in the Kenyan constitutional protection and guarantee of the right of access to justice as well as statutory provisions on access to justice.

In addition, the secondary research focused on the applicable national laws and policies that govern the ADR conflict resolution systems as well as the organizations and institutions involved. This includes an analysis of the correlation and interconnection of these ADR systems. The research sought a quantitative analysis of the indicators of access to justice such as the presence of ADR Professionals, the ADR education system in place, the availability of training and skill development activities and the relationship between traditional customary laws and the formal justice systems.

The second step was the administration of survey questionnaire to target audience. These structured questionnaires were used to determine the respondent's capacity to access the remedies to their claims through ADR. This includes the awareness of the ADR conflict resolution mechanisms, the awareness of the right to access justice as enshrined in the Constitution, types of claims referred to ADR, the factors limiting the access to ADR mechanisms, the awareness of the available ADR institutions, familiarity with the ADR conflict management mechanisms procedures, adequacy of training and development of skill activities, the strengths, weaknesses and opportunities of developing ADR (SWOT and PESTEL analysis, as captured in the Findings section of this Report)[2] and the available sources of public education on ADR.

The third step was an assessment of the capacity of the ADR conflict resolution systems to provide effective remedies to disputes by way of engaging in multiple dialogues. This incorporated the evaluation of enforcement, oversight and adjudication of these conflict resolution systems. These forums and discussions enquired and established the general perception of the predictability and consistency in the application of law and justice using the ADR dispute resolution systems in the country.

1.2.6 Hypothesis/ Causation Chain

The baseline assessment proceeded on the presumption that Alternative Dispute Resolution mechanisms are an effective means to access and dispense justice and are an efficient justice system with regard to settling commercial, non-commercial and public administration disputes. While it is not disputed that each of these systems promote the accessibility to justice, there is need to adopt a collaborative approach between these alternative systems to reduce duplication of efforts and link them to the formal justice system for efficient administration and standardisation.

[2] SWOT and PESTEL are analytical tools that help identify the key external and internal factors that should be taken into account in order to achieve success in a project or initiative. The term 'PESTEL' refers to these domains: Political, Economic, Social, Technological, Environmental and Legal, all external factors. The term 'SWOT' refers to Strengths, Weaknesses, Opportunities, and Threats. Strengths and weaknesses are internal factors. Opportunities and threats are external.

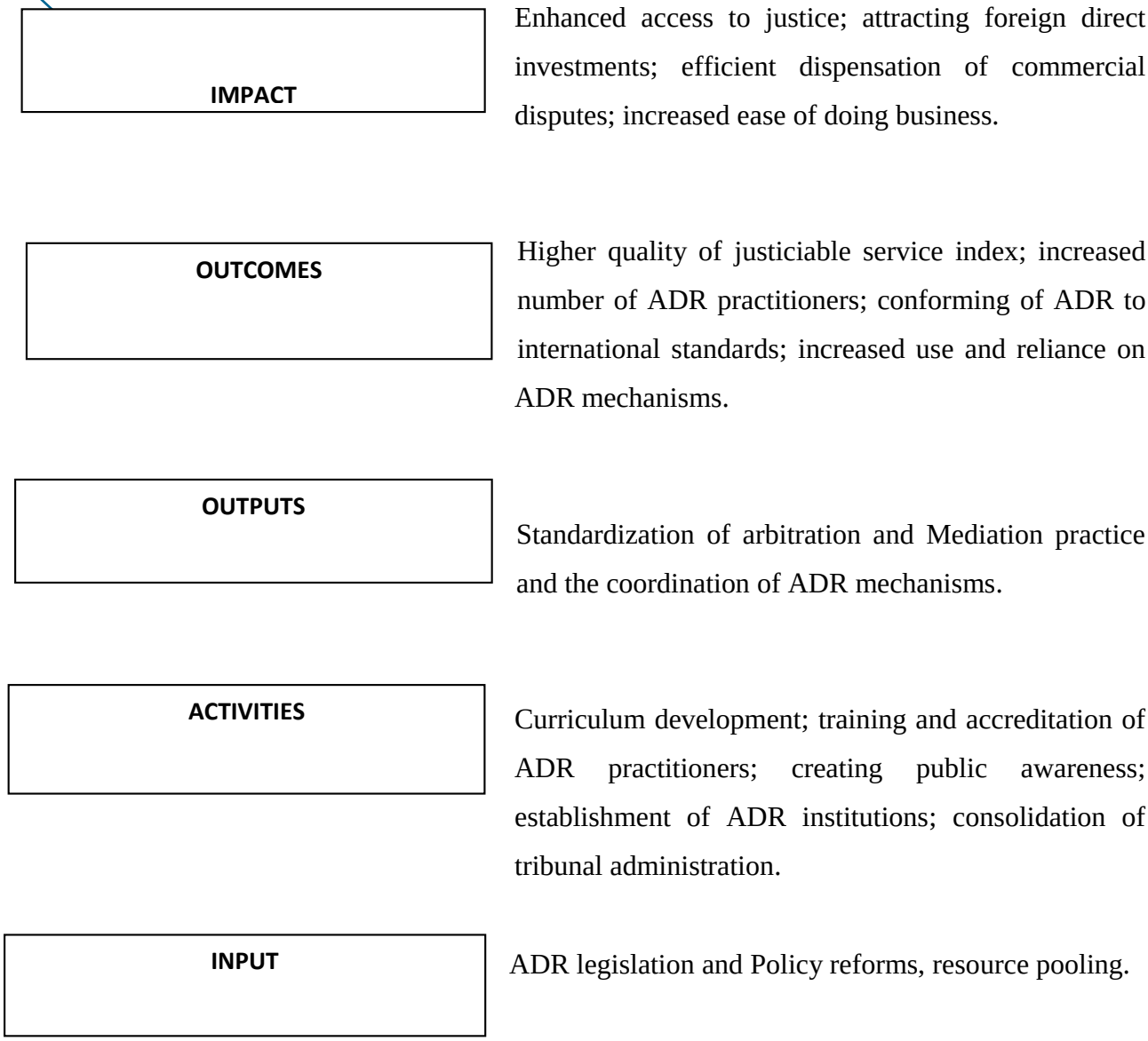

Fig. 1: Causation Chain

1.2.7 Assistance Provided and Challenges

The expert, with the assistance of two researchers, was able to undertake research on the legal, policy and institutional framework relating to ADR and TDRs and other community justice systems.

The main challenge that the expert faced was in respect of the field interview. Out of the targeted group respondents drawn from three local communities (Meru, Kikuyu, Luhya and Kamba), and Local Administrators (Chiefs) only a few respondents from the four communities and the Local Administrators were involved in the study. The study outcome is based on information from

respondents drawn from the four local communities and does not fully represent the diversity of the Kenyan community.

PART II

2. ACCESS TO JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS IN KENYA

Access to justice remains a critical pillar for poverty reduction and sustainable development. Article 48 of the Constitution of Kenya bestows upon government the obligation to facilitate access to justice for all. The Constitution of Kenya 2010 was promulgated as a conclusion to an ambitious national progress that aimed at reversing many years of mis-governance and social decay. As a transformative constitution, it seeks to make a break with the previous governance system. It aims not only to change the purposes and structures of the state, but also society. It is value laden, going beyond the state, with emphasis on social and sometimes economic change, stipulation of principles which guide the exercise of state power, requiring state organs, particularly the judiciary, to use the constitution as a framework for policies and acts for broader shaping of state and society. One of the areas, where such change is required is that of access to justice and the use of alternative dispute resolution.

Increased application of ADR is considered as one of the measures that will lead to faster dispensation of cases, particularly in tribunals and traditional justice mechanisms. There are a myriad of ADR mechanisms that can be employed – whether private arbitration or mediation. The Kenyan ADR legislative, policy, and strategic framework, and plans to develop to develop ADR, conforms to current international perspectives. The World Bank's "Doing Business Report" utilizes a "quality of judicial services index" which includes ADR as one of four good practices.

2.1 Indicators of Access to Justice

Indicators are effective tools in baseline assessment as they are yardsticks and markers of evaluating status, results and progress. The indicators can be used to monitor and assess the progress of an ongoing project consistently and sustainably over time. In this case, the consultancy used indicators to measure the current status of the Kenyan ADR Mechanisms and can later measure and monitor the effectiveness and progress made by the use of legal and policy framework reforms in deepening ADR for access to justice and commercial disputes.

With regards to access to justice, the consultancy's baseline assessment focused on two perspectives that ultimately affect the perceived level of access to justice in any society: the claimholder's and the duty bearer's perspective. The consultancy identified the indicators of access to justice in relation to Kenya's ADR mechanisms which can be used in the baseline assessment and to classify and compare these indicators among all the key shareholders in provision and access to justice though ADR mechanisms.

2.2 Classification of indicators

Predominantly, indicators are classified by their nature and type. On one hand, the nature of the indicators can be qualitative or quantitative. The qualitative nature of indicators capture the political, social and economic bias, perspectives and opinions of the assessment audience while the quantitative takes into account the numerical measurement, physical output and statistical data on the study group or audience. On the other hand, classification by type of indicator takes into account if the evaluation is of inputs, outputs, outcomes or impact. As an example, input indicator could measure the quantity of resources utilized to deepen ADR and other activities to promote access to justice such as creating awareness or funding used in developing a policy framework.

2.2.1 Rights Based Approach

The Rights based approach is entrenched in the Bill of Rights as provided for by the Constitution of Kenya and is concerned with the ability of the people to eradicate or diminish poverty by seeking and obtaining redress for through the available formal and informal systems in line with their human rights and freedoms. This approach looks at the ability of the population, especially the marginalized, low income and weak in society to access the available modes of justice systems. This approach looks beyond the formal administration of justice through law as a social good since the law is often limited and unjust; this limitation is also present in courts in which law is administered.

The broad indicators to consider for the claim holder and the duty bearer using this approach are capacity, the accountability and the empowerment within the ADR mechanisms. The baseline assessment should establish whether the available ADR mechanisms are accessible and if at all, whether the stakeholders have the capacity to settle disputes especially those of commercial nature. The assessment should establish if the stakeholders are able to function effectively and achieve the

set goals and objectives. The assessment should question if the available ADR mechanisms have the capacity to resolve disputes using both qualitative and quantitative measures.[3]

The capacity indicator develops and builds the accountability and the empowerment indicators for both the claim holders and duty bearers in that they are interrelated. The duty bearer requires empowerment through laws and policy to effectively dispense with the responsibility toward the claim holder while the claim holders require empowerment and enhancement of their capabilities for the accountable exercise of their rights.[4]

Capacity in the administration of justice through ADR mechanisms takes different dimensions whose evaluation is essential in the categorization of indicators. These dimensions are the existence of the remedies sought, the capacity of the claim holder to seek remedy and the capacity to provide the remedies sought.

Existence of Remedy	Capacity to Access Remedy	Capability to Provide Remedy
Normative Protection by • International Laws • The Constitution • Legal and policy frameworks • Customary laws and jurisprudence	• Capacity to access justice through the available ADR conflict resolution mechanisms	• Capacity of the available ADR mechanisms to provide settlement of disputes. • Capacity to provide justice through enforcement of decisions. • Capacity to provide appellate avenues

Source: Teehankee, 2003

Firstly, the existence of remedies delves into the normative protection of the access to justice as entrenched in the International law, the Constitution, the legal and policy frameworks as well as the customary law and jurisprudence. The evaluation question in this dimension is whether there are groups that are left out, discriminated or alienated, that makes them unable to seek protection from the existing ADR mechanisms. The baseline assessment can also evaluate the interconnectedness and

[3]Teehankee, J.C. "*Background Paper on Access to Justice Indicators in the Asia-Pacific Region"* (2003). La Salle Institute of Governance with the Support of the United Nations Development Program.
[4] World Bank, *Legal and Judicial Sector at a Glance*. (2000). Retrieved February 14, 2018 from http://www4.worldbank.org/legal/database/Justice.

relationship between statutory laws and customary values and whether the customary laws enhance, mitigate or impede the delivery of justice. The specific indicators in this would be whether the customary and statutory laws are integrated, non-integrated or parallel as well as how the traditional dispute mechanisms can be linked to formal justice systems.[5]

Further, the baseline assessment should evaluate the access to the formal and informal ADR mechanisms by looking at the factors that hinder people from accessing ADR justice systems and the costs incurred in accessing these justice systems.

Secondly, in order to promote poverty reduction, there is need to evaluate capacity to access the remedy through awareness creation. This awareness covers the knowledge of the rights and protections guaranteed by the Constitution, the awareness of the available alternative dispute resolution mechanisms, the factors affecting public legal awareness and the factors limiting the access to ADR mechanisms. The specific indicators to evaluate include, but are not limited to, the public awareness of the existing ADR mechanisms legal framework, the standard of ADR education and profession, adequacy of training and skill development activities, knowledge of claims that can be addressed by ADR mechanisms, the available ADR institutions and the familiarity with the ADR conflict management mechanisms procedures.[6]

Thirdly, the other dimension of capacity is to provide remedy through the ADR mechanisms. The baseline assessment's evaluation of the effectiveness of the ADR conflict management mechanisms takes into central focus the stakeholder discussions, the civil society participation and oversight.

Finally, it is of import to assess and evaluate the sustainability of these indicators used in the baseline assessment as they will be used to monitor the status of ADR systems over time. The indicators will be evaluated on the basis of cost, time, sustainability and reliability. For instance, there ought to be cost effectiveness and timely data collection and the indicators' reliability, sustainability, predictability and the equal application of the law in the face of a diversified Kenyan customary law context.

[5]Teehankee, J. C., "*Background Paper on Access to Justice Indicators in the Asia-Pacific Region"* (2003), La Salle Institute of Governance with the Support of the United Nations Development Program.
[6]Ubink, J. M. *"Customary Justice: Perspectives on Legal Empowerment."* (2011).

PART III

3. OVERVIEW OF ADR MECHANISMS USED IN KENYA: LEGAL AND POLICY FRAMEWORK

Alternative Dispute Resolution mechanisms refer to all other dispute resolution or decision-making processes that are an alternative to litigation. The Charter of the United Nations[7] makes provision for the use of Alternative Dispute Resolution mechanism. It states that parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. These mechanisms are provided for by the Constitution of Kenya within the ambit of Article 159 that provides that in exercise of judicial authority, the Judiciary shall promote the use of alternative dispute resolution mechanisms8. These mechanisms include:

3.1 Negotiation

This is the most basic dispute resolution mechanism with parties having autonomy over the process of reaching a mutually acceptable decision without assistant from third parties. Negotiation is one of the mechanisms that bring about conflict resolution and are non-coercive in that the parties have aut onomy about the forum, the process, the third parties involved and the outcome. Non-coercive meth ods allow parties to work through their conflict, address its underlying causes, and reach a resolution to that conflict. Resolution means that the conflict has been dealt with and cannot re-emerge later.[9] Within negotiations disputants meet to discuss mutual or opposing interests despite the parties having equal or unequal powers to reach a win-win solution. Negotiation is the first step to mediation. The negotiation phase is the one during which the parties hammer out an agreement, or even agree to disagree and it is during this stage that the core issues of the conflict are negotiated or bargained.[10] Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation but have reached a deadlock.[11]

[7] Art 33 (1), 24th October 1945.
[8] Article 159(2)(c), Constitution of Kenya, 2010.
[9] Cloke, K., "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005.
[10] Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.
[11] Ibid.

The aim of negotiation is to harmonize the interests of the parties concerned amicably. This mechanism involves the parties themselves exploring options for resolution of the dispute without involving a third party. In this process, there is a lot of back and forth communication between the parties in which offers for settlement are made by either party. If agreed upon by the other party, the dispute is deemed to have been resolved amicably.

Negotiation is different from arbitration and other forms of decision making. Unlike an arbitrator, a mediator or an adjudicator, the power to determine the facts, define the process and to make the decision in negotiations rests with the participants, not with a third party.

Many failures in negotiations result from misunderstanding the basic fact that right and wrong are defined by the parties themselves, not by a third party; and decisions can be implemented and perpetuated in direct proportion to the relationship and reasoning of the participants.

There are two extreme styles of negotiating; there is what is referred to as the competitive bargaining or hard bargaining style and there is the co-operative bargaining style or soft negotiating.
The competitive negotiators are so concerned with the substantive results that they advocate extreme positions. They create false issues, they mislead the other negotiator, they even bluff to gain advantage. It is rare that they make concessions and if they do, they do so arguably, they may even intimidate the other negotiator.
Cooperative negotiators are more interested in developing a relationship based on trust and cooperation they are therefore more prepared to make concessions on substantive issues in order to preserve that relationship.

3.2 Mediation

Mediation is the voluntary, informal, consensual, strictly confidential and non-binding process in which the disputants submit to a neutral third party to assist them to reach a negotiated solution. The third party in the discussion facilitates the flow of information aiding the process of the parties to reach an agreement. The mediator need not be neutral or impartial but must be acceptable to all disputants.

Mediation is a traditional dispute resolution mechanism where parties negotiate their disputes with the assistance of a third party, the mediator, and has existed since antiquity. In Kenya, this dispute re

solution mechanism has existed within the customary jurisprudence of the native tribes. The Constit ution of Kenya 2010 has provided for the use of mediation as a dispute resolution mechanism. Articl e 159 has provided that the courts and tribunals in exercise of their judicial authority shall be guided by principles such as the promotion of ADR that includes mediation.

Mediation has a voluntary, informal, concessional and confidential nature which makes this dispute resolution mechanism ideal for conflict resolution. The Mediator assists parties to settle their disput es through facilitating the negotiation process and have powers to make decisions. There are argume nts that the negotiator has to be a neutral third party. These thoughts have been challenged on the ba sis that mediators are people who possess certain dispute resolution resources valued by the disputan ts, which make the parties submitting to the process less concerned by the impartiality of the mediat or. According to Mwagiru, a mediator need not be impartial to the dispute affecting the parties, how ever, the mediator must be acceptable by all the disputants.[12] Further, the mediator should not have a n interest in the dispute other than the interest to amicably settle the dispute

3.2.1 Characteristics of Mediation

Notably, mediation, has the attributes of being voluntary, autonomous, party satisfaction, speedy and expeditious, confidential, focuses on the interest of parties and not their rights, non-binding, non-coercive, flexible, cost effective and informal. These characteristics of mediation are similar in the traditional dispute resolution mechanisms. These attributes are the core source of mediation to derive its legitimacy in application to resolve the disputes between the parties.[13] The disputants have autonomy to make real and free choices within the mediation process and the mediator obtains genuine input of the parties in deciding on the best way to balance the parties' interests in resolving the dispute. The parties have an active and participatory role in the resolution of their dispute. They may choose the mediator, the venue and the attendance of the mediation meetings.

The mediator cannot coerce the parties to reach an agreement on how to resolve their conflict allowing the parties to drive their dispute resolution process. This autonomy leads to party satisfaction with the process and outcome and decisions made through mediation are likely to be stable, long lasting and unchallenged through appeal. Mediation is time saving unlike the litigation process. The parties and

[12] Mwagiru,M., *Conflict in Africa; Theory, Process institutions of Management* (Centre of Conflict Research, Nairobi) 2006 pp 53-54.
[13] Ibid, pp 38.

their mediators agree on how to conduct the process, how often to meet and the limited role of advocates has improved the speediness in reaching to a settlement.

In the case of *Vacluse Holdings Limited vs. Lindsay*[14], the New Zealand Court of Appeal held that the mediation agreements and settlements are confidential and any matters that arise from mediation ought not to be put to issue in case of any subsequent litigation by the parties. The court further stated that the documents relied on by the mediator should not be relied upon or produced in subsequent litigation processes. Furthermore, anything said or done in the course of mediation should not rebound to the detriment of any party in the instances where mediation fails.[15] This case reaffirms the importance of confidentiality within the mediation process since the agreements and negotiations within the negotiation process are done on a without prejudice basis and the communications made within the mediation process being protected in law.

Mediation places emphasis on the interests of the parties and tries to meet the interests of the parties fairly so as not to damage the pre-existing relationships between the disputants. The pure mediation is non–binding and parties are not coerced to submit to the mediation process after the first meeting with the mediator and the continuation of the mediation process depends on the willingness of the parties. The mediation process relies on the goodwill of the parties to resolve their own dispute with the help of the mediator. Mediation is also non-coercive as it lacks the element of legal enforcement using legal tools unlike the litigation and arbitration process. There is no enforcement of the settlement by the courts, the court registries, the police or other state agencies.

In addition, mediation is flexible as it is informal with little or no procedure and structure. The parties agree on the rules in which to conduct the mediation and resolve their dispute. This contributes to this process being cost effective and speedily. This informality in the process allows the parties to resolve their dispute quickly without the constraints and limitation of procedure and processes. Consequently, mediation has been preferred as a means to resolve disputes as it is deemed to be fair, effective, allows for party participation and efficient.

3.2.2 Court Annexed Mediation

This refers to the Court backed process in which the disputants are statutorily coerced to submit to the mediation process. They enter an arrangement and arrive at an agreement which they are forced

[14] Vaucluse Holdings Ltd v Lindsay. (1997) 10 PRNZ 557 (CA) at 559.
[15] Ibid,pp 42.

to live with, while exercising little or no autonomy over their choice of mediator. This process focuses on the issues surrounding the conflict and is largely linked with judicial settlement, arbitration and legal enforcement. Notably, while matters are referred to mediation by the Court, parties are still free to exercise their autonomy within the mediation. If a settlement or resolution is reached, then the Registrar records that fact. In the National ADR Stakeholder Forum, the Hon. Elizabeth Tanui, Deputy Registrar, Commercial & Tax Division of the High Court and the Registrar for the court annexed mediation pilot project made a presentation in the 'Overview of Ongoing Initiatives by Judiciary Court Annexed Mediation Project'.[16] The Court Annexed Mediation (CAM) was introduced in Kenya by the Judiciary in April, 2016, on a pilot basis. The design and the Structural set up of CAM borrowed heavily from the Multi-Door Court House concept in Nigeria. The Deputy Registrar informed the forum that the Multi-Door Court House concept posits that the ideal court house is a multifaceted dispute resolution centre that ought to offer disputants several options or doors in resolving disputes rather than just one door that leads to the courtroom to a judge. The availability of several doors within the courthouse allows the disputants to be directed to the appropriate dispute resolution process. In Kenyan courts, the doors that are available to litigants within the court house mostly lead to either litigation or mediation.

Particularly, the pilot project was set up under the Family and Commercial Divisions of Milimani High Court, Nairobi with the aim of resolving commercial and family disputes that have propensity of clogging the judicial system with overload of cases.[17] The goals that the Kenyan Judiciary had for the Pilot Project included:

a. Complying with the constitutional provisions;
b. Reducing or eliminating case backlog;
c. Facilitating access to Justice;
d. Making mediation an integral part of its case management process;
e. Resolving disputes at the earliest possible stage; and
f. Inculcating the culture of mediation in Kenya's legal system.

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

In order to operationalize the CAM project, the Taskforce on ADR; CAM, Mediation Accreditation Committee (MAC) and the Secretariat were established and tasked with the implementing the project. The Alternative Dispute Resolution Taskforce members were gazetted on July 2017 by the Chief Justice to oversee roll out of Court Annexed Mediation (CAM) across the country, and the taskforce drew membership from various institutions within the justice sectors. These institutions included Judges, the Attorney General, Magistrates, Arbitrators, LSK, NCIA, FIDA, JPIP, IDLO and Court Registrars.

The MAC comprises of 13 members nominated from various institutions alongside the Judiciary and is mandated to, inter alia, maintain a register of accredited mediators and to enforce a Code of Ethics for these mediators. Since its launch on April 20th 2015, MAC has undertaken various programs that ensure the success of the Court annexed mediation pilot project.[18] In addition, the CAM is also empowered to, inter alia, determine the criteria for certification of mediators, propose rules for certification, and establish appropriate training programs for mediators. The Committee has also developed and adopted Accreditation Standards that guide the process of accreditation and re-accreditation of the mediators. It has also developed a Code of Ethics that applies to all mediators taking part in the pilot program.

The Secretariat is charged with the day to day running of the project and supports the Mediation Taskforce. The secretariat is funded by donor partners mainly JPIP and IDLO. It consists of 1 interim Project manager from the Judiciary, 2 Program officers from JPIP and eight mediation clerks of whom 6 funded by JPIP and 2 by IDLO.[19]

With regards to its status, the Court Annexed Mediation Project came to an end on the 7th July 2017 and was rated a success owing to the 50% settlement rate in both divisions. It has managed to have a membership of at least 104 accredited mediators.

Through Practice Directions, the Honourable Chief Justice embedded mediation as a permanent feature in both the Family and Commercial Divisions and formed a Taskforce to oversee the rollout

[18] Laws of Kenya, Civil Procedure Act, 2010. Section 59A (2).
[19] Tanui.E. "Overview of Ongoing Initiatives by Judiciary Court Annexed Mediation Project." Cultivating a Robust Coordinated Alternative Dispute Resolution (ADR) Framework for Kenya towards Sustained Economic Growth and Access to Justice Forum held on APRIL 12 – 13, 2018 – Crowne Plaza, Nairobi, Kenya.

of the Court Annexed Mediation. Towards that end, the taskforce conducted a mediation settlement week in the month of December 2017 in other court stations and divisions.

3.2.2.1 The mediation process within Court Annexed Mediation

Screening of Files: In this stage, the file is presented before the Mediation Deputy Registrar (MDR) who determines which cases are to be referred for Mediation. The matters referred to mediation are those with disputes relating to facts and not of law, few disputed facts and those that are not complex in nature.

Parties Notified of the Decision: When the Mediation Deputy Registrar (MDR) makes a decision for a case to be referred to mediation, the MDR notifies the parties of this decision within seven (7) days.

Case Summaries: The parties are, within 7 days of receipt of notification to file Case Summaries.

Nomination of Accredited Mediators: The MDR will then nominate three (3) mediators from the Mediation Accreditation Committee Register and notify the parties of the names.

Parties Respond: Parties respond by stating their preferred mediators in writing. The MDR will appoint a mediator to handle the case. Parties are notified about mediation.

Notification of Appointed Mediators: The MDR shall within 7 days of receipt of notice of preference of mediators appoint a mediator and notify the parties.

Appointed Mediator responds: Upon receipt of the notification, the mediators are expected to file their response.

Mediation Begins: The appointed mediator will schedule a date for initial mediation and notify the parties of the date, time and place. The mediation proceedings will be concluded within sixty (60) days from the date it is referred for mediation. However, this period may be extended for a further ten (10) days.

Filing of report: Upon completion of mediation, the mediator is expected to file a report which indicates whether or not a Mediation Settlement agreement was reached.

The mediator shall file a certificate of non- compliance where a party fails to comply with any of the mediator's directions or constantly fails to attend mediation sessions.

3.2.3 Arguments for Mediation

Mediation has been preferred due to the above stated attributes over the formal legal process administered by the court systems. Mediation is speedy and expeditious in comparison to other dispute resolution processes. It is flexible, affordable, cost effective, confidential, preserves the pre-existing relationships between parties, offers party autonomy, leads to [arty satisfaction, is non-coercive and is non-binding on the parties. Mediation is not limited by formality and rules of procedure and takes into account the interests of the parties rather that their rights.

3.2.4 Arguments against Mediation

Despite the numerous advantages of mediation, there are certain limitations to settling disputes using mediation. For instance, the non-binding nature of the mediation process has been a detriment to the development of this dispute resolution mechanism in promotion of access to justice. When the parties agree to submit to the mediation process, they are not under obligation to continue with the mediation process after the first meeting.

There is uncertainty in mediation as a means of resolving disputes as there are no precedents that the parties can rely on. The settlements or resolutions reached after successful mediation may differ and lack uniformity to previous cases. This gives litigation preference over mediation as it is certain and has uniform application across similar cases.

There are also instances where delays in mediation process could be occasioned by lawyers' lack of understanding on how the process of mediation, and indeed, other ADR mechanisms work.

3.2.5 Legal Framework on Mediation

Following the promulgation of the new Constitution of Kenya 2010, numerous statutes have incorporated mediation clauses. The following legal framework forms part of what governs mediation in Kenya,

a. Constitution of Kenya, 2010.
b. Civil Procedure Act and Rules, 2010
c. Practices Directions
d. Mediation (Pilot Project) Rules 2015
e. Mediation Manual

a. Constitution of Kenya, 2010

The Constitution of Kenya, 2010 provides for principles that must guide the courts in exercising judicial authority. One of the stipulated principles is the use of Alternative Dispute Resolution Mechanisms, including Mediation. The Constitution also provides that the State is obligated to ensure access to justice for all which can be achieved through the promotion of mediation as a means of dispute resolution.

b. Civil Procedure Act, 2010

The Act provides a definition of the process of mediation, the mediation rules as well as who is a mediator.[20] The Mediation Accreditation Committee (MAC) is established by section S59 A of this Act. It also gives court the discretion to refer a dispute to mediation upon request of the parties or where it deems it appropriate or if the law so requires. Such mediation shall be conducted in accordance with the mediation rules. No appeal shall lie against a mediation agreement.[21]

3.3 Conciliation

Conciliation is an ADR process where an independent third party, the conciliator, helps people in a dispute to identify the disputed issues, develop options, consider alternatives and try to reach an agreement by way of clarifying misconceptions and perceptions to reduce tension and promote effective communication with the aim to facilitate continued negotiations. A conciliator may have professional expertise in the subject matter in dispute and will generally provide advice about the issues and options for resolution. However, a conciliator will not make a judgment or decision about the dispute. Conciliation may be voluntary, court ordered or required as part of a contract.

A conciliator uses expert knowledge of the domain in which they conciliate. The conciliator can make suggestions for settlement terms and can give advice on the subject-matter. Conciliators may also use their role to actively encourage the parties to come to a resolution. In certain types of dispute, the conciliator has a duty to provide legal information. This helps any agreement reached to comply with any relevant statutory framework pertaining to the dispute. Therefore, conciliation may include an advisory aspect.

[20] Laws of Kenya, Civil Procedure Act, 2010. Section 2.
[21] Civil Procedure Act, S59 B (1) (a) (b) and (c).

Like mediation, conciliation is a voluntary, flexible, confidential, and interest-based process. The parties seek to reach an amicable dispute settlement with the assistance of the conciliator, who acts as a neutral third party.

The main difference between conciliation and mediation proceedings is that, at some point during the conciliation, the conciliator will be asked by the parties to provide them with a non-binding settlement proposal. Mediators, by contrast, will in most cases and as a matter of principle, refrain from making such a proposal.

Conciliation is also used to resolve disputes between parties and involves a third party taking an interventionist approach. The third party plays an active role making independent decisions; however, the parties involved are not bound by these proposals. Conciliation is a creative process, whereby parties can choose from a variety of options in determining the outcome. If conciliation does result in a court procedure, the conciliation process will be useful in recognizing and simplifying the issues within the case so that it can be dealt with swiftly and effectively in court.

3.3.1 The Conciliation process

The role of conciliators is similar to that of mediators except that the conciliator may also:

a. Have specialist knowledge and give you some legal information;
b. Suggest or give you and the other participants expert advice on the possible options for sorting out the issues in your dispute; or
c. Actively encourage you and the other participants to reach an agreement.

The conciliator will not do the following**:**

a. Take Sides or Make Decisions;
b. Tell You What Decision to Make, Although They May Make Suggestions;
c. Decide Who Is Right or Wrong; or
d. Provide Counselling.

Conciliation is usually held face to face, so that you can talk to each other directly. However, you may also have separate sessions with the conciliator.

Sometimes the conciliator can act as a 'messenger' by talking to you and the other participants separately and communicating ideas or proposals between you. It is also possible to hold conciliation sessions by telephone in some circumstances.

3.3.2 Main Benefits of Conciliation

a. Conciliation ensures party autonomy. The parties can choose the timing, language, place, structure and content of the conciliation proceedings;

Conciliation ensures the expertise of the decision maker. The parties are free to select their conciliator. A conciliator does not have to have a specific professional background. The parties may base their selection on criteria such as; experience, professional and / or personal expertise, availability, language and cultural skills. A conciliator should be impartial and independent.

c. Conciliation is time and cost efficient. Due to the informal and flexible nature of conciliation proceedings, they can be conducted in a time and cost-efficient manner.

d. Conciliation ensures confidentiality. The parties usually agree on confidentiality. Thus, disputes can be settled discretely and business secrets will remain confidential.

3.4 Arbitration

Arbitration is defined as the determination of a dispute by one or more independent third party, kno wn as the Arbitrator(s), an Arbitrator umpires the arbitral process. Arbitration is fundamentally disti nct from Court litigation.[22] A neutral third party, the Arbitrator, is appointed by the parties or an app ointing authority to hear the dispute and arrive at a final binding award.

Arbitration is founded on agreement. In essence, parties agree that they will take their dispute to a decision maker whom they trust (the arbitrator or arbitral tribunal) and abide by the decision of that person or tribunal.

Concretely, arbitration is a dispute settlement mechanism where a neutral third party is appointed by parties or an appointing authority to determine disputes between parties and give a final and binding award. It is a mechanism of settling disputes whether administered by a permanent Arbitral Institution or not.[23]

[22]Oxford Dictionary of Law, 2003 page 31.
[23]Section 3 (1) Arbitration Act 1995.

An arbitrator is appointed by parties in a dispute to intervene and spearhead successful dispute resolution between such parties. Arbitrators are appointed by the parties in accordance with the terms of the arbitration agreement or in default by a court.

Arbitrators apply laid up principles and the law in their conduct, an arbitral process essentially pays regard to natural justice in the proceedings and may generally adopt whatever procedure in conducting the process since they are unbound by the exclusionary rules of civil procedure and evidence law.

3.4.1 Types of Arbitration

Arbitration is often used for the resolution of commercial disputes, particularly in the context of international commercial transactions, it is also frequently employed in consumer and employment matters, where arbitration may be mandated by the terms of employment or commercial contracts and may include a waiver of the right to bring a class action claim. Mandatory consumer and employment arbitration should be distinguished from consensual arbitration, particularly commercial arbitration. As a method of dispute resolution, arbitration procedure can be varied to suit the needs of the parties. There exist certain specific types of arbitration procedure that have since developed. The various types of Arbitration are as broken down hereunder;[24]

3.4.1.1 Ad hoc Arbitration

Ad hoc Arbitration is an arbitral proceeding administered solely by parties and requires them to make their own arrangements for selection of arbitrators. The parties are under discretion to choose designation of rules, applicable law, procedures and administrative support. Proceedings under ad hoc arbitration are more flexible, cheaper and faster than an administered proceeding.

Ad hoc Arbitration is precisely administered outside any institutional framework. This is in the instances where the Arbitration Agreement gives no specification for an institutional arbitration. Parties determine all aspects of the Arbitration including, selection of the arbitral tribunal, procedure and administrative support outside any arbitral institution.[25]

[24]Hasan, Z., 'Law of Arbitration' September 2011.
[25]Rajoo S, 'Institutional and Ad hoc Arbitrations: Advantages and Disadvantages,' *The Law Review* 2010, p 548.

3.4.1.2 Institutional Arbitration

Institutional Arbitration is where parties choose the established mechanisms and procedures offered by an arbitral institution. The institutions often have formal procedures and rules designed to assist the parties in the process. The institution chosen may administer the arbitration according to its own rules or, in most cases, according to other rules if requested. It is exclusively administered by a specialist institution, parties incorporate the rules of the selected institution into their arbitration clause by reference and thus disputes are directed to such institutions.[26]

3.4.1.3 Statutory Arbitration

Under the Statutory Arbitration, it is usually a mandatory provision in an Act of parliament, in such case, arbitration is by statute and it is immaterial whether there is pre-existing arbitration agreement between the parties. Most statutes enacted post 2010 have since incorporated ADR mechanisms.[27]

The Constitutional provision expresses that one of the guiding principles in exercising judicial authority is the promotion of ADR; this may be stated as one of ADRs statutory provision[28]

3.4.1.4 Look sniff Arbitration

Look sniff Arbitration encompasses a combination of Arbitral process and the utilization of expert opinion. Parties thus select an expert arbitrator with specialized skill, knowledge and experience in a specific area.[29]

It is a core use of arbitration is in situations where technical, commercial, or professional expertise is essential to the fair resolution of the dispute. The parties can select an arbitrator in whose expert

[26]Rubino – Sammartano M, 'International Arbitration,' P 3, 2011.
[27]Civil procedure Rules, order 46 Rule 20 on Court referral to ADR, see also S. 20 Environment and Land Court Act, 2011. Sec 15 (4) Industrial Court Act, 2011. Sec 34 Inter governmental Relations Act, Sec 4, Land Act 2012, Sec 17 (3) Elections Act, 2011; Rule 11, Supreme Court Rules, 2011.
[28]Art 159 (2)(c).
[29]Rajoo S, 'Trade Disputes Solving mechanisms,' p 18.

judgment they have full confidence. Look sniff Arbitration has thus traditionally been important in situations where the quality of a product is at issue.

It may be broadly referred to as quality arbitration, it is exercised primarily in commodity field where disputes are purely on quality where knowledge, expertise specialized and experience is desired.

3.4.1.5 Flip flop Arbitration

This is a type of Arbitration where parties formulate their cases before hand and then invite the Arbitrator to make an award by adopting, without modification one of the parties' respective final positions. This is mostly used in monetary differences.[30]

Flip flop Arbitration is also known as pendulum arbitration Pendulum arbitration exercised in quantum disputes where parties formulate their respective cases beforehand. The arbitrator chooses one of the two.

3.4.1.6 Documents only Arbitration

This Arbitration is based on the exchange of written documents, it is appropriate where all the evidence relevant to the dispute is contained in documents and where there is no need for oral evidence. It is also efficient in solving simple issues of fact and opinion.

In documents only Arbitration, procedures arise, most frequently, as a result of the parties' arbitration agreement or the incorporation of specific rules providing for such a procedure.

3.4.1.7 Domestic Arbitration

Domestic Arbitration is where the Arbitration Agreement expressly provides or implies for Arbitration in Kenya[31] or where the parties are Kenyan or habitual residents of Kenya. Arbitration

[30]Drogg, D. D., 'Baseline Arbitration of Commercial & Construction Disputes' 2015.
[31]Arbitration Act 1995.

where the body corporate or the parties are incorporated in Kenya or central management is exercised in Kenya also falls under domestic Arbitration.

3.4.1.8 International Arbitration

This is where parties to an arbitration agreement at the time of conclusion of the Arbitration agreement have their places of business in different states or where parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one state.

International Arbitration is where parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State.

3.4.2 Legal Framework on Arbitration

Following the promulgation of the current constitution of Kenya 2010, numerous legislations have incorporated Arbitration clauses. The following statutes are part of the Legal framework that governs Arbitration in Kenya:

a. Constitution of Kenya, 2010.
b. Arbitration Act, 1995 and the Rules thereof
c. Civil Procedure Act and Rules, 2010
d. Environment and Land Court Act 2011
e. Community Land Act 2016
f. Industrial Court Act, 2011
g. Inter-Governmental Relations Act, 2012
h. Land Act 2012
i. Elections Act 2011
j. Supreme Court Rules, 2011
k. The Nairobi Centre for International Arbitration Act 2013

a. Constitution of Kenya, 2010

The Constitution of Kenya, 2010[32] provides for principles in exercising judicial authority, and one of the principles stipulated is the use of Arbitration.

[32]Article 159.

The Constitution of Kenya has provisions on preservation of culture and cultural heritage.[33] Customs and traditional heritage are protected under the constitution and thus traditional systems and culture is recognized as the foundation of the nation.[34]

It also obligates the state to ensure access to Justice for all persons and that such justice should be timely and affordable.[35] Utilizing Arbitration opens up the avenue for expeditious justice.

Moreover, the Constitution gives provisions on the principles of land policy. It stipulates that land in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with principles, *inter alia*, that encourage communities to settle land disputes through recognized local community initiatives consistent with the Constitution.[36]

b. Arbitration Act, 1995 and the Arbitration Rules 1997

This is the principal Act governing Arbitration in Kenya**.** The Act contains provisions relating to arbitral proceedings, recognition and enforcement of arbitral awards, irrespective of the state in which it was made subject to certain limitations.

Arbitration may be administered by a permanent arbitral institution or any other body.[37]

Arbitration in Kenya is also governed by the Arbitration rules. In exercise of the powers under section 40,[38] the arbitration rules 1997 were made on 6th May 1997. Further, there are institutional arbitration rules formulated under the auspices of the Chartered Institute of Arbitrators to govern arbitral proceedings under the Institute.

c. Civil Procedure Act and Rules, 2010

Section 1A of the Act gives provisions for the overriding objective of the Court**.**

[33]Article 11, Constitution of Kenya 2010.
[34] Ibid.
[35]Article 48.
[36]Article 60 (g), Constitution of Kenya 2010.
[37]Section 3 (1) Arbitration Act, 1995.
[38]Arbitration Act, 1995.

The Civil Procedure Act and Rules 2010 have provisions that encourage settlement of disputes by Arbitration. It is provided that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by the rules.[39]

It also provides that any interested parties who are not under disability and agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.[40]

Order 46 Rule 20 gives provisions for application of ADR; it is sufficiently comprehensive since it complements the provisions of the Arbitration Act, 1995.

d. Environment and Land Court Act, 2011

This Act gives provisions for Application of alternative dispute resolution mechanisms in environment and land disputes. It states that 'nothing in the Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution'. Furthermore, 'where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled'.[41]

e. Industrial Court Act, 2011

The Industrial Court Act promotes the application of ADR in solving industrial disputes. It is provided that if at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.[42]

[39] Section 59 of the Civil Procedure Act, 2010.
[40] Order 46 of the Civil Procedure Rules, 2010.
[41] Section 20.
[42] Sec 15 (4).

f. Inter-Governmental Relations Act, 2012

The Inter-Governmental Relations Act gives provisions for utilization of ADR in settling disputes between Government entities.

It establishes the procedure after formal declaration of a dispute, the nature of the dispute is to be determined and the identification of appropriate mechanisms or procedures, other than judicial proceedings, that are available to the parties to assist in settling the dispute, including a mechanism or procedure provided for in this Act, other legislation or in an agreement, if any, between the parties.[43]

g. Land Act 2012

The Act expresses that in the discharge of the functions of the National Land Commission, the Commission and any State officer or public officer shall be guided by the values and principles that in the discharge of their functions and exercise of their powers under the Act, the Commission and any State officer or public officer shall be guided by values and principles, inter *alia* that alternative dispute resolution mechanisms in land dispute handling and management.[44]

3.5 Adjudication

This is an informal, speedy, flexible and inexpensive process where a neutral third party called the Adjudicator makes a rapid fair decision within disputes arising from contracts. It's preferred when there is power imbalance between the disputants and is suitable for construction disputes.

The term adjudication can be misleading. In its general sense it refers to the process by which the judge decides the case before him/her or the manner in which a referee should decide issues before him or her. More specially, adjudication may be defined as a process where a neutral third party gives a decision, which is binding on the parties in dispute unless or until revised in arbitration or litigation. This narrow interpretation may refer to the commercial use of an adjudicator to decide issues between parties to a contract. The use of an adjudicator is found in a variety of standard forms of contract used in the construction industry.

Adjudication in the construction industry has displayed certain characteristics. First, the adjudicator is a neutral individual who is not involved in the day to day running of the contract. He or she is

[43]Sec 34 (1) (b) (i).
[44]Sec 4.

neither an arbitrator, nor a State appointed Judge. Second, the adjudicator enjoys his or her powers by virtue of the agreement between the parties. In other words, the parties have agreed by contract that the decision of the adjudicator shall decide the matter for them. Third, the adjudicator's decision is binding on the parties, and therefore, unlike mediation, the process does not require the co-operation of both parties. Fourth, Adjudicator's decisions are usually expressed as being binding until the end of the contract when either party may seek a review of the decision, most commonly by arbitration.

Further, the provisions of the Small Claims Court Act[45], although not yet operationalized, has provided for the use of adjudication in the formal court system. Section 5 of the Act provides that the Small Claims Court shall be presided over by an adjudicator who shall administer judicial justice through procedures that guarantee the timely disposal of all proceedings before the Court using the least expensive method. The adjudicator must ensure the equal opportunity to access judicial services under the Act, promote fairness of the process and simplicity of the procedure.

The Act also provides that in exercise of its jurisdiction under this Act the Court may, with the consent of the parties, adopt and implement any other appropriate means of dispute resolution for the attainment of the objective envisaged under section 3[46] of this Act.[47] Furthermore, the Court may adopt an alternative dispute resolution mechanism and shall make such orders or issue such directions

[45] Small Claims Act, No 2 of 2016, Laws of Kenya.

[46] 3. (1) In exercise of its jurisdiction under this Act, Court shall be guided by the principles of judicial authority prescribed under Article 159(2) of the Constitution.

(2) The parties and their duly authorized representatives, as the case may be, shall assist the Court to facilitate the observance of the guiding principles set out in this section, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of that Court.

(3) Without prejudice to the generality of subsection (1) the Court shall adopt such procedures as the Court deems appropriate to ensure -

(a) the timely disposal of all proceedings before the Court using the least expensive method;

(b) equal opportunity to access judicial services under this Act;

(c)fairness of process; and

(d) simplicity of procedure.

[47] Sec. 18(1), Small Claims Act, 2016.

as may be necessary to facilitate such means of dispute resolution.[48] Any agreement reached by means of an alternative dispute resolution mechanism shall be recorded as a binding order of the Court.[49]

The operationalization of this Act is meant to boost the development of adjudication in the dispensation of commercial justice due to the nature and extent of the jurisdiction of the small claims courts. Section 12 of this Act sets out the jurisdiction of the small claims courts to include matters arising from contract for sale and supply of goods or services; a contract relating to money held and received; liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property; compensation for personal injuries; and set-off and counterclaim under any contract. Further, these courts may exercise any other civil jurisdiction as may be conferred under any other written law provided that the pecuniary jurisdiction of the Court shall be limited to limited to two hundred thousand shillings.

However, stakeholders have expressed concerns over the nature of adjudication process envisaged under the Small Claims Court Act 2016. Notably, the Act has not defined what is meant by 'adjudication' in its usage under the Act. The Act seems to envisage an inquisitorial type of process that may not sit very well with the general practice in adjudication processes.[50]

Also, of concern would be the nature of qualifications required under section 5 thereof for one to be appointed as an adjudicator. The Act provides that 'a person shall be qualified for appointment as an Adjudicator if that person— is an advocate of the High Court of Kenya; and has at least three years' experience in the legal field. There is no mention of any special qualifications as an adjudicator. Arguably, this may deny the process the advantage of being administered by a qualified adjudicator in line with the conventional adjudication procedures and practice.

The Act may thus require review for the above issues to be revisited in line with the general philosophy guiding adjudication processes.

[48] Sec. 18(2), Small Claims Act, 2016.

[49] Sec. 18(3), Small Claims Act, 2016.

[50] Sec. 19. (1) A Court may, of its own motion or at the request of any party, summon any witness and require the production of any document, record, books of accounts or other thing, which is relevant in any proceedings.

(2) The Court shall inquire into any matter which it may consider relevant to a claim, whether or not a party has raised it.

3.5.1 Advantages of adjudication

a. Speed, as a decision must be reached within a specified number of days
b. It can be commenced during the course of works to resolve interim disputes quickly, assist cash flow and ensure progress of works continue
c. The adjudicators decision is binding (unless set aside by arbitration or the courts)
d. Adjudicators can be chosen from all backgrounds and disciplines and for their technical expertise.

3.5.2 Arguments against Adjudication

Adjudication may occasion some pitfalls such as:

a. Adjudication does not operate in non-construction disputes;
b. The decision is solely dependent on the adequate choice of an adjudicator; and
c. The Adjudicators decision is binding and thus may not enhance better relations between the parties.

3.6 Facilitation

This is a process where a neutral party, the Facilitator, improves the flow of information between disputing parties by providing procedural direction within negotiations. Unlike mediation, facilitation aims to provide procedural assistance but not substantive assistance to the disputants.

3.7 Convening

A process where a neutral third party, the Convener, identifies the issues and problems arising between disputants and brings the disputants together for negotiations or mediation. It is ideal where the issues, problems and identity of parties to a dispute are uncertain.

3.8 Fact finding/Neutral Fact Finding

This is an investigative process involving a neutral third party, the fact finder, who determines the facts of the dispute independently when parties have reached a stalemate. The process deals only with facts of the dispute and when the fact finder concludes the investigative process, he/she presents an opinion to the disputants which may serve to move the disputants away from the impasse.

3.9 Traditional Conflict Resolution Mechanisms

These are the means in which the African communities within Kenya handle and manage conflict. These TDRM, incorporate, and are founded on mechanisms that are now known as mediation and negotiation and on the principles of common living, reciprocity and respect.

3.9.1 Legal and policy Framework on TDR

Save for the constitutional provisions,[51] there is no specific statute governing the practice of TDR in Kenya. Communities in Kenya used TDR with regard to the traditions, customary rules and procedure of a community.

Customs and traditions of various communities espouse TDR mechanisms that have for time immemorial been solving most disputes.

Moreover, the Courts recently relied on *R vs Mohamed Abdow Mohamed* in the recent case of *R vs MusiliIvia & Another*[52] where the Court, in consideration of the provisions of the Constitution, the written law and international conventions, scrutinized whether any of the provisions prohibits a TDR settlement and established they did not. The court also considered the effect of the proposed out of court settlement on the interests of the victim, relatives of the victim, local community and the public at large. In the circumstances of the case, the court did not find the settlement agreement to be inconsistent with the spirit and purpose of Article 159(2) (c) and (3) of the Constitution of Kenya 2010.[53] The litigants were given an opportunity for the application of TDR in the murder case and the case was withdrawn to be settled by the Kamba council of elders. Accused persons were discharged.

Customs and traditions in communities on TDR are handed down from one generation to another. However, some statutory provisions and legislation support and promote the use of TDR in Kenya, namely;

a. Constitution of Kenya, 2010.
b. Civil Procedure Act and Rules, 2010
c. Environment and Land Court Act 2011
d. Land Act 2012
e. The commission on Administrative Justice Act 2011

[51] Art 159
[52] eKLR, [2017].
[53] Provides for Principles applied in the exercise of Judicial authority including application of TDRs in a way not inconsistent with the constitution

f. National Land commission Act

a. Constitution of Kenya, 2010

The Constitution of Kenya, 2010 gives provision for the utilization of TDR in dispute resolutions.[54]

It expresses that judicial authority in Kenya is derived from the people vests in and exercised by Courts and tribunals under the constitution with regard to the principles *inter alia* that ADR mechanisms shall be promoted in dispute resolution.[55]

The Constitution also gives provisions for the preservation of culture.[56] Cultural literature and heritage is protected, formation of customary units that assist in dispute resolution is robustly contemplated by the constitution. The constitution encourages settlement of land disputes through recognized local community initiatives consistent with the Constitution.[57]

b. Civil Procedure Act and Rules, 2010

The Civil procedure Act and Rules stipulates for the procedural law and practice in civil courts in Kenya. The Act provides for the overriding objective of the Courts which is to facilitate just, expeditious and cost-effective resolution of civil disputes under the Act.[58] It is the courts' duty to ensure justice is dispensed amicably.[59]

Utilization of TDR mechanisms in solving disputes achieves the overriding objective in civil cases especially customary cases like marriage, divorce and matrimonial property since such cases are often solved by the customs and traditions of the parties' community. The Civil Procedure Act empowers the court to give any orders that will enhance the dispensation of Justice and the Court is thus empowered to promote the use of TDR. The Court has powers under the Act to order a dispute be resolved by ADR including TDR.[60]

[54]Art 159 (2)(c)
[55] Ibid
[56]Article 11
[57]Article 60 (g)
[58]Sec 1A.
[59]Sec 1B.
[60]Sec 3A.

The Civil procedure Rules, 2010[61] as read together with the Civil Procedure Act, 2010,[62]gives the Court powers to order the use of TDR in attaining the overriding objective of the Court It is provided under the Civil Procedure Rules, 2010[63] that a Court may adopt ADR mechanism for the settlement of disputes and may issue appropriate orders to enhance the use of TDR.

c. Environment and Land Court Act 2011

The Environment and Land Court Act[64] enables the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act.[65]

The Act empowers the court to adopt and implement on its own motion the agreement and request of the parties any appropriate mechanisms including TDR in accordance with Article 159 (2)(c).[66]

d. Land Act, 2012

The Land Act 2012[67] was enacted with the aim of harmonizing land regimes to deal with matters pertaining land in Kenya.

The Act provides for the guiding values and principles of land management and administration which amongst other things include promoting communities to settle land disputes through recognized local community initiatives, participation, accountability and democratic decision making within communities, the public and Government; and Alternative dispute resolution mechanisms in handling land disputes and management.[68] Disputes involving community land can thus be settled best through TDR mechanisms.

[61]Order 46 rule 20.
[62]Sec1A, 1B.
[63]order 46 Rule 20 (2).
[64] No. 19 of 2011, Laws of Kenya.

[65]Sec. 3, Environment and Land Court Act.
[66] Constitution of Kenya, 2010.
[67] No. 6 of 2012, Laws of Kenya.

[68]Section 4, Land Act 2012.

e. The Commission on Administrative Justice Act, 2011

Section 3 of the Act[69] establishes the Commission Administrative Justice. The commission is mandated to work with various public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration.[70]

f. National Land Commission Act, 2012

Objective of the Act include provisions for the effective management and administration of land in accordance with the principles of National land policy and the Constitution.[71]

The commission operates under the mandate of promoting the application of traditional dispute resolution mechanisms in land conflicts.[72] Further, it is obligated to promote and encourage the application of ADR in land disputes management.[73]

More so, in exercising its powers, the commission is not bound by strict rules of evidence.[74]

3.9.2 Policy framework on TDR

There is no dedicated policy on TDRs and other community-based justice systems in Kenya. TDRs and other community justice systems are communal based. The rules governing the TDRs processes differ from one community to another depending on the customs and traditions of the communities.

3.10 Special Dispute Resolution Mechanisms

These are dispute resolution mechanisms employed in solving disputes in special circumstances and which do not necessarily fall within the Courts or the other ADR mechanisms. These include:

a. Problem-Solving Workshop
b. Dispute review boards
c. Early neutral evaluation

[69]The Commission on Administrative Justice Act, 2011.
[70]Sec 8, Commission on Administrative Justice Act.
[71]Sec 3, National Land Commission Act, 2012.
[72]Sec 5 (f), National Land Commission Act, 2012.
[73]Ibid.
[74]Sec 6 (3), National Land Commission Act.

a. Problem-Solving Workshop

Problems solving workshops are systems that aim at creating and maintaining an atmosphere where the parties can analyse their situations and create solutions for themselves.

Parties are thus able understand the root causes of the conflict and explore the available options for settlement.

In communities, community leaders would arrange the problem-solving meetings in which members drawn from each community come together to brainstorm on the most appropriate ways to resolve inter personal and inter community dispute. This has for long proved to be an amicable way of solving disputes in communities.

b. Dispute Review Boards

These are set up in contracts to assist the parties in resolving disagreements arising in the course of the contract. The boards then make recommendations on the disputes referred. Such decisions and recommendations are only binding as a matter of contract between the parties and can be enforced by action for breach of contract.

In other jurisdictions, and indeed across the world, the ubiquity of disputes on construction projects and the accompanying expense and disruption of litigation, led to the development of dispute review boards (DRBs) specifically for the challenges of large construction projects and have become the ADR of choice on substantial, high-profile work in the construction industry.[75] Although the origins of DRB's are found in the construction industry, their ambit is far wider than construction and DRB's are now found in financial services industry, long-term concession projects, operational and maintenance contracts.[76] Dispute Boards are normally set up at the outset of a contract and remain in place throughout its duration to assist the parties, if they so desire, in resolving disagreements arising in the course of the contract and make recommendations or decisions regarding disputes referred to it by any of the parties.[77]

[75] McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," *Construction Lawyer*, Vol.25, no. 2 (2005), p.1.

[76] Chapman, P.H.J, "Dispute Boards," p.2, available at

http://fidic.org/sites/default/files/25%20Dispute%20Boards.pdf [Accessed on 11/06/2018].

[77] Sourced from http://www.buildingdisputestribunal.co.nz/DRBS.html, accessed on 24/08/2011

The key features of a Dispute Review Board (DRB) have been identified as follows:[78] the three members of the DRB are appointed for their extensive expertise in the type of project on which the DRB is established; the DRB members must not have conflicts of interest and must act as objective, neutral third parties under a Three Party Agreement with the Employer and Contractor; the DRB is appointed at the beginning of the project, visits the project on a periodic basis depending on the pace of construction, and is kept appraised of the project's progress between site visits; at the periodic site visits the DRB explores with the parties all open issues and urges the parties to resolve disputes that may otherwise eventually become formal claims. The DRB can also be asked to give non-binding, very informal "advisory opinions" on issues that have not become formal claims under the contract; the DRB hears claims as part of an informal hearing process where the parties themselves (as opposed to legal representatives) present their positions. The informal hearing process has none of the trappings of a legal process, such as a formal record, swearing of witnesses, or cross-examination; the DRB issues detailed non-binding findings and recommendations that analyze the parties' arguments, the contract documents, the project records, and the supporting information presented at the hearing.[79]

In addition to the foregoing, since the DRB's findings and recommendations are non-binding, the parties are free to accept them, reject them, or keep negotiating based on the parties' respective risk exposure, taking into account the DRB's analysis.[80] The DRB's findings and recommendations (but not other records) usually are also admissible in subsequent proceedings.[81] The technical competence of DRB members is considered as the one that enhances the credibility of their recommendations.[82]

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[78] Dettman, K. and Christopher Miers, C., "Dispute Review Boards and Dispute Adjudication Boards: Comparison and Commentary," *Forum*, February 2012 (Special Edition Reprint), p. 1. Available at

https://www.scmediation.org/wp-content/uploads/2013/09/DRBF-Forum-Kings-College-02-12-DRB-DAB-Reprint.pdf.

[79] Ibid, p.1.

[80] Ibid, p.1.

[81] Ibid, p.1.

[82] McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," op cit,, p.1.

The DRB is considered a hybrid form of ADR, which shares some attributes of adjudication as well as some traits of mediation.[83] It has been suggested that the expanding use of DRBs on major construction projects requires that construction lawyers become more familiar with the DRB process, standard DRB agreements, and the varied roles lawyers may play in the DRB process.[84]

c. Early Neutral Evaluation

This is a private non-binding mechanism where a neutral third party gives opinion on the likely outcome of a trial as a basis for settlement discussions. This process is solely to promote settlement discussions early litigation stage. This is aimed at assisting parties to avoid the cost and time that may be spent in litigation.

d. Mediation-Arbitration

The disputants agree to submit to mediation process but if it fails to resolve the dispute, the matter is referred to arbitration to allow the disputants to draw advantage from the two dispute resolution mechanisms.

e. **Arbitration-Mediation** (Arb-Med)

In Arb-Med, the disputants submit their conflict to arbitration before a neutral third party and when that fails to resolve the dispute, the matter proceeds to mediation under the same person. When the mediation succeeds, the arbitral award will be set aside but if it fails, the arbitral award is revealed and is deemed final and binding.

3.11 Mini-Trial

A mini trail also known as an executive tribunal is a voluntary and non-binding mechanisms where parties present their disputes before senior members of their organization, such mechanism is presided by a neutral third party who assists the representatives in negotiating a settlement.

[83] McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," op cit,, p.1.

[84] Ibid, p.1.

This process is a sophisticated and structured settlement technique that narrows the gap between party perceptions of the dispute by identifying facts in dispute. The mechanism involves submission of evidence of the disputing parties by their lawyers or representatives to the decision makers who are often senior executives or personnel from each of the parties. The decision makers then discuss the matter privately and reach a settlement.

3.12 Ombudsman (Ombudsperson)

The Ombudsman, who is an organizationally designated person, receives, investigates and facilitates the resolution of complaints, systemic problems and resolves disputes from individual complainants. For instance, the Commission on Administrative Justice (CAJ) also known as the Office of the Ombudsman is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011. The Commission has a mandate, inter-alia, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.[85] The Commission works with different public institutions to promote alternative dispute resolution through alternative dispute resolution on matters affecting public administration.

3.13 Peer Review Panels

Peer Review is mechanism of solving disputes where an employee takes a dispute to a group or panel of fellow employees and managers for a decision. This is largely encouraged by institutions where disputes amongst colleagues arise.

Peer review aims at resolving disputes early before they become they can be escalated as formal complaints.

This process involves a panel of two or more neutral experts in the subject matter of the conflict. The experts conduct fact finding, inquiries, assess issues and present a workable solution to resolve the dispute.

[85] Commission on Administrative Justice, available at http://www.ombudsman.go.ke/

3.14 Private Judging

This process has an element of arbitration and litigation in terms of control and formalities involved. The parties present their case before a judge, in most cases retired or former judge, in private courtroom for determination.[86]

3.15 Hybrid ADR

This includes any creative adaptation of any of the ADR conflict resolution mechanisms within litigation to reduce emotional or financial costs.

3.16 Expert Determination

In this mechanism, parties submit their disputes to an expert in the field of dispute for their determination. The decision is thus delivered based on the expertise. It is informal, expeditious and cost-effective technique. It is especially used in building and construction where disputes resolve around qualitative and quantitative issues.

PART IV

4. LINKAGES TO EXISTING AND PAST REPORTS, PLANS, POLICIES AND PROGRAMMES ON ACCESS TO JUSTICE, ADR AND TDR MECHANISMS IN KENYA

Notably, there has been previous work carried out with a bid to enhance the uptake and practice of ADR and TDR mechanisms in Kenya, with a view to enhancing access to justice for the Kenya people. While some of the recommendations made under these reports may have already been implemented, it is worth noting that some are still as relevant as when they were made and are therefore worth considering in this Report. While the Consultant may not have imported all the recommendations into the current Report's section on recommendations, these reports and the subsequent recommendations are still worth considering while implementing the current ones.

a. Report on Review of Policy, Legislation and Administrative Procedures on Access to Justice (CIC in collaboration with IDLO and UNDP, June 2015, Phase II)

In order to effectively implement the right of access to justice, CIC in collaboration with IDLO engaged the services of the consultant to: (a) undertake review of existing judicial policies, legislation

[86] Ibid,p. 17.

and administrative procedures relating to the right of access to justice; (b) identify gaps in their implementation; and (c) recommend policy and law reform to enhance access to justice through conventional and informal justice systems.

The project was designed to be executed in three phases. Phases I and II focused on access to justice while Phase III focused on traditional justice systems (TDRs). Phase I was undertaken and duly completed by November 2012 and a Report was prepared and submitted. Phase I was undertaken during the period between September and November 2012 when CIC, in collaboration with IDLO, undertook an inquiry into the judicial system with a view of ascertaining: (a) the status of existing policy and legislation relating to the right of access to justice; (b) the social-economic and other factors that impede full and equal access to justice; and (c) the efficacy of administrative procedures for the administration of justice.

Phase II was designed to generate specific proposals to guide the formulation of policy, legislation and administrative procedures to guarantee full and equal access to justice in both conventional and informal justice systems. Accordingly, this report provided policy and legislative proposals that would address the gaps/overlaps, weaknesses and challenges in the existing legal, policy and administrative frameworks.

From the analysis, the consultant drew a conclusion that the existing legal and policy framework at the time did not adequately meet the constitutional guarantee of access to justice. To address these gaps, the consultant recommended reforms in policy, legal and administrative frameworks to facilitate full and equal access to justice. The proposals made in the report were founded on the principles of access to justice, namely: (a) expedition; (b) proportionality and cost-effectiveness; (c) equality of opportunity; (d) fairness of process; (e) party autonomy (or party control); (f) party satisfaction; and (g) availability and the effectiveness of remedies.

Similarly, the review and appraisal of the administrative procedures revealed various procedural challenges that present impediments and limit the realization of the right of access to justice. The report recommended reforms in policy and administrative procedures, including programmes, plans and actions to facilitate equal access to judicial services and alternative dispute resolution strategies (whether voluntary or adjudicative, formal or informal). It recommended coordination and consultation between various state and non-state organs to ensure effective realization of the right to access justice on an equal basis.

Regarding the identified gaps, overlaps, weaknesses and challenges in legislation, policy and administrative frameworks that impede full and equal access to justice, the Report contained recommendations for reforms to facilitate the realization of the constitutional right of access to justice. The proposals include: (a) amendment of existing legislation and review of policy to address the identified gaps; (b) enactment of overarching legislation on access to justice and ADR; and (c) the need to strengthen the existing administrative structures to promote equal access to justice.

As far as administrative and quasi-judicial tribunals are concerned, the Consultant was of the opinion that while tribunals offer an alternative means of dispute resolution, they are highly centralized and inaccessible at the county level. Their specialized nature makes them accessible only to a limited number of users in the respective sectors. With the exception of administrative tribunals, questions arise as to their efficacy in the face of progressive decentralisation of judicial services. Even though they are intended to exercise jurisdiction over matters to which their parent statutes regulate, such jurisdiction can be exercised by conventional courts; provided that such courts adhere to simplified procedures that govern the conduct of business by such tribunals. On the other hand, administrative and quasi-judicial tribunals play a critical role in ensuring expeditious and cost-effective determination of sector-based disputes without undue formality.

In order to strengthen linkages with stakeholders, the Report stated that focus group discussions conducted with court user committees in Bungoma, Kisumu and Tharaka-Nithi counties revealed an array of challenges ranging from financial constraints to operational and institutional incapacity to effectively address challenges that impede effective administration of justice.

The Consultant was of the opinion that the ongoing judicial reforms would go a long way in enhancing equal access to justice if the State would take decisive steps to:

a) fully implement the recommendations of the 2009 Taskforce on Judicial Reforms;
b) re-establish the National Council on the Administration of Justice as a body corporate with a permanent secretariat to coordinate the activities of both state and non-state agencies in the justice sector;
c) allocate adequate resources to facilitate effective discharge by NCAJ of its functions;
d) ensure that all state departments, in consultation with NCAJ, implement the recommendations of court user committees;
e) establish and operationalise a state-funded legal aid and awareness scheme;

f) set national standards, formulate and implement sector wide policies to facilitate realization by all of equal access to justice;
g) formulate and implement programmes, plans and actions to promote ADR, including traditional and community-based dispute resolution mechanisms;
h) create linkages and develop a close working relationship with all non-state agencies in the justice sector; and
i) undertake continuous legal education of all judicial officers and staff of the judiciary.

The Report also pointed out that training is critical for the success of the ongoing judicial reforms. It is essential in equipping judges, magistrates and other judicial officers with knowledge and skills in discharging their responsibilities more efficiently. This would include skills and knowledge in emerging areas of law such as ICT and ADR and traditional dispute resolution mechanisms. The Judiciary Training Institute was established towards the realization of this goal. The training should be preceded by a needs assessment of individual officers, paralegals and the judiciary as an institution. Such training should be synchronized with the court calendar to avoid disruption of judicial services.[87]

Summary of Recommendations (Phase II)

Below is a summary of recommendations for reform to augment the realization by all of the constitutional right of equal access to justice, per the Report. These are:

a) There is need to undertake legal and policy reforms to entrench the legislative proposals made in this report. The legal and policy framework should be broadly defined to establish sound foundation for access to justice and encourage innovative strategies for ensuring full and equal access to judicial services.
b) There is need to introduce changes in the administrative structures on access to justice in line with the reform proposals made in this report. Accordingly, it is necessary to review the mandate of each of the relevant entities with a view to minimize overlap in responsibilities and multiplicity of similar institutions engaged in the justice sector.

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

c) A continuous monitoring and evaluation programme should be undertaken to appraise the implementation of the law, policy and administrative procedures and programmes on access to justice. This is based on the proposition that no matter how good a law or policy is, it is of no use until it is effectively implemented and reviewed from time to time to guarantee their efficacy.

d) Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive rather than procedural justice. Article 159 (2) (d) of the Constitution obligates courts and tribunal to dispense justice without undue regard to procedural technicalities. To this end, the legal reforms should be targeted at amending or repealing existing bureaucratic laws and policies in order to promote substantive justice. Courts and judicial tribunals should be obligated by policy and legislation to interpret laws in a manner that promotes substantive justice rather than the dictates of procedural technicalities.

e) The use of Alternative Dispute Resolution (ADR) mechanisms in conflict management and dispute resolution should be encouraged by all relevant stakeholders. Some ADR mechanisms such as negotiation, conciliation and mediation are informal, flexible and allow parties to find their own solutions thus aiding access to justice. However, ADR mechanisms should be regulated by policy and legislation so as to meet the standards prescribed in Article 159(2) (c) and (3) of the Constitution.

f) It is imperative to harness information technology to facilitate expedition and efficient records management relating to judicial services. Although the judiciary is in the process of operationalizing ICT services in its operations (digitalization of the judiciary), only the courts in major towns such as Nairobi and Mombasa enjoy these services. There is additional need to train ICT staff to be able to operate ICT equipment effectively.

g) It is recommended that Kenya adopts tested best practices in comparable jurisdictions with regard to access to justice. There are countries around the world that have undergone extensive reforms and have established sound laws, policies and institutions to regulate effective discharge by courts and tribunals of judicial and quasi-judicial services in addition to effective contractual and community-based alternative dispute resolution mechanisms.

h) The exhaustive enactment of legislation on access to justice contemplated under the Fifth Schedule to the Constitution should be expedited. While numerous statutes have been enacted, Parliament would do well to adopt the recommendations made in this report to inform the enactment of the remaining legislation.

i) The various administrative authorities mandated to promote access to justice need to work on a consultative and co-operative basis. This is imperative in resolving emerging institutional conflicts due to overlapping mandate and multiplicity of institutions. They need to consult and agree on how to execute the shared mandate in a way that minimizes conflicts. The establishment of the National Council on the Administration of Justice (NCAJ) under the Judicial Service Act, 2011 goes a long way in facilitating such cooperation and consultation among state and non-state agencies in the administration of justice. However, there is need to strengthen the Council by conferring on it corporate status with defined linkages with court user committees in all judicial stations. This will facilitate effective response to the needs and concerns of all court users by the Council in consultation with the relevant state departments. It is unlikely that this would be achieved for as long as NCAJ remains as a consultative forum, whose recommendations are left to the discretion of various bodies represented in the Council.

j) The Constitution requires public participation in decision-making processes in matters affecting the public.[88] Whereas the Constitution does not explicitly prescribe any standards for public participation, there is need to ensure meaningful public participation of all persons likely to be affected by any decision relating to judicial services in the administration of justice. The need for meaningful public participation in the formulation and implementation of policy, legislation and administrative procedures cannot be overemphasized.

k) The system of devolved governance under the transformed constitutional order has created important opportunities for promoting the welfare of communities at the decentralized units of service delivery. Most public services, resources and administrative activities have been decentralized and made more accessible to the people. Accordingly, it becomes imperative to decentralize judicial services and establish mechanisms for the regulation of community-based justice systems, including traditional dispute resolution mechanisms. The relevant state agencies should put in place programmes, plans and actions to promote expeditious and affordable dispute resolution strategies

[88] See Articles 10(2) (a), 69 1(d), 118(1) (b), 196 (1) (b) and 201 (a).

l) The critical need for a defined state-funded legal aid scheme cannot be overemphasised. To ensure access to justice by persons who cannot meet the cost of hiring legal counsel and raising court fees, there is need for a national legal aid scheme to provide legal aid in all parts of Kenya. It is incumbent upon the State to muster resources and set standards for non-state legal aid service providers to facilitate an effective legal aid scheme[89].

b. Report on the Institutionalization of Traditional Dispute Resolution Mechanisms and other Community Justice Systems (CIC in collaboration with UNDP, June 2015, Phase III)

Phase III reinforced Phase I and Phase II and was designed to generate specific proposals to guide formulation of policy, legislation and administrative procedures designed to guarantee full and equal access to justice in both conventional and informal justice systems. In this Phase, the expert focused on Traditional Dispute Resolution mechanisms/strategies and informal community justice systems with a view of making recommendations for the formulation of policy and legislation to implement Article 159(2) (c) and (3) of the Constitution.

The report explored appropriate policy, statutory and administrative intervention designed to ensure that: (a) TDR strategies and other informal justice systems find their rightful place in the conventional judicial system; (b) the requirements of Article 159(2) and (3) of the 2010 Constitution are meaningfully implemented; and (c) all traditional and informal justice systems observe the minimum standards prescribed in Article 159(3) of the Constitution.

The overall objective of the project was to undertake a status analysis of Traditional Dispute Resolution Mechanisms and informal community justice systems and to make recommendations and provide guidelines for formulation of policies and legislation to support TDR strategies.

[89] Notably, the *Legal Aid Act, No. 6 of 2016* has since been enacted to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes. There is also in place National Action Plan, Legal Aid 2017-2022 Kenya. The development of the Legal Aid Act and the National Action Plan, Legal Aid was formulated with a clear vision of facilitating access to justice for all. Their objectives and priorities included: To establish a framework for policies, laws and administrative processes that will ensure sustainable and quality access to justice to all; To provide quality, effective and timely legal assistance, advice and representation for the poor, marginalized and vulnerable; To enhance access to justice through continuous legal awareness; To promote and institutionalize the paralegal approach in access to justice; To promote the use of Alternative and Traditional dispute resolution mechanisms; To establish an implementation, monitoring, regulatory and support framework for legal aid and awareness services in Kenya; and to ensure and promote adequate allocation of resources including fiscal, human and technical for legal aid and awareness services in Kenya.

For the field study, six local communities where TDR mechanisms have been used to manage conflicts and resolve civil disputes were identified. These included the Digo, Meru, Kikuyu, Somali, Luhya and the Luo communities; where council of elders *(Kaya elders* among the Digo community, the *Njuri Ncheke* of Meru, the *Kiama* of the Kikuyu community and *Ker* among the Luo community) are community gate keepers. In addition, Court User Committees (CUCs) and Local Administrators (Chiefs) were identified as respondents. Due to logistical reasons, actual interviews were conducted in two communities: Luo and Meru.

Overall, the field study attracted a total of 81 respondents, 80% male and 20% female who were inte rviewed from four (4) counties: Kisumu, Siaya and Homabay for the Luo community and the Thara ka Nithi County for the Meru Community (Fig. 1). The respondents comprised of members of the C ouncil of Elders (Luo and Meru) forming 26% of the respondents, local administration (22% of the r espondents) and the Court User Committee members (49% of respondents).

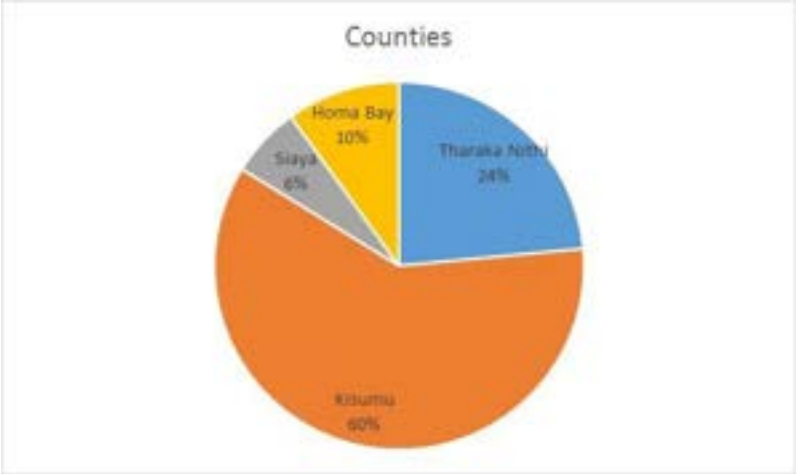
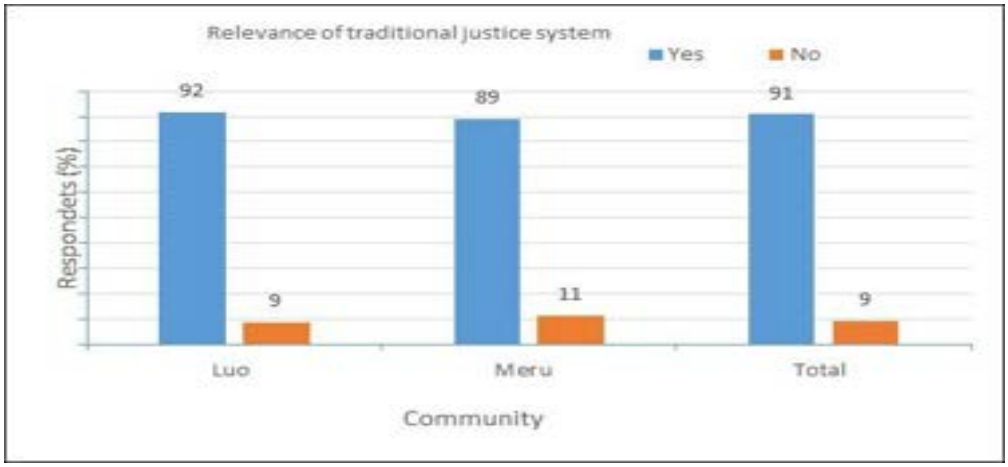


Fig. 1: Respondents by County

The research conducted on TDRs and other community justice systems indicated that they are distinct from other justice processes and are the most preferred mode of conflict resolution by communities. The main characteristics of TDRs are: they do not adhere to a prescribed or written set of rules; they draw from customs and traditions of the community in which they operate; easily accessible to all people and use local language which is widely understood by people; proceedings are oral and usually there is no record keeping; Veracity of customs and values/rules depends on the memory of the

mediators; mostly fail to adhere to the Bill of Rights; remedies are couched on restorative justice; wide and undefined jurisdiction; TDRs practitioners need no formal education and training.

The study assessed the advantages of TDRs and other community based justice systems and found out that; traditional values are part of the heritage of the people hence people subscribe to its principles; promotes social cohesion, peace and harmony; proximity to the people/accessibility and use of language that the people understand; the mechanisms are affordable; TDRs are resolution mechanisms; are cost effective since parties can easily represent themselves in such forums; proceedings undertaken are confidential; TDRs and ADR mechanisms are flexible since they do not adhere to strict rules of procedure or evidence and they yield durable solutions. The majority of the respondents (91%) interviewed do consider community justice systems as valuable. (See Fig. 2 below)



Further, the respondents were of the view that TDR mechanisms are valuable because: they deconge st the courts and prisons, respect the traditional cultures and traditions, decisions emanating from su ch mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence am ong communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling matters discreetly for quick resolution, they are less costly and easy accessible to the poor, resolve disputes a t grass-root level and enhance access to justice, they also provide local solutions which are more acc eptable to people and they are agents of change and promote economic development, foster love, co hesion, integrity and promote respect for each other. (See table 1 below on the perceptions on releva nce of TDRs).

Reasons	Number of respondents	
	Yes	No
Decongest courts and prison	18	0
Respect traditions of communities	17	0
Promotes peace, harmony and coexistence among communities and security	16	0
Expeditious and most cases are resolved- Allow for handling matters discretely to allow resolution	16	0
Less costly and Easy access by poor	17	0
Resolve disputes at grass-root level and enhances access to justice	10	0
Local solution/more acceptable to people	8	0
Elders understand history of the case and people and have experience	6	0
Agent of change and promotes economic development	9	0
Foster love, cohesion and integrity and promotes respect for each other	7	0
mediate political issues and advise leadership on how to conduct themselves	2	0
Inclusiveness and non-discriminatory	2	0
Lack of framework and policies to enforce and not legally binding	0	2
little involvement of women and there is need for inclusion	0	2
Ignorance of legal knowledge	0	2
Lack of resources and limited financial ability	0	1
Communities have evolved and integrated a lot and sets of common laws do not exist	0	1
Disrespect of resolutions of TDR by many	0	1
Favouritism /biasness at times	0	1

Table 1: Perception on relevance of TDR in community

However, TDRs were found to have various disadvantages such as: disregard for basic human rights (For example where women as discriminated against or where corporal punishment is meted out); application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; limited resources and financial inability of the systems; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made.

Further, the study conducted indicates that there was some form of documentation of TDRs although it is poorly done. Documentation of cases and outcomes creates a historical data for reference. In the traditional setting, documentation was majorly by memorization. The research established that 77% of the respondents said their proceedings are recorded. The recordings are recorded to provide future

references in case of need, during appeals and for forwarding the cases to the next level, whether in t he same line of the TDR or to the courts of law. (See Fig. 3 below).

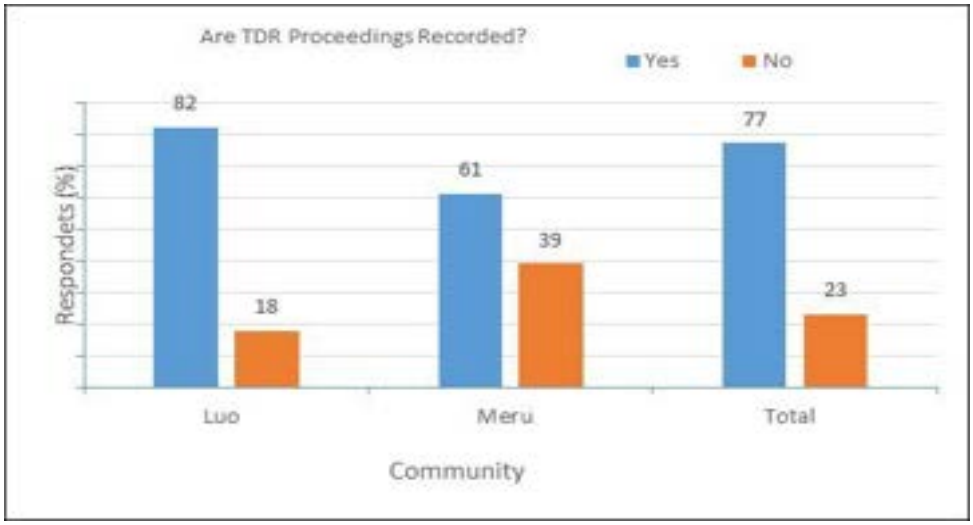


Fig. 3: Recording of TDR proceedings in writing

The main challenges reported from the field study include: inadequate resources to finance the meeti ngs and facilitation of the elders to participate actively in the meetings in form of transport. The serv ices are usually voluntary and as such are dependent on the income level of the elders. Some of the meetings fail to take off, as indicated elsewhere in this report, due to lack of quorums or non-availab ility of the elders mainly because of lack of transport. Other challenges include lack of recognition a nd empowerment of elders both legally and by the government, inadequate security and protection a nd negative attitudes towards elders by the community, illiteracy and lack of modern technology, ge nder imbalance in the composition of the committees and lack of awareness by the public on the TD Rs and general rights, among others. (See Table 2 below)

	Number of respondents		
Challenge	Luo	Meru	Total
Limited resources and lack of funds and lack of transport facilities	33	6	39
Inadequate recognition and empowerment of elders -through prote ction and security, identification, negative attitudes towards elders	24	2	26
Not recognized by law and lack of enforcement mechanism	13	4	17
Non-compliance to rules	9	2	11
Illiteracy and lack of modern technology- illiterate clerks leading t o inaccurate records, no records of how resolutions are arrived at	5	6	11

Challenge	Number of respondents		
	Luo	Meru	Total
Gender imbalance and lack of representation and bias	10	0	10
Lack of exposure and capacity building	9	0	8
Vested interests in subject matter and lack on honesty with some e lders looking at task as gainful employment and not service	5	0	5
No laid down standards/ framework for filing complaints and reso lving disputes, how to behave as an elder	2	2	4
Lack of infrastructure and stationery-office space and furniture, bu ildings for holding courts	0	3	3
Political interference	2	0	2
Lack of quorum and reducing number of elders	2	0	2
Lack of awareness on rights and freedoms of public	4	1	5
Multiplicity of hearings and apathy	2	0	2

Table 2: Challenges facing traditional dispute resolution processes in the community

The disputes resolved by use of TDRS are anti-communal acts that require resolution through the tra ditional dispute resolution mechanisms without being referred to courts. The disputes could range fr om the criminal to the anti-social behaviour such as violent acts, disputes over resources, and social misconduct such as murder, theft, sexual misbehaviour, etc. The five main disputes, according to the study, requiring resolution under the TDR mechanisms in the communities include land disputes, m arriage, gender violence, family cases including inheritance, clan disputes, and welfare issues such a s nuisance, child welfare and neglect of elderly in that order.
(See figure 4 below).

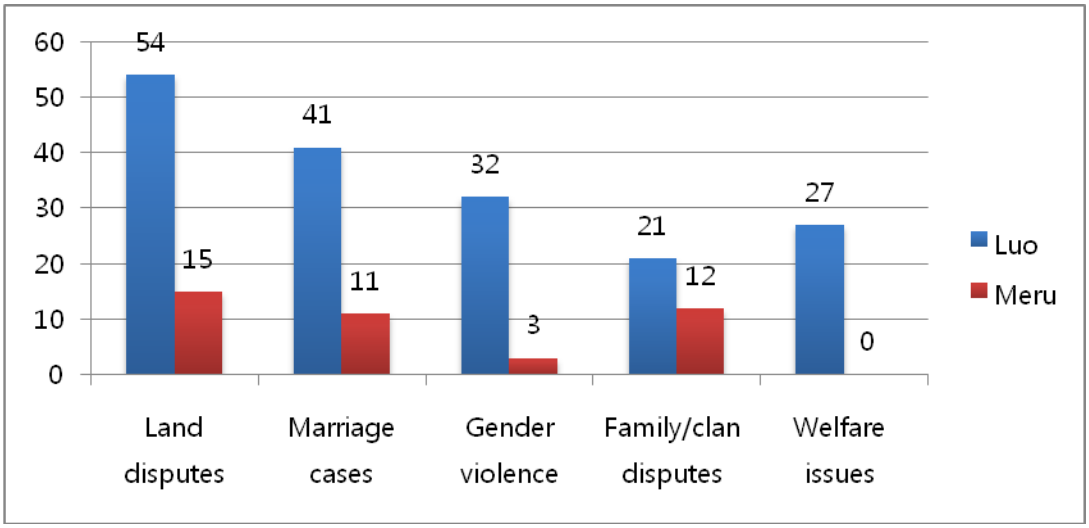


Fig. 4: Five main disputes requiring resolution under the TDR mechanisms in the two communities

Basically, majority of respondents indicated that many cases are resolvable through TDRs except fo r serious criminal offences that require the intervention of the courts. The offences suitable for trial i

n the court of law in addition to compensation under the traditional dispute resolution mechanism w ere reported as murder, manslaughter, sexual offences, grievous harm and stock theft.

Regarding legal, policy and administrative framework for TDRs and other Community Based Justic e Systems, Phase III report highlighted the fact that currently, there is no single statute on traditional dispute resolution in Kenya. In communities where, traditional dispute resolution process is utilized in conflict management, the rules and procedure used is derived from customs and traditions of the c ommunity. The customs and traditions are handed down from one generation to the next. In addition , there is no sort of documentation for TDRs in most Kenyan communities. Consequently, there is a danger of distortion or neutralization of customs and traditions in the context of modern notions of W estern civilization. To safeguard this, a few communities have introduced record keeping for agreem ents made at the conclusion of the TDR process. However, the problem persists due to illiteracy amo ng traditional leaders and lack of formal training in record keeping.

Similarly, there is no policy on TDRs and other community-based justice systems in Kenya. Thus, d ispute resolution through TDRs and other community justice systems is communal based. The rules governing the TDRs processes differ from one community to another depending on the customs and traditions of the communities. In this regard, there is a gap owing to the absence of a comprehensive policy to guide dispute resolution through TDRs. It recommended formulation of policy framework on the same.

Summary of Recommendations (Phase III)

General Recommendations

a. It is critical to identify the aspects of Traditional Dispute Resolution Mechanisms that contravene morality and are repugnant to the constitution and the law with a view to modifying them or have them eliminated.

b. There is a need to raise awareness on customary and religious laws and how they impact on women's rights. In particular, any customary practices that encourage or promote gender discrimination ought to be abandoned.

c. In order to eliminate the perception of bias and discrimination, Traditional Dispute Resolution Mechanisms ought to be restructured to ensure inclusiveness by involving women, youth and people with disabilities through policies and legislation.

d. More effort is needed in creating awareness to the public and the formal justice system on the existence, role and effectiveness of Traditional Dispute Resolution Mechanisms. This can be achieved through having clear provisions in law that promote the use of Traditional Dispute Resolution Mechanisms.

e. There is a need to train everyone involved in Traditional Dispute Resolution Mechanisms and especially the decision-makers in TDRMs on the constitutional provisions and the need to ensure that their decisions and the procedures they use to arrive at their decisions is in conformity with the constitution. Such training should especially ensure that the decision-makers are aware of the Bill of Rights.

f. Introduction of technology in TDRs practice would greatly help in documentation and record keeping in TDR processes.

Legal and Policy Framework Recommendations

Policy Framework Recommendations

a. There is need to formulate an enabling Policy framework for ADR and TDRs. The framework to be enacted ought to address the following issues:

i) Define and clarify the jurisdiction of TDRs and ADR. The matters that can be dealt with through TDRs and those which ought to be subjected to the formal court process need to be clearly prescribed;

ii) Provide a framework for development of programmes, plans and actions for creation of awareness and the establishment of institutional mechanisms for promotion of TDR practice in all the applicable sectors of society;

iii) The operationalization of Article 159 (2)(c) and (3)(a)-(c) of the Constitution and the development of a comprehensive regulatory and institutional framework to govern TDRMs;

iv) Regulation and training of the various players involved in TDRMs;

v) Restructuring of the TDRMs to ensure inclusiveness in the composition of TDRs;

vi) Documentation of TDR proceedings;

vii) Maintain informality in the TDR proceedings;

viii) Identification of the most suitable system to be employed with respect to TDRMs in the formal legal systems;

ix) Mapping of TDR and stakeholders Remuneration of TDRMs practitioners;

x) Enforcement of outcomes of TDR processes;

xi) Development of a multi-sectoral policy implementation forum comprising of key stakeholders drawn from the justice sector;

xii) Ethical framework for TDRM and ADR practitioners;

xiii) Setting ethical standards for TDR practice; and

xiv) Protection of TDRMs and ADR consumers from unconstitutional or unlawful outcomes.

b. In formulating the policy framework for TDRMs the following guidelines should be taken into account:

I. TDRMs need to meet the constitutional threshold set out under Article 159 of the constitution;
II. The composition of TDRs needs to be all inclusive;
III. The outcomes of TDRMs and their enforcement need to be streamlined with constitutional requirements;

IV. TDRMs need to be kept as informal as possible;

V. Introduction of record-keeping and clear references for purposes of accountability and pursuit of justice through TDRs appeal mechanisms and the formal justice system;

VI. Remuneration of TDRMs practitioners and the necessary resources to run TDRs;

VII. Creation of awareness about TDRMs and their effectiveness in resolving disputes; and

VIII. Uniformity of TDRs procedures throughout the country to ensure that the process of arriving at outcomes is fair.

c. A continuous monitoring and evaluation programme should be undertaken to appraise the implementation of the policy framework on TDRMs.

Legal Framework Recommendations

a. In order to foster an effective working relationship between the formal justice system and TDRMs, there is need to introduce court-annexed TDRMs and ADR. This would tackle the problem of backlog of cases, enhance access to justice, encourage expeditious disposal of disputes and lower costs of accessing justice;

b. In order to ensure a smooth interaction between TDRMS and the formal justice systems, laws providing for strict and convoluted procedures need to be reviewed with a view to simplifying the rules and procedures. In particular, the following laws need to be reviewed and amended in order to accommodate TDRMs in their application:

(i) The Civil Procedure Act and Rules, Cap 21- Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases;

(ii) The Evidence Act, Cap 80 should be reviewed so as to simplify the evidential rules to cover situations where informal systems of dispute resolution are being used. Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive rather than procedural justice as contemplated under Article 159(2) (d);

(iii) The Judicature Act, 1967 should be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution (Articles 11 and 44).

(iv) Parliament should amend the Limitation of Actions Act, Cap 22 such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

(v) Kadhis' Courts Act, Cap 11 should be reviewed to make provision for the appointment of women Kadhis.

(vi) The Appellate Jurisdiction Act should be amended to provide for application of TDRs in the appellate process where the matter in dispute involves customary law.

(vii) Land Act, 2012, should be reviewed to ensure clear and substantive provisions that ensure: elimination of gender discrimination in law, customs and practices related to land and property in land especially in conflict management; encouragement of

communities to settle land disputes through recognized local community initiatives; participation, accountability and democratic decision making within communities, the public and the Government; affording equal opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; democracy, inclusiveness and participation of the people; and the active utilisation of alternative dispute resolution mechanisms, especially TDRMs, in land dispute handling and management.

(viii) Marriage Act, 2014, should be reviewed to ensure that mediation of disputes in customary marriages and the customary dispute resolution mechanisms provided for in the Act conform to the principles of the Constitution.

(ix) Matrimonial Property Act, should be reviewed to ensure that Section 11 of the Act which stipulates that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives is expanded to provide guidelines/rules that ensure that the same is smoothly implemented.

(x) Section 17 of the National Land Commission Act should be amended with a view to incorporating a requirement on the part of the Commission to consult or seek assistance from community leaders on matters pertaining to land. Section 18 which provides for the establishment of County Land Management Boards needs to be amended in terms of the composition of the Boards so as to include community leaders.

(xi) Rule 54 of the Supreme Court Rules 2012 which provides for the attendance of Amicus curiae, experts or advocates assisting the court in determining technical matters should be accorded a wide interpretation and application to provide an

opportunity for community leaders to assist the court in matters pertaining to customary law.

c. There is need to formulate an enabling legal framework for ADR and TDRMs.

d. It is proposed to have a law to be known as ADR and TDR Mechanisms Act enacted to provide for the operationalization of Article 159 (2)(c) and (3)(a)-(c) of the constitution and to provide for the regulatory and institutional framework to govern the practice of ADR and TDRMs. The formulation of the said legislation should be informed by the following guidelines:

   i. The need to ensure that TDRMs meet the Constitutional threshold under Article 159(3) of the Constitution and the Bill of Rights;

   ii. The need to establish an efficient referral system for matters from courts of law to TDRs and vice versa depending on the nature of the dispute and steps taken by the disputants;

   iii. Provide for a clear review and appeal system in TDR and ADR;

   iv. Legal mechanisms for the formal recognition and enforcement of decisions made in TDR and ADR processes ought to be set up to make TDRMs more efficient;

   v. The legislation should maintain informality of TDRMs;

   vi. Defining the jurisdiction of TDRMs;

   vii. Establishment of an efficient institutional framework for implementation and enforcement framework of TDRM Policies;

   viii. Provide for enforcement mechanisms of TDRMs outcomes;

   ix. Abolish unconstitutional and/or unlawful TDRs and their outcomes; and

   x. Establish collaboration between the National Government and the Devolved Governments to ensure that TDRMs are promoted and accessible to every person.

   xi. Collaboration between the National Government and the devolved units of governance to ensure that TDRMs are promoted in the counties and that every person has access to the mechanisms.

e. Kenya needs to adopt tested best practices in comparable jurisdictions with regard to TDRMs.

Phase III Report also highlighted related studies by other bodies as follows:

i. FIDA-Kenya

The Federation of Women Lawyers conducted a study on Traditional Justice Systems among comm unities in the coast province of Kenya. The main objective of the field research was to study traditio nal justice systems in the selected communities and come up with recommendations for legal reform that would result in the mainstreaming of traditional justice institutions into the Kenyan justice syste m, with a view to promoting access to justice by vulnerable groups, particularly women.

The field research was undertaken among ethnic communities in Mombasa, Kilifi, Kwale, Kinangop and Tana River districts. The field research was undertaken by three consultants from each of the thr ee disciplines of law, gender studies and sociology. Each research had specific terms of reference. W hile the researchers had regard to the overall objectives of the research, each one focused on a specif ic topic in order to reflect their disciplinary competencies. This approach was adopted in order to arr ive at a more nuanced picture of the research field. Fieldwork tools from sociology and anthropolog y were used in the study, including focus group discussions, gathering information from key informa nts and participant observation. Meetings were also held with women's groups and councils of elder s in each of the ethnic groups visited.

The study found that there is a hierarchy of Traditional Justice Systems (TJS) from village, locationa l, divisional and district levels. TJS members are predominantly elders drawn from the community, e xcept for the Council of Imams and Preachers of Kenya (CIPK) in Mombasa which is composed of I mams and religious leaders. TJS members are mostly elected by community members, but in some c ases, they are appointed by the chiefs.

With regard to the composition of the Traditional Justice Systems in the communities, the study fou nd that in most TJS, the members are men only, although there are a few TJS made up of both men a nd women with men comprising the majority. Two exceptional TJS exist among *Had Gasa* of the O rma community and the *Kijo* of the Pokomo community, whose TJS is made up of women only. TJS members are older, married, residents of the area, knowledgeable and respected in the community. M any male TJS members are religious leaders or knowledgeable in religious matters, for example Isla m or Christianity.

The study found that Traditional Justice Systems are employed to resolve particular disputes at certa

in levels. At the village or locational level, TJS is used to resolve family and neighbourhood disputes while at the divisional and district levels they deal with issues such as security, livestock theft, grazing patterns, land disputes etc. Serious offences such as homicides and robberies are referred to the police. Women-only TJS deal with matters related to women's sexuality, for example rape or defilement, as well as social issues such as HIV/AIDS and FGM.

As regards the procedure during the proceedings, once a complaint is made the Respondent is summoned either orally or in writing and a date for the hearing of the dispute is set. On the date of the hearing each party presents their side of the case and call witnesses. Thereafter, the TJS members deliberate and either reach a decision on the same day or a decision is communicated at a later date.

If a disputant is dissatisfied with the decision made he/she may appeal to the next level of the TJS. Where a TJS decision is not complied with, the matter may be referred to the chief. Enforcement of decisions by a TJS consists of social sanctions, for example shunning, ostracism and in some cases banishment from the community. Enforcement may also take a spiritual form such as cursing. In the women-only *Had Gasa* punishment may be meted out in the form of beating but the Chief has to be notified of such punishments.

The study found that men and women generally consider TJS accessible, affordable and fair. However, as far as outcomes are concerned many women perceive TJS, particularly men-only ones, to be biased against women due to the TJS negative perceptions of women. The invocation of traditional beliefs often operates to deny women's claims, for example to land. TJS are also vulnerable to vested interests of the community. Women's lower socio-economic position relative to men may sometimes result in detrimental outcomes, particularly for poor women or widows.

ii. International Commission of Jurists

The International Commission of Jurists published a report on the interface between the formal and informal justice systems in Kenya. The report examines and analyses the different forms of TJS and ADR using the integrity 'lenses' and elucidates on them. The research makes a concise comparison between the formal and informal justice systems drawing key lessons which can be used to integrate an efficient and responsive justice system in the country. The research also explores the existing efforts to mainstream the use of IJS as an alternative to the court administered justice, the successes, cha

llenges and way forward. It also assessed the adequacy of existing legal, legislative and policy frame work on the same and suggests amendments.

The report finds that many Kenyans are frustrated and dissatisfied with the court process hence the t endency to trust alternative means of accessing justice. TJS are viewed as being accessible, impartia l and affordable. It is also incorruptible, proceedings and language are familiar, accessible at all time s, affordable, utilizes local resources, decisions are based on consensus, and seek to heal and unite di sputing parties. This is unlike the formal system that is seen as breeding hatred.

The TJS hardly differentiates between criminal and civil cases. Land matters, family disputes, dome stic violence, theft, marriage and divorce are some of the cases that are dealt with by TJS. Cases whi ch cannot be resolved through the chiefs are often referred to the courts. There is a tendency to conf use 'referral' and 'appeal'. Since the formal justice system does not expressly recognize TJS the cas es which are 'appealed' to the law courts have to start afresh.

The report finds that the TJS is trusted by communities because it is close to the people, it exhausts t he issues between the parties, it is less expensive and is less time consuming due to the absence of el aborate procedures.

Traditional Justice Systems though widely accepted and used possess some negative traits which inc lude their anarchical nature as a result of the laws and procedures being unwritten, inconsistency wit h the constitution and rule of law, infrequency and lack of structure, lack of defined jurisdictions, sy stemic biasness and lack of adequate mechanisms to enforce decisions.

iii. Chartered Institute of Arbitrators, Kenya Branch

The Chartered Institute of Arbitrators organized a forum for ADR stakeholders in Kenya which was held on 22-23rd October 2014 at the Windsor Golf Hotel. The forum observed that Traditional Dispu te Resolution is the oldest system of dispute resolution with clear foundations and acceptance by its users. It therefore does not require legitimization from the state.

The fact that communities have differing practices with regard to traditional dispute resolution, pose s a significant challenge in the development of rules and standardization of practice for traditional di

spute resolution.

C. Judiciary's Pilot Court Annexed Mediation Project (CAMP)

The Pilot Project on Court Annexed Mediation in Kenya commenced on 4th April, 2016 at the Family Division and Commercial and Admiralty Division of the High Court in Nairobi. The Pilot Project was entrusted to the following bodies: Mediation Accreditation Committee (MAC); Alternative Dispute Operationalization Committee (AOC)[90]; and the Secretariat (Technical Working Group (TWG)[91]). The pilot project was mainly introduced as a mechanism to help address the backlog of cases in Kenyan court. The Kenyan legal framework on mediation generally envisages the Facilitative Model of mediation.

The Mediation Accreditation Committee (MAC) is a committee established under section 59A of the Civil Procedure Act[92]. The first appointment of the Committee members was made by the Hon Chief Justice through Gazette Notice No 1088 of 2015[93], chaired by the Chairman of the Rules Committee, Hon Justice Alnashir Visram (JA). The functions of the Committee include, inter alia, to determine the criteria for certification of mediators, propose rules for certification, maintain a register of qualified mediators, enforce the code of ethics and establish appropriate training programmes for mediators.[94]

External Assessment of the Court Annexed Mediation Pilot Project

An external end-pilot evaluation that was conducted after the end of the pilot project identified the CAMP's strengths and weaknesses. It provides a comprehensive set of recommendations for taking mediation forward that includes the establishment of an ADR Taskforce. The Judiciary recognizes that CAM is but one part of an ADR system that includes the important work of arbitration centres, private mediation practices, and tribunals.

The Report on the *External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts* highlights some of the challenges that emerged from the implementation of the Project and offers some recommendations as follows:[95]

[90] The Alternative Dispute Resolution Operationalization Committee (AOC) oversees the implementation of the Court Annexed Mediation project. It meets regularly to review the progress of the project, makes recommendations and formulates policies on how to guide the project. AOC was instrumental in the development of the Mediation Manual.
[91] CAMP has a secretariat which also doubles up as the Technical Working Group (TWG). The TWG is charged with the day to day running of the project. The team consists of 3 MDRs, MAC Registrar, 1 Communication specialist, an Interim Program Manager and 2 Program Officers, 2 Mediation Clerks, 2 Executive Assistants and 4 Interns.
[92] Chapter 21, Laws of Kenya.
[93] *The Kenya Gazette*, Vol CXVII-No.17 (20 February, 2015).
[94] Sec. 59A (4), Civil Procedure Act, Cap 21, Laws of Kenya.
[95] *External Evaluation of the Court Annexed Mediation Pilot Project Within the Family And Commercial Divisions of The Milimani Law Courts, May 2017*, submitted to Judiciary of Kenya, Milimani Law Courts, Nairobi, Kenya by Achere

a. Funding and Remuneration of Mediators/Staff

In order to secure a stable source of funds for the program, the report recommends funding either directly from the executive (exchequer) or from the Judiciary. Regarding remuneration of mediators, it is suggested that mediators should be paid a fixed fee per case from the Project's fund/budget, where a percentage of the fees should be paid upfront to encourage the practice of mediation. It is also recommended that the Advocates Remuneration Order should be amended to include billing for mediation. There is however a recommendation for development of pro-bono mediation scheme for indigent Parties.[96]

b. Development of Infrastructure and Organisational Structure

It has been suggested there should be development of permanent infrastructure for the Project, including but not limited to: office space, mediation rooms, mediators' room, wash room and office equipment, amongst others. There should also be a central Registry for mediation which co-ordinates all mediation activities – including use of space, preferably located at the available space for the CAMP in the Milimani High Court.[97]

The Judiciary should consider creating a Mediation Division headed by a designated Mediation Registrar or Deputy Registrar(s), and the Judiciary should take ownership of the project staffing. The division should have ADR Judges who should be officially appointed and trained in accordance with the relevant rules/laws. Furthermore, ADR Judges could be appointed on a rotational basis to ensure that all Judges eventually have the benefit of exposure to mediation practice.[98]

The Mediation Division should also have Screening Officers whose sole responsibility is to screen cases as suitable for mediation should be designated.[99]

c. Laws, Rules and Manuals

The Report also recommends that a Law establishing the Court Annexed Mediation Project (consider changing 'project' to 'program') should be created.[100] It is also suggested that the Mediation Pilot Project Rules, 2015 should be amended to expunge and modify impediments to an efficient mediation process inclusive of procedural technicalities (such as filing of case summaries, appointment of mediators etc.). The amendments should be dynamic and innovative to suit the

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Ibifuro Cole Consultant, External Evaluator Lagos, Nigeria (Supported by: International Development Law Organization (IDLO) Nairobi, Kenya; International Commission of Jurists, Kenya Nairobi, Kenya; Kenya Human Rights Commission Nairobi, Kenya).

[96] *External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts, May 2017*, pp.28-29.

[97] Ibid, p.29.

[98] Ibid, p.30.

[99] Ibid, p.30.

[100] This should aim at defining the organisation; set the objectives, functions and extent of its powers; create a governing structure recognised by law; state the role of the Principal Judge, Judges, ADR Judges, Mediation Deputy Registrar and other officers of the CAMP; give power to the governing council to make staff regulations concerning conditions of service of the CAMP employees; State the role of the Court, Counsel and Disputing Parties, define the relationship between the Mediation Accreditation Committee with the Project ; establish a fund for the project and state how this fund will be realized and the limits to receiving funding; define the accounting and auditing process of the project; and other provisions which are necessary for inclusion in the law.

challenges identified with the project. Restorative Justice provisions should be considered in making amendments to the Rules.[101]

d. Mediation Process and Mediators

It has been suggested that the Judiciary should consider development of a Case Management System, separate from the one created for the Judiciary, that can track mediation cases (mediators and mediation law clerks should access and update this system), generate progress reports and deal with the appointment of mediators. It is also recommended that there should be inclusion of the 'mention process' in the rules. Cases should be brought before the Mediation Deputy Registrar for mention at different stages. It is suggested that sanctions for non-compliance in the Rules should be maintained but sparingly used at this initial stage to gain acceptability. It is also suggested that settlement agreements should not be reviewed in court by parties or Advocates.[102]

It is also suggested that for clarity of agreements (Mediation Law Clerks should also be trained in drafting settlement agreements), Judges should be trained on the Mediation process which will include the finality of the mediation agreements, mediators should be trained not to coerce parties to sign as they may renege at the courts, mediators should at no time be required to be in the courts to attest to the veracity of the settlement agreement etc.[103]

There is also a recommendation that the same format for settlement agreements should be used in each division. Furthermore, standard mediation settlement clauses should be added. It is also suggested that settlement agreements should also be reviewed by the Technical Working Group.[104]

With regard to Mediators' Appointment, it is suggested that the Judiciary – Mediation Deputy Registrar and Program Manager, should have the prerogative/primary responsibility for the appointment of mediators from the MAC register. Parties/Advocates should also be given the opportunity but only based on their request. It is also suggested that MAC should consider modifications to the mediation accreditation standards requirements in S.4 (b) and S. 5 – specifically certificate of membership of a recognized professional body as this may be exclusive. It is also suggested that MAC should maintain other requirements in s.4 of mediation accreditation standards requirements to ensure (amongst others) that a university degree is a prerequisite for being enlisted in the register of mediators.[105]

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[101] *External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts, May 2017*, pp.31-32.
[102] Ibid, pp.32-34.
[103] Ibid.
[104] Ibid.
[105] Ibid, p.34.

However, it has been pointed out in the Report that MAC should note that mediation in the CAMP and in the communities or alternative justice systems have different parameters.

e. Training and Sensitisation/Advocacy

It has been recommended that there should be training and exchange programs with other jurisdictions for the following groups: ADR Judges: Case Management in Court Annexed Mediation; Judges: Mediation Process in Court Annexed Mediation; Mediators: Drafting settlement agreements, mediator's ethics, the process of mediation at the CAMP, mediation principles, practice sessions on mediation, co-mediation, mentorship (this can accommodate the need for new mediators to complete at least 3 mediations), development of Kenyan based mediation case studies, case management etc.; and Technical Working Group: Case Management in Court Annexed Mediation; the mediation process, ethics; customer care; drafting settlement agreements, etc.[106]

It is also suggested that a curriculum should be designed for each group and the Judicial Training Institute co-opted to aid in the training as well as a curriculum for mediator's 'follow up' training. There is also a recommendation that collaborative and continuous sensitisation of stakeholders with deployment of feedback towards improvement of the Project should be continued monthly.[107]

f. Monitoring/Management and Replication

It has been suggested that a small taskforce should be created to ensure appropriate planning and implementation of these recommendations. Brainstorming sessions should be held first to gain clarity of approach and make necessary modifications to the recommendations before the planning commences. It is however suggested that overall responsibility for compliance with the recommendations should be given to a designated Mediation Deputy Registrar and project leader of the CAMP.[108]

A phased replication of the Court Annexed Dispute Resolution Pilot Project is recommended after implementation of these recommendations. A general replication model should be created indicating clear milestones and timelines for funding, human resource structures (mediators, staff,

[106] Ibid, p.34.
[107] Ibid, p.35.
[108] Ibid, p.36.

Judges, Mediation Deputy Registrar's etc.), infrastructure, training, etc. This replication model should be modified based on the circumstances of each division and county.[109]

g.Political Will

To achieve success on this project, there has to be sufficient political will from the Office of the Chief Justice, Presiding Judges' and all relevant stakeholders especially for funding, infrastructure, training, human resource and creation of enabling laws.[110]

More recent reports, as at June 2018, on the progress of CAMP highlight the status of implementation of the earlier recommendations on strengths and weaknesses, as highlighted by the External Evaluation Report of 2017, as well as reflecting the current statistics. The statistics are captured in the table below:

Case Monitoring Report as At June, 2018

No.	Description	Division							Total
		Family	Commercial	Civil Division	ELRC	ELC	Milimani Children's Court	Chief Magistrates' Court (Milimani)	
1	Total number of files screened	551	1128*	-	-	-	-	-	1679
2	Total number of matters referred to mediation	339	308	5	23	3	24	3	705
3	Total Number of concluded matters	249	128	-	8	1	17	-	403
4	Total number of matters with	139	69	-	8	0	11	-	227

[109] Ibid, p.36.
[110] Ibid, p.37.

	settlement agreements								
	Breakdown Full Settlements	119	69	-	4	-	9	-	201
	Partial Settlements	11	56	-	2	-	-	-	69
	Consent	9	16	-	-	-	2	-	27
5	Total number of matters where parties have failed to reach an agreement	110	59	-	4	-	7	-	180
6.	Non Compliance	36	12	-	-	-	2	-	50
7.	Terminated	7	14	-	-	-	-	-	21
8.	Total number of mediations where settlement agreements have been adopted	114	69	-	4	-	11	-	198
	Total value of matters in mediation	2,603,117,864	18,199,982,275	29,051,407	8,545,621	-	-	-	20,840,697,167
	Total value of matters in mediation with settlement agreements	350,592,000	2,292,896,590	-	2,834,035	-	-	-	2,646,322,625

N/B-

Item No. 1- The high number of screened matters in the Commercial Division is due to re- evaluation of cases that had been screened earlier and not found suitable for mediation.

NO.	ITEM	COURT/DIVISION							TOTAL
		FAMILY	**CIVIL**	**ELC**	**ELRC**	**CM's COMM**	**CHILDREN'S**	**COMMERCIAL-HC**	
1.	Total number of matters referred to mediation	10	11	6	10	29 (30) One matter terminated)	22 (Terminated)	8	97
2.	Total Number of concluded matters	10	8	2	10	27	21	4	82
3.	Ongoing Mediation Sessions	0	3	3	0	2	1	4	13
4.	Total number of matters with settlement agreements	5 (3- full Settlements; 1- Partial; 1 Consent)	0	3 2 (Partial Settlement- Further date given to agree on other pending issues) 1(consent before mediation could start)	3 (full Settlements)	14 (8- Full Settlements 6- consent)	11 (10- full Settlements; 1- Partial)	1 Full Settlement	37
5.	Total number of matters with Non-Compliance	3	-	2	-	6	4	-	15
5.	Total number of matters where Mediation failed	5	8	3	7	13	10	3	49

6.	Total value of matters in mediation	33,800,000	12,955,000	6,596,412	8,423,534	TBA after liability is established	371,800	517,002,808	579,149,554
7.	Total value of matters in mediation with settlement agreements	12,500,000	0	0	1,429,980	TBA after liability is established	267,000	0	14,196,980

Case Monitoring Report of the Mediation Settlement Week as at 26th June, 2018

Apart from the foregoing statistics, a specific Report on the "Progress on Implementation of the External Evaluation Report" on the Court Annexed Mediation has since been prepared by the Judiciary, and the same is herein reproduced in part:

INTRODUCTION

As part of the transformation process, the Judiciary embarked on measures to address the age-old problem of increasing caseloads in the courts. The measures included recruitment of more judicial officers and staff, building and refurbishment of more courts and adoption of modern management practices. The Judiciary has also carried special initiatives such as Service Weeks aimed at reducing the backlog. In spite of these measures the courts continue to have a heavy backlog. The latest statistics from the Directorate of Performance Management reveals that as March, 2018, there were 32,058 cases pending in all courts countrywide.

There is no doubt that given the adversarial nature of our judicial system, even those cases that were successfully completed in court left the litigants with severely damaged relationships after a long and tortuous court process. It is for this reason that the Constitution of Kenya 2010 endorsed Alternative Dispute Resolution as a legal alternative to court proceedings.

Guided by Article 159 and Article 48 of the Kenyan Constitution 2010; Section 59(a), 59(b), 59(c) 59(d) of the Civil Procedure Act 2015 and the Mediation (Pilot) Project Rules 2015, Court Annexed Mediation was established in the Judiciary in April, 2016 on a pilot basis after extensive consultation with stakeholders. The initial consultative forum was held between the 4th and 7th February, 2015 at Amboseli. The objective of this meeting was to develop a design of the ADR pilot project. It laid ground for the establishment of the court annexed mediation program by developing an implementation framework and formulation of a mediation pilot steering committee that was tasked with the responsibility of facilitating strategies towards launching of the pilot project.

The pilot project that ran in Family and Commercial Divisions of the High Court came to and in July 2017. As at the conclusion of the pilot project, approximately 421 disputes were included in the Court Annexed Mediation Pilot Project with an overall settlement rate of 55.17% and a total sum of Kenyan Shillings Seven Hundred and Seventy (770) Million released into the economy by virtue of the cases that were resolved during the project phase.

Upon conclusion of the Pilot phase, the Judiciary sought the services of an external evaluator to independently and comprehensively assess the ongoing court annexed mediation project, to determine whether the interventions were relevant, efficient, effective and sustainable, by gauging the successes, challenges and methodologies of the pilot.

The Judiciary, through the Taskforce on Alternative Dispute Resolution is set to roll out Court Annexed Mediation in the High Court stations, Courts of equal status and the Magistrates Courts. However, there is need to incorporate the recommendations by the external evaluator before roll out as this will this will inform the replication plan.

Below is a summary of the recommendations made and an update on the implementation progress:

Progress on Implementation of the External Evaluation Report

NO	Recommendation by External Evaluator	Progress on Implementation
FUNDING		
1.	Identification of funding for the Project either directly from the executive (exchequer) or from the Judiciary.	Proposed Mediation budget for the FY 2018/2019 presented to the Judicial Service Commission (JSC).
2.	Identification of a fee-paying scheme for Parties/Advocates	Legal & Policy Sub- Committee of the Taskforce coming up with proposals on this.
3.	Creation of a pro-bono mediation scheme for indigent Parties	
4.	Development of a payment scheme for mediators. • Consider either fixed amount or payment on a scale of fees. • Consider paying a percentage of Mediators fees upfront to encourage the practice of mediation. • Impose fine to parties for no-shows or late cancellation of sessions.	
INFRASTRUCTURE		
1.	Identification of office space for the Mediation project	Done (Milimani Law Courts)
2.	Identification of space on permanent terms e.g. A Mediation Centre	Space identified in Milimani though there in need for expansion in future.
3.	Central registry/ secretariat for the CAM based in Nairobi to coordinate administrative aspect of the Project.	Proposal presented to the JSC.
4.	Designing and designation of a Mediator's room/ lounge	Three Mediation suites with a reception and a lounge set up at Milimani Law Courts.
5.	Functional Washrooms at all identified mediation locations.	
6.	Provision of appropriate storage & filing facilities with appropriate furniture.	Done.

7.	An appropriate dispatch system should be established.	Communication strategy to both internal and external stakeholders in place.
ORGANISATIONAL STRUCTURE		
1.	The Judiciary should consider creating a Mediation Division.	Proposal submitted to JSC
2.	The Judiciary should take ownership of the project staffing.	
3.	ADR Judges should be officially appointed and trained. Provision for their appointment should be made in the relevant rules/laws.	Under consideration by the Legal & Policy Sub-Committee.
4.	There should be designated Mediation Registrar or Deputy Registrar(s) who is (are) solely responsible for managing the affairs of the CAMP without additional judicial responsibilities.	Considered and included in the replication model.
5.	Recruitment of a Program Manager based on qualification, skill, expertise and experience in mediation. Preferably one with legal (law degree) and project management background.	Under consideration by the Taskforce.
6.	Designation of Screening officers, Mediation clerks and administrative assistants	Included in the replication model.
7.	TORs for each staff to be clearly stated to reflect the need of the project	Human Resource strategy developed for the replication model.
8.	Appropriate matching of roles to staff qualifications and experience.	
LAWS, RULES AND MANUALS		
1.	Designing of a comprehensive Legislation for Mediation.	• ADR baseline assessment survey conducted and report generated. • Legislative Drafting expert engaged to support full operationalization and rollout of CAM within the Judiciary. (ongoing) • Legal & Policy Sub-Committee leading the process.
2.	Amendment of Civil Procedure Act to delineate Arbitration & Mediation	
3.	Amendment of rules to expunge procedural technicalities.	
4.	Amendment of the Mediation Manual	
5.	Development of a strategic plan for Court Annexed Mediation	
6.	Amendment of Advocates Remuneration Order to include Mediation fees.	
MEDIATION PROCESS		
1.	Development of a Case Management system for Mediation	Done through the Judiciary ICMS committee
2.	Review of processes e.g. • Expansion on modes of referral of cases to mediation. • Inclusion of Mention process in the rules.	Done. Included in the replication model.
MEDIATORS		
1.	Ensure attendance of refresher courses is a prerequisite to accreditation.	Under Consideration by the Legal & Policy Sub-Committee

TRAINING		
1.	Training and exchange programs with other jurisdictions	Proposal submitted to one of the Judiciary partners (IDLO)
2.	Designing of a training curriculum targeting specific groups	Under Consideration by the Legal & Policy Sub-Committee
SENSITIZATION/ADVOCACY		
1.	Collaborative and continuous sensitization of stakeholders with deployment of feedback towards improvement of the Project should be continued monthly	Ongoing
2.	Development of a stakeholder engagement plan.	Done. To be implemented in August 2018.
3.	Incentives for parties whose cases are settled during Mediation	Under Consideration by the Legal & Policy Sub-Committee
4.	Translation of advocacy tools into Swahili language	Done. All IEC materials translated into Kiswahili and illustrated by a cartoonist.
MONITORING & EVALUATION		
1.	Formation of a Taskforce to ensure appropriate planning and implementation of these recommendations.	Done. Finance & Administration Sub Committee leading the process.
2.	Monthly monitoring of compliance with recommendations	
REPLICATION		
1.	Phased replication of Court Annexed Mediation after implementation of recommendations.	Replication plan developed. To be prioritized in Kisumu, Nyeri, Kakamega, Eldoret, Nakuru, Mombasa, Kisii, Garissa, Machakos and Embu.
2.	Development of a replication model	Done. The model includes a Finance & Human Resource strategy and the Mediation Registry processes.
POLITCAL WILL		
1.	Ensure that there is political will from both internal and external stakeholders.	Ongoing through continuous stakeholder engagement.

D. A Survey on ADR Strengths, Weaknesses and Policy Gaps "A Case Study of Meru, Isiolo and Nairobi Counties, Kenya" (Judiciary)

This Report was a result of a baseline survey that was carried out in three regions in Kenya namely: Meru County; Isiolo County; and Nairobi County, for purposes of identifying trends in the use of ADR in Kenya, including a description of the types of ADR mechanisms used in the region, identification, and description of linkages between the various institutions engaged in dispute

resolution. It carries documented information on the use of ADR in Kenya by identifying strengths, weaknesses, and gaps on such usage. The issues discussed range from political, social, economic, technological, legal and ecological. It provides viable recommendations and a strategy for the use of ADR in Kenya, coupled with a planning base for advocacy strategies towards the increased use of ADR for improved access to justice in particular. The recommendations also include ways of strengthening cooperation and coordination between the various legal aid providers and the judiciary.

The Consultant arrived at the following conclusions and recommendations:

I. Documented information on the use of ADR in Kenya

1. From the findings, there is enough evidence that there is documented information on use of ADR in Kenya.

2. The components/ subtypes of ADR are also clearly understood by all categories of respondents.

3. Conflicts/disputes are a common phenomenon in Kenyan society and that they can be resolved amicably.

4. On the types of disputes/conflicts that are rampant among the group respondents, familial/domestic was highest at 71.3% followed by land at 14.3%. Debt was third at 8.6% while criminal was 2.9%. Most respondents felt that criminal act was not a dispute and as such should be treated differently. This is a clear indication that no community is willing to tolerate crime and that crime should not be categorized as a dispute/conflict.

5. ADR is mostly administered by chiefs' office and family/relatives. From the findings, few Kenyans would go to court at first instance. They explore all other avenues (ADR) before resolving to go to court. This shows that here is documented use of ADR in Kenya.

6. As much as the respondents did not understand negotiation clearly, it is the most used form of ADR among the groups, followed by mediation, arbitration and traditional dispute resolution.

7. Among the groups, ADR services are obtained from different providers with the chiefs' office being the preferred provider at 57.1%, family at 28.6% and church/mosque at 14.3% and none of the courts.

8. Whenever disputes arose, 54.3% of stakeholder respondents went to chiefs' office, 25.7% sought help from family/relatives, 17.1% went to church/mosque and only 2.9% preferred the court.

9. 54% of the groups sought redress at the chiefs' office, 25% sought from the family /relatives, 17% went to church/mosque and about 3% opted to go to court.

10. More stakeholders (50%) are engaged in mediation, 27% are engaged in arbitration while 22.7% are engaged in negotiation.

11. On the motivating factors that make citizens to opt for ADR, the stakeholders intimated preservation of relationships and the preservation of reputations as the major factor at 83.3%, lower costs and durability of agreements followed at 75%, likelihood and speed of settlement (66.7%), less complexity and confidentiality (58.3%), flexibility of procedure and practical solutions tailored to parties' interest stood at 33.3% each, while parties choice of neutral third party stood at 25%. Among the key informants, 100% cited flexibility of procedure and less complexity respectively as the motivating factor for out of court settlement, likelihood and speed of settlement, practical solutions and low cost (81.8%), parties choice of neutral third parties (63.4%), durability of agreements and the preservation of relationships and preservation of reputations (54.5%), confidentiality (36.6%).

12. Asked where else they were aware ADR services could be accessed, the respondents thought chiefs office (20.5%), council of elders (16.1%), family (8.8%) and Courts and district peace committee at 4.4%.

13. The respondents were very candid on the main reasons for higher ADR uptake in Kenya. These were: -

    i. Corruption in Courts
    ii. Confidentiality and non-adversarial nature
    iii. Culturally and family appropriate
    iv. Timely
    v. Low Cost

14. On the charges on ADR services, 83. 3% of respondents said they did not prefer any charges while 16.7% said they would prefer some charges between 1,000/= and 5,000/= depending on the clients' ability.

15. Further, all the respondents said there were no official charges; however, some bought tea while others gave out some gifts as a way of appreciating those who dispense the ADR and eating together as a way of reconciliation.

16. As far as resolving the dispute/conflict is concerned, the respondents (100%) agreed that the disputes can be resolved amicably.

17. On the issue of legal and institutional framework, key informants thought that the legal framework was 10% supportive to promote ADR; while the stakeholders thought that the framework was 62.5% supportive to promote ADR in Kenya. This was based on divergent opinion on what constitutes a framework.

II. Strengths, Weaknesses, and Gaps on Such Usage.

To identify the strengths and weaknesses, the consultant adopted the SWOT/PESTEL Analysis Matrix (SPAM) while the gaps are identified through SEGA Effectiveness Matrix (SEGAEM)

Strengths and Weaknesses

1. Political

Strengths: Acceptance of ADR by various political players since it is home grown, home managed and home administered.

Weaknesses: Can easily be manipulated by the political class and therefore may provide a fertile ground for revenge and counter revenge

2. Economic

Strengths: It is affordable since there are no charges preferred. The distances covered are short and therefore accessible. Time spent is short allowing the disputants to continue with their economic and livelihoods activities. There are no confinements and therefore the disputants are free.

Weaknesses: In case of penalties where livestock is used for compensation, encourages raid to redeem. Where land is used to compensate for damages, there is a feeling that ‘we are poor because so and so occupies our land’

3. **Social**

Strengths: It is socially acceptable and appreciated. It strengthens and preserves social relationships. It brings a sense of social ownership. It provides the social networks/fabric with the much needed goodwill.

Weaknesses: Engenders resentment which if not vented out causes social tension.

Encourages social activism which may breed group psychology that our clan, group or religion is on trial. Is not universal and therefore ideal for homogenous social entities who share common creed, ethos, culture, ethnicity and or livelihood patterns.

4. **Technological**

Strengths: Does not need intensive and extensive technology.

Weaknesses: Due to its informal/non-formal nature, may not produce replicable outcomes as a result of weak or lack of documentation. May lack consistency in rulings due to weak points of reference.

5. Ecological

Strengths: The disputants come from the same locality and therefore form part of the community. With this in mind, they may hold the key to amicable resolution of the dispute.

Weaknesses: The accused can easily be blacklisted by the community through stigma, tagging or stereotyping.

6. **Legal**

Strengths: Has social structural backing backed by a rich heritage and test of time. Is ingrained in the individual and communal conscience, and there can be applied through impulse action or reaction.

Weaknesses: The outcome may not be binding. The credibility of the process may be questioned based on the personality of the 'judges', the arguments raised and social interest or disinterest.

III. Gaps on the Usage

Performance of ADR: It is evident from the study that the performance of ADR is above average with the respondents giving it a 61% - 80% success.

Decision making Process: The respondents observed that in most instances the disputants themselves approached the ADR providers. This is evidenced by the fact that ADR is mostly administered by chiefs' office and family/relatives. 54.3% of group respondents sought redress to the disputes from chiefs' office, 25.7% sought help from relatives/family, and another 17.1% would go to church/mosque. Although the decisions may not be popular with both sides, there is a general feeling that all parties are involved in the decision-making process.

Resources by ADR providers: In most instances, the ADR providers do not have work stations assigned to ADR, rather they 'create room' whenever the cases come. This makes the documentation process both scanty and non-versatile.

Manpower: Most ADR providers do not have permanent staffs for the specific job. Rather they work as ad hoc committees with very limited life span. This lifespan is determined by the workload and on the need to be retained basis.

Money: Since the ADR is not formalized in most institutions, there are some times no operational budget. The finances and other budgetary demands are activity and circumstance driven.

Time: The time allocated for ADR in some institutions is what they call spare time. This is occasioned by the voluntarism concept of ADR. It is therefore incumbent upon the disputants and the ADR provider to agree on time.

ADR Justification: ADR traditions vary somewhat by country, community and culture. Its use has been as old as mankind and as ancient as dispute. It has been used by all generations across the world. It is therefore without gain saying is justifiable.

Informing policy and disseminating new knowledge and understanding: ADR is a policy issue. It can be seen from a multi-sectoral approach such as governance, democracy, human rights, peace building, religion, culture and a social service. In this regard, ADR can both be a service and a product.

Its delivery can also be a brand. In this context, ADR requires some standardization and universality.

Participatory: All the respondents agree that ADR has an element of participation. However, from the FGDs, this participation is skewed in favour of patriarchy. The women think that ADR is a male court whose decisions are always pre- determined to perpetuate and further their dominance.

Inclusive and responsive to the vulnerable Planning: The respondents agree that ADR is responsive to the vulnerable in planning. This is evident when the opinion of the parties is sought about day, time and place.

Access: The respondents agree that ADR is accessible but, in some instances, the access is controlled by taboos, sectarian biases and other inhibitive factors.

Benefits: The benefits that accrue from ADR are both individual and collective (communal). In cases where the feud is familial or clan based, the benefits are seen in terms of continued co-existence, levels of tolerance and productivity.

Appeal: Some processes of ADR have provisions for appeal (*Njuri Ncheke*) depending on hierarchy. Most other forms do not have such room and therefore decisions arrived at are supreme.

Impact of ADR both qualitatively and quantitatively, for individuals, households and more broadly within the community: There is empirical evidence of both qualitative and quantitative impact of ADR for individuals, households and more broadly the community. The visible levels of tolerance, harmony, co-existence, tranquillity and calmness which may not necessarily depict peace can all be attributed to some remnant of ADR. It is therefore appreciated that with all its weaknesses and challenges, ADR is still the way to go.

IV. Recommendations to inform policies on the use of ADR in Kenya.

To effectively address this, the consultant reviewed several pieces of literature and materials. Chief among them are; the Miscellaneous Statute Amendment Act, the Arbitration Act, the Civil Procedure Act, the Draft of the Legal Aid Bill 2012 and the Draft Legal Aid and Awareness Policy 2012. Comparative analysis on international best practices on ADR was also undertaken. On the inputs for

a National Strategy for use of ADR in Kenya, the author hereby sets foot print path towards a national strategy.

Input 1: Undertake an Operations Research

1. Employ a sector wide approach in regard to ADR and formulate an integrated mechanism that goes beyond the domestic/familial, debt, land and other civil cases.
2. Subject the findings to a wider public participation and out of this, document aspirations and Kenyan dreams.
3. Through forums, identify the dispute dynamics (factors that push people into disputes and factors that pull them out of disputes) and develop the critical path analysis to ring fence the dynamics and create an exit framework.
4. Convert the framework into a strategy for ADR use.

Input 2: Improving the Policy and Legal Environment

i. Harmonization of different pieces of legislation and other legal instruments to provide a fair playing ground for both the ADR practitioners and consumers. This can possibly be done by repealing some statutes and coming up with an all-inclusive and all-encompassing ADR Act.

ii. Regulation and sanitization of ADR practice through development of an ADR curriculum, ADR training manual, ADR code of conduct and ADR reporting templates with an inbuilt monitoring and evaluation framework.

iii. Placement of ADR practice under a specific agency such as the Legal Aid Service for coordination and monitoring.

iv. Provide the Legal Aid Service with a regulatory role and make it a SAGA for roll-out of ADR in Kenya.

v. Strengthen the institutional and organizational capacity of Legal Aid Service to spread its wings in all the counties for effective regulatory role.

vi. Allow Legal Aid Service to undertake intensive resource mobilization to fund its operations beyond the national purse.

Input 3: Registration and preservation of data of ADR Service Providers.

a) Develop a minimum requirement package for registration of ADR service providers. These may include NGOs, CBOs, FBOs, SACCOs, Youth Groups, Women Groups, Council of Elders, District Peace Committees, Community Policing Committees, Chiefs Office, Trusts, Foundations, Companies (both limited and limited by guarantee) etc

b) Through the decentralized systems, design and roll out either District ADR committees or County ADR committees. The committees may incorporate as diverse stakeholders as possible representing the face of the district or county. This is envisioned to eliminate the fear of the minority and the easily marginalized that the ADR is an exclusive club.

V. Practical Recommendations on the Necessary National Policy Interventions for Establishment of an Efficient and Effective Use of ADR in line with the Constitution.

1. Harmonization of different pieces of legislation and other legal instruments to provide a fair playing ground for both the ADR practitioners and consumers. This can possibly be done by repealing some statutes and coming up with an all-inclusive and all-encompassing ADR act in line with constitution.

2. Regulation and sanitization of ADR practice through development of an ADR curriculum, ADR training manual, ADR code of conduct and ADR reporting templates with an inbuilt monitoring and evaluation framework.

3. Placement of ADR practice under a specific agency such as Legal Aid Service for coordination and monitoring.

4. Development of a minimum requirement package for registration of ADR service providers.

5. Design and roll out either District ADR committees or County ADR committees.

Recommendations by the Respondents.

1. Undertake sensitization forums, workshops and outreaches to general public on regular and continuous basis.
2. Hold ADR meetings, seminars and workshops within counties and nationwide to create awareness.
3. Bring together various stakeholders and come up with way forward
4. Appreciate the roles played by the community and cultural organizations such as *Njuri Ncheke* and other council of elders
5. The community should be trained, guided and counselled to see the appreciate the ADR
6. ADR and the systems that support ADR should be strengthened because in some parts of the country the courts are very far i.e. from Meru to Isiolo.
7. Courts should not be too keen on fines and the process should be friendly to the accuser and the accused.
8. There should be an ADR mechanism that that can work for inter-communities such as Borana- Meru, Somali –Turkana, Samburu –Borana.
9. Educate the people who are sought after in the provision of ADR.
10. Conduct outreach and training for the CPA actors in the Northern Districts.
11. The government should educate the youth on conflict resolution.
12. Provide periodic training to those handling ADR.
13. Create more awareness on community peace agreements and let the courts enforce them without going into technicalities.
14. Strengthen community peace mechanisms and let the provincial administration not interfere with community systems.

15. Include the elders in payroll for them not to use ADR as a conduit of bribery

16. Organize county forums to popularize the sections of the constitution that talk about ADR

17. Let parliament enact an ADR act to allow the courts to respect the decision arrived at by the parties.

18. Fund peace committees and equip their offices.

19. Let every police station have an ADR desk to allow the disputants try and agree on non-criminal cases before they are taken to court.

    Include peace budgets in the national budget. We spend a lot of money buying military hardware but we do not fund peace efforts.

PART V

5. CURRENT STATUS OF ADR JUSTICE SYSTEMS IN KENYA

5.1 Field study

A field study on ADR was done among select communities in Kenya including the Luhya, Meru, Kikuyu and Kamba community. The main objective of the field research was to carry out the ADR situational analysis in the selected communities and come up with recommendations for legal and policy reforms that would result in the alignment of ADR into a robust component of dispute resolution in the Kenyan justice system. The field research was undertaken with regard to the overall objectives of the research, utilizing fieldwork tools including focus group discussions, surveys, questionnaires gathering information from key informants and participant observation. The field work was structured to bring out the participant's perception of their right to access to justice, their knowledge or ability to understand the ADR mechanisms, the source of knowledge of ADR, the perceived gaps, opportunities, successes and challenges in using ADR for conflict resolution, the average time it takes to resolve disputes through ADR as well as the preference to use ADR as opposed to the use of the administrative and legal tools within their communities. Meetings were also held with various councils of community leaders and elders in each of the ethnic groups visited.

a. Luhya Community

A field study on the Luhya community was done among sub-tribes in western Kenya, specifically the sub tribes of the Luhya community within the Kakamega County. The main objective of the field research was to study ADR in the selected community so as to come up with recommendations for legal and policy reforms that would result in an integrated approach for development and alignment of legal and policy framework on ADR into a robust coordinated component of dispute resolution in the Kenyan justice system.

The field research was undertaken among ethnic communities in the Sigalagala, Musoli, Mukoyani, Shinyalu and Khayega wards located in Kakamega County. The study found that ADR and TDR methods are the main mechanism utilized in adjudication of disputes in the community, ADR methods especially Negotiation, Mediation and TDRs are the most preferred means of settling disputes amongst the Luhya communities. Primarily, TDR mechanism is preferred due to its legitimacy and easy accessibility of such services.

Procedurally, once a complaint is made, the Respondent is summoned and a date for the hearing of the dispute is set. On the date of the hearing each party presents their side of the case and call witnesses. Thereafter, the Luhya council of elders deliberate and either reach a decision on the same day or a decision is communicated at a later date.

If a disputant is dissatisfied with the decision made, he/she may appeal and considered by the council of elders and if no agreement ensues, the matter may be referred to the chief. 11 out 13 respondents intimated that they are always contented with decisions emanating from the council.

Enforcement of decisions by council consists of social sanctions, for example, shunning, ostracism and in some cases banishment from the community. Enforcement may also take a spiritual form, such as cursing.

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

b. Meru Community

The Meru community in the larger Eastern Region of Kenya has an indigenous institution known as Njuri-Ncheke. Njuri-Ncheke means 'the thinned out' or selected committee with a definite social role. It is a traditional governing council for the entire Meru Community which is made up of five sub-groups: Igembe, Tigania, Imenti, Tharaka and Mwimbi.

The name of Njuri Ncheke is derived from the ritual oath that was taken by all the members of the traditional council. However, only the elders (judges) of the court know this sacred and secret oath. The council has three ranks: the lowest being the Njuri comprised of general elders; the second rank is the Njuri Ncheke, a ruling committee; while the third is the supreme authority, the Njuri Mpingere. Members of the Njuri are selected elders who have passed through a series of special initiation rites and paid the established fees. For all practical purposes, the choice of an elder for Njuri membership depends entirely on the inviting members. The choice generally falls on elders who have distinguished themselves by their brilliance and their wealth.

The study established that Njuri Ncheke has been able to expedite dispute resolution without delay and through a corruption-free process. Also, seven of the ten participants stated that and as contrasted with the formal judicial systems, Njuri Ncheke offers legal service at affordable costs thus making its services accessible to many; with the destitute, orphans and widowers accessing such legal service from Njuri Ncheke for free.

Another achievement cited by the respondents was that Njuri Ncheke promotes peace in the community through maintenance of discipline among the community members. Those who contravene Njuri Ncheke discipline code are punished. It was also established that Njuri Ncheke provides social moderation and respect for social values which are vital in promotion of peace within the community, including giving guidance on various social aspects such as marriage, dowry payment and inheritance so as to help avoid conflicting cultural practices.

In Meru communities today, it is fairly common for the local people to resort to traditional methods, especially when they find it hard to determine their disputes through tête-à-tête talks between the parties themselves or in litigation before formal courts or out-of-court mediation at a chief's baraza (meeting). In such cases, the parties visit the neighbourhood forum of Njuri Ncheke in which traditional oaths can be taken as an alternative method of dispute settlement. In both criminal and civil cases, once the defendants swear with regard to the matter of dispute, they are released from the

burden of proof, whereas the complainants are required to wait for the outcomes of the oath. Some of the cases dealt with by these Njuri Ncheke Houses include boundary disputes, personal debts and petty theft cases.

c. Kikuyu Community

The study focused on the Kikuyu community in the central region of Kenya, specifically within Nyeri County and Kirinyaga County. Within the larger Nyeri County, the field study was carried out among the communities living in Magutu, Iriaini, Kirimukuyu and Karatina municipality within Mathira sub county, Ruringu within Nyeri Municipality, Mahiga and Karima within Othaya sub county, communities in Chaka, Kiganjo within Kieni East as well as those living in Tetu. Within Kirinyaga County, the field study was conducted among the Kikuyu communities living within Gichugu and Ndia constituencies.

The field research revealed that the participants were aware of the existing ADR mechanisms that are available within their communities especially negotiation, mediation, conciliation and traditional dispute resolution mechanisms. The communities also relied on chiefs and other administrative personnel and the police to resolve their disputes. Out of the 16 respondents within these communities, 14 of them stated that they prefer to use ADR mechanisms to resolve their disputes and would not opt to go to court unless there was no satisfactory resolution of the dispute.

In addition, the field report showed that when negotiation fails, mediation is the most preferred mechanism to resolve the dispute utilizing the services of community leaders, church leaders or an elder to resolve the dispute. The use of the clan and community elders is a mechanism that these communities consider and result to for weighty matters and disputes within the family context, land context and some criminal matters. Primarily, TDR mechanism is preferred due to its legitimacy and easy accessibility of such services and the participants are likely to treat it as the final solution to their dispute. Within the Mathira sub country, the participants reported that even in instances where parties take their disputes in court, especially land disputes, the court first seeks to establish if the matter was presented to the elders for resolution before presenting the matter in court. The clan system is valued and respected and is the most commonly used TRDM mechanism used within the Kikuyu community. The clan, *Muhiriga*, is relied upon in deciding personal, family, inter family disputes. This is because the clan system provides a sense of identity, belonging as well as a political and social institution among the *Agikuyu* community.

During a session, once a complaint is lodged, the Respondent is summoned to appear before representatives of their clan and a date for the hearing of the dispute is set. On the date of the hearing each party presents their side of the case and call witnesses. One may nominate a close and respected member of their family to make representation on their behalf. Thereafter, the elders deliberate and reach a decision. In recent times, the elders sometimes involve and incorporate the services of land surveyors in deciding on land disputes. The decision of the elders is considered final. The disputants can appeal the matter to the chief or present their disputes in a formal court of justice.

The enforcement of decisions is usually carried out with the backing and reinforcement of the family institution, *Mbari or Nyumba*, and the clan system, *Muhiriga*. The two being the key institutions surrounding the disputants, guarantee that the sanctions and fines imposed by elders, *Kiama* are paid up and carried out. Tendencies to rush to the chiefs and government administration or courts to settle disputes, other that serious criminal offences, is often viewed with a negative perception. For exemple, a disputant may win in court, but they do so at a social cost; being avoided and shunned as a person who is unreasonable or reasoned with through the use of TDRMs.

Further, the Agikuyu find that the family, elders and the clan systems offer mediation or arbitration services that are efficient, informal, speedy and promote harmony among the people. These ADR systems are cost effective and the cost is equally divided among the disputants prior to the conclusion of the matter. This makes these systems accessible and affordable in comparison to court and advocate fees.

The gaps identified by the participants while using these ADR mechanisms is the lack of inclusion of women within the council of elders. The female participants did not particularly express interest in being members of the council as they consider and accept this to be a male role within the cultural heritage. The challenges facing ADR mechanisms within the communities are the cultural erosion within the community due to urbanization and the non-coercive nature of these mechanisms.

d. Kamba Community

The field study also targeted the Akamba community within the far-flung areas within Kitui County. Specifically, the field group targeted the communities living in Kitui East in areas Endau, Zombe, Nzambani, Chuluni, Mutito and Malalani. The field study also targeted members of this community living in Mutomo in Kitui South, Matinyani in Kitui West and Nuu in Mwingi Central.

The field research revealed that the participants were aware of the existing ADR mechanisms and that these mechanisms were relied upon to resolve majority of the disputes within these communities. These mechanisms are available to this community, including negotiation, mediation and traditional dispute resolution mechanisms. Out of the 11 participants in the field study in this community all of them stated that they use forms of alternative dispute resolution mechanisms to resolve conflict.

Specifically, the field report showed that when disputes arise, the members of the community have a responsibility to resolve the conflict locally using the available mechanisms as the access to other formal justice systems is limited and the ADR mechanisms have legitimacy in the communities as they have been in use since antiquity.

The participants revealed that when a dispute arises and the offenders or disputants are known, the first step is to report to the community elder or leader appointed by the elders. Upon reporting, the elder reports the dispute to the elders of the two disputing parties who summon the parties. The convening of the elders from the two sides of the conflict, *kikao kya atumia* (council of elders) resolve the majority of the disputes to the exception of murder and defilement cases. The field study reported that where the disputants or offenders are yet to be identified the spiritual world through traditional doctors are often resulted to disclose the offenders who will then be summoned by the elders. The spiritual world and the witchdoctors are also instrumental in fostering harmony through resolution of conflicts where an impasse is reached in cases where offenders deny wrong doing or where there is not enough evidence through administration of oaths. These rituals and oaths serve to deter offenders and ascertain the truth so that parties can move from an impasse to resolution of the conflict by elders.

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

In addition, the Akamba community council of elders and other alternative justice systems are effective, expedient and informal, cost effective in comparison to court systems. They are also physically, financially accessible and does not have the limitations of too much procedure. They foster harmony among the community and at the end of each conflict resolution, the disputants must shake hands and eat together as a sign of the end of the ill blood or conflict and renewal of friendship.

5.2 Sectoral Approach to the Use of ADR in Kenya: The Legal and Institutional Framework

Since the promulgation of the current Constitution of Kenya 2010, new legislation has been enacted, in order align them with Article 159 of the constitution which introduces the notion of use of alternative forms of dispute including reconciliation, mediation and traditional conflict resolution mechanisms as part of the legal framework on access to justice in Kenya. Notably, the current Constitution of Kenya broadened the applicability of ADR and the acceptance of ADR means of conflict resolution in various fields.

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

5.2.1 Electoral Justice and ADR

Documented reports from past research in Kenya shows that election-related violence has claimed many lives and displaced many more.[111] The formal justice system has done little to address this problem. As a result, there has been recognition of the need for alternative means of addressing these problems.

The Elections Act 2011 envisages Independent Electoral and Boundaries Commission (IEBC) peace committees using mediation to manage disputes between political parties.[112] The Supreme Court Rules 2011 allows the Supreme Court to refer any matter for hearing and determination by alternative dispute resolution mechanisms.[113]

[111] Melody Hood, Kenya's National Action Plan: "To Involve Women is to Sustain Peace" (Inclusive Security, August 27, 2015). Available at https://www.inclusivesecurity.org/2015/08/27/kenyas-national-action-plan-to-involve-women-is-to-sustain-peace/

[112] Section 17 (3) of the Elections Act 2011.

[113] Rule 11 of the Supreme Court Rules 2011.

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

i. ADR in Family Law

a. Marriage Act 2014

The Marriage Act 2014 is the current marriage regime in Kenya. This Act repealed pre-existing legislation on various types of marriages.[114] All marriages registered under the Act have the same legal status. The Act recognizes the following marriages; Christian marriages, Civil marriages, customary marriages, Islamic marriages and Hindu marriages.

Part V deals with customary marriages and envisages rules to govern customary marriages. Part X of the Act provides for resolution of matrimonial disputes and specifies the relevant laws to be applied depending on the type of marriage. Section 68 provides for mediation of disputes in customary marriages. It stipulates that parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage.

b. Matrimonial Property Act

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

ii. Children's Matters and Juvenile Justice System

The Juvenile Justice system is mostly benign as it focuses on rehabilitation and not punishment.

The Children's Act, 2001 domesticated the provisions of the United Nations Convention on Rights of the Child and the African Charter on the Rights and Welfare of the Child but this Act has been silent on the issue of diversion.

Diversion refers to the use of alternative methods of holding children accountable for their unlawful acts or omissions resulting in harm to other persons; removing the child from the criminal justice

[114] The Marriage Act, cap 150, the African Christian Marriage and Divorce Act. Cap 151, the Matrimonial Causes Act. Cap 152, the Subordinate Court (Separation and Maintenance) Act. Cap 153, the Man Marriage and Divorce Registration Act. Cap 155, the Mohammedan Marriage Divorce and Succession Act. Cap 156, the Hindu Marriage and Divorce Act. Cap 157

system into approved programmes that make them accountable for their actions. Through diversion, the Children courts seeks to encourage symbolic restitution by the offending child as compensation for the harm caused to the aggrieved person or victim and also promote reconciliation between the child and the victims affected by the delinquent conduct of the child.

a. Children Act, 2001

The *Children Act, 2001*[115] was enacted to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes.

The Act empowers the Cabinet Secretary in charge to appoint a Director of Children's Services[116], and whose main function is to safeguard the welfare of children and shall in particular, assist in the establishment, promotion, co-ordination and supervision of services and facilities designed to advance the well-being of children and their families.[117] In addition, the Director is also empowered to mediate, in so far as permitted under this Act, in family disputes involving children, and their parents, guardians or other persons who have parental responsibility in respect of the children, and promote family reconciliation.[118]

b. The National Council on Administration of Justice (*NCAJ*) Special Task Force on Children's Matters

The NCAJ Special Taskforce on children matters was gazetted in January 2016[119] with the following terms of reference: To review and report on the status of children in the administration of justice; Examine the operative policy and legal regimes as well as the emerging case law to identify the challenges and make appropriate recommendations; Assess, review, report and recommend on the service standards of each of the justice sector institutions with respect to children matters; Prepare

[115] No. 8 of 2001, Laws of Kenya.
[116] Sec. 37, Children Act, 2001.
[117] Sec. 38(1), Children Act, 2001.
[118] Sec. 38(2)(m), Children Act, 2001.
[119] The Kenya Gazette Notice, Vol. CXVII-No. 8, Gazette Notice No. 369, 29th January, 2016, p. 154.

draft rules of procedure for enforcement of fundamental rights of children; Conduct a situation analysis of the existing infrastructure and equipment in the criminal justice system in regard to children matters and develop guidelines for the monitoring, supervision and inspections for holding facilities; Develop Guidelines for Child Protection Units and propose mechanisms for the establishment of Child Police Unit in the National Police Service; Develop the Court Practice Directions on Children cases; Develop the Diversion Regulations; Develop a Policy on Mandatory Continuous Professional Development program on child rights for justice and examine and review the training curricula on children; Develop policies on re-integration of children accompanying imprisoned mothers; Develop policies on separated cells for children (include guidelines/minimum standards of infrastructure of children
facilities); Development of the guidelines for children with special needs; Develop guidelines for inclusion of children with special needs in the Juvenile Justice Actors procedure to be included in the Practice guidelines; Develop a coordinated sensitization and awareness strategy; Develop a form for presenting the P&C cases in court (to be included in the court practice directions); and Improve co-ordination of the Juvenile Justice Actors at the National and County level.[120]

In a meeting with the NCAJ Special Taskforce on children matters, the members of the Taskforce highlighted their advocacy efforts (in line with the terms of reference) for use of ADR as a tool for protection of children and calls for special training of ADR practitioners interested in family law and children matters in order to ensure their sensitivity to the principle of best interests of the child and avert trauma for the children.

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

The Taskforce also played a key role in coming up with the draft Children Bill, 2017, which seeks to introduce the National Council of Children Services whose tasks will include, amongst others, to mediate in family disputes involving children, and their parents, guardians or other persons who have parental responsibility in respect of the children and promote family reconciliation.

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

The Children Bill, 2017 has also made provision for diversion and if passed into law will impact the juvenile system positively.

c. Challenges in Use of ADR in Children Matters

According to the NCAJ Special Taskforce on children matters, there are a number of challenges affecting access to justice through ADR in children matters, and these include but not limited to: lack of proper training of CUCs members on plea bargaining agreements; lack of pro bono lawyers; most of the Court Annexed Mediation program accredited ADR practitioners are currently mostly found in Nairobi and Mombasa areas only. However, regarding this last challenge, it was pointed out that the current Deputy Registrar in charge of Court Annexed Mediation program has been putting in place measures aimed at ensuring countrywide training and accreditation of practitioners. It was also pointed out that there were over 200 applications from interested practitioners from across the country.

The current Chairperson, *NCAJ- Special Task Force on Children* Matters, Hon. Lady Justice Martha Koome also believes, and rightly so, that lawyers have a role to play and urged that they should continually be sensitised on the need to promote reconciliation in family and children matters and use ADR as the first port of call in order to uphold and protect the rights and best interests of the children.

5.2.3 ADR in Commerce and Finance

a. *Investment Disputes Convention Act*

b. The *Investment Disputes Convention Act*[121] was enacted to give legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States. Section 1 of the Act adopts *Article* 1 of the ICSID Convention which established the International Centre for Settlement of Investment Disputes whose purpose is provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of the Convention.

c. Arbitration Act, 1995

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

The *Arbitration Act, 1995* provides for domestic arbitration and international arbitration of mainly commercial nature.[122]

d. Court Annexed Mediation

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

e. Consumer Protection Act, 2012

The *Consumer Protection Act, 2012*[123]was enacted to provide for the protection of the consumer prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto. One of the purposes of this Act is to promote and advance the social and economic welfare of consumers in Kenya by providing a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions.[124]

The Consumer Protection Act also provides for class proceedings and states that a consumer may commence a proceeding on behalf of a class of persons or may become a member of such class of persons in a proceeding in respect of a dispute arising out of a consumer agreement despite any term or acknowledgment in the consumer agreement or other agreement that purports to prevent or has the effect of preventing the consumer from commencing or becoming a member of a class proceeding.[125] In addition, when a dispute that may result in a class proceeding arises, the consumer, the supplier and any other person involved in it may agree to resolve the dispute using any procedure that is available in law.[126] A settlement or decision that results from the procedure agreed to under subsection (2) shall be binding on the parties.[127]

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

[122] Arbitration Act, 1995, sec. 3(2) (3).
[123] No. 46 of 2012, Laws of Kenya.
[124] Sec. 3(4) (g), *Consumer Protection Act, 2012.*
[125] Sec. 4(1), *Consumer Protection Act, 2012.*
[126] Sec. 4(2), *Consumer Protection Act, 2012.*
[127] Sec. 4(3), *Consumer Protection Act, 2012.*

Court given under this Act.'[128] It also provides that 'despite subsection (1), after a dispute over which a consumer may commence an action in the High Court arises, the consumer, the supplier and any other person involved in the dispute may agree to resolve the dispute using any procedure that is available in law'.[129] 'A settlement or decision that results from the procedure agreed to under subsection (2) is as binding on the parties as such a settlement or decision would be if it were reached in respect of a dispute concerning an agreement to which this Act does not apply'.[130]

The Act also established[131] the Kenya Consumers Protection Advisory Committee whose functions include, *inter alia:* creating or facilitating the establishment of conflict resolution mechanisms on consumer issues, investigation of any complaints received regarding consumer issues, and where appropriate, referring the complaint to the appropriate competent authority and ensuring that action has been taken by the competent authority to whom the complaint has been referred; and working in consultation with the Chief Justice, County governors and other relevant institutions on the establishment of dispute resolution mechanisms[132].

f. Tax Procedures Act, 2015

The *Tax Procedures Act, 2015*[133] was enacted to harmonise and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected proposes. The Act allows out of court or tribunal settlement of tax disputes and provides that 'where a Court or the Tribunal permits the parties to settle a dispute out of Court or the Tribunal, as the case may be, the settlement shall be made within ninety days from the date the Court or the Tribunal permits the settlement'.[134] Where parties fail to settle the dispute within the period specified in subsection (1), the dispute should be referred back to the Court or the Tribunal that permitted the settlement.[135]

[128] Sec. 88(1), *Consumer Protection Act, 2012.*
[129] Sec. 88(2), *Consumer Protection Act, 2012.*
[130] Sec. 88(3), *Consumer Protection Act, 2012.*
[131] Sec. 89(1), *Consumer Protection Act, 2012.*
[132] Sec. 90(f) (g), *Consumer Protection Act, 2012.*
[133] No. 29 of 2015, Laws of Kenya.

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

[135] Sec. 55(2), *Tax Procedures Act, 2015*.

g. Tax Appeals Tribunal Act, 2013

The *Tax Appeals Tribunal Act,* 2013[136] was enacted to make provision for the establishment of a Tribunal; for the management and administration of tax appeals, and for connected purposes.

A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal, provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings.[137]

Notably, the Act provides that 'the parties may, at any stage during proceedings, apply to the Tribunal to be allowed to settle the matter out of the Tribunal, and the Tribunal should grant the request under such conditions as it may impose.[138] However, the parties to the appeal should report to the Tribunal the outcome of settlement of the matter outside the Tribunal.[139]

h. Use of Alternative Dispute Resolution (ADR) for settlement of tax disputes by Kenya Revenue Authority (KRA)

This subsection offers an overview of the procedures of settling tax disputes as carried out by the KRA, based on the aforementioned Tax Procedures Act, 2015 and Tax Appeals Tribunal Act, 2013.

i. How tax disputes arise

A tax assessment for which the taxpayer is expected to respond within 30 days.

If there arises a Taxpayer's Objection, the Commissioner has three options namely;

1. To agree with the taxpayer wholly and vacate the assessment altogether, in which case there is no dispute;
2. To partially agree with the taxpayer and amend the assessment accordingly;
3. To totally disagree with the taxpayer and confirm the assessment;

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

[137] Sec. 12, *Tax Appeals Tribunal Act,* 2013.

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

[139] Sec., 28(2), *Tax Appeals Tribunal Act,* 2013.

4. The Commissioner confirms the tax assessment in 2&3 above; or
5. Commissioner issues an objection decision, after which a tax dispute crystalizes.

ii. Right of appeal

Following issuance of objection decision, a taxpayer (TP) is expected to;

a. To file an intention to appeal the commissioner's decision at the Tax Appeal Tribunal (TAT) within thirty (30) days;

b. To file a Memorandum of Appeal and Statement of Facts, within fourteen (14) days;

If TP is not satisfied at TAT, can appeal to the Courts.

Subsequent to the above, the taxpayer may seek leave from TAT/Court to engage in the ADR process.

iii. Parties to an ADR Process and Role of Parties

a. Taxpayer;
b. Commissioner; and
c. Facilitator/mediator – Chairs the ADR discussions.

- Parties are expected to: Uphold and maintain decorum, and confidentiality;
- Participate in all discussions fairly and diligently;
- Make full disclosure of material facts relevant to the dispute;
- Attend all scheduled meetings;
- Strictly adhere to the agreed timelines.

iv. The ADR Process in resolving Tax Disputes

a. Application for ADR to ADR Division in KRA;

b. Determination of suitability of tax dispute;

c. Communication to taxpayer of the outcome of the suitability test;

d. Commencement of ADR meeting;

e. ADR settlement agreement is prepared and executed

f. Consent is drawn and filed at TAT or Courts.

v. Collapse of ADR for Tax Disputes

ADR discussions can be terminated for the following reasons:

- Where either party opts out of ADR;
- Where parties unanimously agree to do so;
- Where a party is of the opinion that the dispute cannot be resolved due to undue conduct on the part of the other party;
- A party consistently fails to honor ADR meeting invitations;
- Where a party fails to carry out a reasonable request by the facilitator with no valid justification.

vi. **Disputes appropriate for ADR**

All Tax Disputes can be resolved through ADR with the following exceptions;

a. The settlement would be contrary to the Constitution, the Revenue Laws or any other enabling Laws;

b. The matter borders on technical interpretation of law;

c. It is in the public interest to have judicial clarification of the issue;

d. There are undisputed judgments and rulings; or

e. A party is unwilling to engage in ADR process.

vii. **What are the ADR timelines?**

ADR Timelines in a Case pending Before the Tribunal/Court

- 90 days as provided for in Tax Procedure Act (TPA) section 55;
- Court initiated ADR - dependent on Court timelines given.

viii. Challenges

a. Perception issues on Neutrality/independence of ADR Facilitators/mediators.
b. Lack of awareness of ADR to resolve tax disputes by the taxpayers and the general public

ix. Benefits of ADR in resolving Tax Disputes

a. Voluntary process
b. Friendly
c. Accessible to all
d. Cost effective in terms of;
   i. engaging the Tax Agents and Lawyers;
   ii. self-representation by the taxpayer during ADR process;
e. Confidential
f. Without Prejudice
g. Improve tax compliance
h. Maintains good relationships between KRA & Taxpayer.

x. **Where to find ADR for Tax Disputes**

Physical Location – 7th floor of Times Tower

Contacts: ADR Customer care – 0709013231, 0709013027

Email address – adr@kra.go.ke

5.2.4 Environment and Land Based Conflicts

The Environment and Land Court Act 2011[140] establishes the Environment and Land Court, as a superior court of record with the status of the High Court.[141] The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.[142] Specifically, the Court has power to hear and determine disputes—(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.

However, in addition to the foregoing and even long before the formal Court system was established, traditional conflict resolution mechanisms have always been employed in resolving environmental conflicts where the council of elders, peace committees, land adjudication committees and local environmental committees play a pivotal role in managing conflicts.[143]

Environmental conflicts have been perceived as a symptomatic manifestation of global model of economic development based on the exploitation of natural resources, disregard for people's rights and lack of social justice.[144] Furthermore, there are about four key factors that contribute in the

[140] Act No. 19 of 2011, Laws of Kenya.

Preamble: An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

[141] Sec. 4.

[142] Sec. 13(1).

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

[144] Ibid.

creation of environmental conflict: poverty, vulnerable livelihoods, migration and weak state institutions – all problems that are present at the local level.[145]

Environmental factors often interact with the visible drivers of ethnic tensions, political marginalisation and poor governance to create a causal framework that allows degradation to affect livelihoods, interests and capital – which, in turn, lead to conflict.[146]

Natural resource based conflicts are defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.[147] They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource-based conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.[148]

Natural resource-based conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests. rights, access, use and ownership) and stakes (economic, political. environmental and socio-cultural).[149] As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.[150] Despite this, there are key principles such as, inter alia, participatory approaches[151], equitable representation, capacity building,

[145] Barnett, J., & Adger, W. N., 'Climate change, human security and violent conflict,' *Political Geography*, Vol.26, 2007, pp. 639-655, at p.643 (As quoted in Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/].

[146] Akins, E., "Environmental Conflict: A Misnomer?" *Environment, Climate Change and International Relations*: 99, available at http://www.e-ir.info/2016/05/12/environmental-conflict-a-misnomer/ [Accessed on 18/10/2017]; See also Sosa-Nunez, G. & Atkins, E., *Environment, Climate Change and International Relations*, (E-International Relations, 2016). Available at http://www.e-ir.info/wp-content/uploads/2016/05/Environment-Climate-Change-and-International-Relations-E-IR.pdf [Accessed on 18/10/2017].

[147] Funder, M., et al, 'Addressing Climate Change and Conflict in Development Cooperation Experiences from Natural Resource Management,' p. 17, (Danish Institute for International Studies, DIIS, 2012), available at https://www.ciaonet.org/attachments/20068/uploads [Accessed on 10/01/2016].

[148] Toepfer, K., "Forward", in Schwartz, D. & Singh, A., Environmental *conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999). p.4.

[149] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' *Annex C - Summary of Discussion Papers*, (FAO), available at http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage [Accessed on 2/01/2016].

[150] Ibid.

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

context of the conflict and increased access and dissemination of information, that must always be considered.[152]

Natural resource-based conflicts are sensitive considering that they arise from the need for people to satisfy their basic needs.[153] To them, justice would mean affording them an opportunity to get what they feel entitled to and anything less, means that they resort to other means of possessing the same. This way, conflicts become inevitable. Conflict resolution mechanisms such as negotiation and mediation afford the parties an opportunity to negotiate and reach a compromise agreement, where all sides get satisfactory outcome.[154] This is particularly important in ensuring that there will be no future flare-up of conflict due to unaddressed underlying issues.[155]

Natural resource-based conflicts in Kenya are still prevalent and a cause of much concern. It has been noted that the contribution of the issue of land to violent conflicts in Kenya is due to the way land is "treated with fervent sentimentality and sensitivity and in many ways considered explosive."[156]

The emergence of multi-party politics in Kenya was perceived by many communities as a move to marginalize and dispossess them of land. The multi-party politics were thus influenced by tribal considerations with their roots in economic and considerations making it easier to incite politically based tribal violence.[157]

Land clashes that occurred in Kenya in 1992 and 1997 have been attributed to inequitable allocation of land resources and poor government policies and programmes perceived as favouring some factions at the expense of others. The issues of the use of environmental resources underlie the numerous conflicts that have occurred in Kenya. The post-election violence in 2007-08 can be traced, to a large extent, to contests over access to and use of natural resources in Kenya and the harboured feelings of alienation and discrimination in access and benefit sharing of the accruing benefits.[158]

[152] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.
[153] FAO, 'Negotiation and mediation techniques for natural resource management,' available at http://www.fao.org/3/a-a0032e/a0032e05.htm [Accessed on 07/02/2016].
[154] Warner, M., 'Conflict Management in Community-Based Natural Resource Projects: Experiences from Fiji and Papua New Guinea,' *Working Paper No. 135*, (Overseas Development Institute, April, 2000), p. 16.
[155] See generally Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management, op. cit.
[156] Government of Kenya, et al, Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 31st July, 1999.
[157] Ibid.
[158] See Machel, G. & Mkapa, B., *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

Giving voice to communities and explaining the details of these conflicts helps them regain power in decision-making process and create a model of active democracy enabling them to help protecting their own territory and environment.[159] It is against this background that ADR mechanisms and particularly negotiation and mediation should be explored as they present in realising the goal of effectively managing natural resource-based conflicts in Kenya. Mediation is applied to the resolution of environmental conflicts, like land boundary conflicts, at a very informal level. Parties with such a conflict will bring it, for instance, to a panel of elders who are respected members of the society. They will listen to the parties and encourage them to come to a consensus on those issues. This ensures access to justice for the aggrieved parties, as the consensus reached is binding and the society has widely accepted internal enforcement mechanisms. This process has been widely applied by many communities in Kenya. It is a safe method as it preserves the relationship of the parties as it was before the conflict. Any legal framework would therefore only be for purposes of ensuring that this is done within the confines of the formal framework on access to justice.

a. Constitution of Kenya 2010

In order to realize sustainable, equitable, efficient and productive management of land, the constitution provides for the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the constitution.[160] Further, one of the functions of the National Land Commission established under Article 67 of the constitution is to encourage the application of traditional conflict resolution mechanisms in land conflicts.[161]

b. Environment and Land Court Act 2011

The Environment and Land Court Act 2011 allows the court to adopt and implement on its own motion with the agreement or at the request of the parties any other appropriate means of alternative dispute resolution including conciliation, mediation, and traditional conflict resolution mechanisms in accordance with Article 159 (2) (c) of the Constitution.[162]

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[159] CDCA, 'Why environmental conflicts?' op cit.
[160] Ibid., Article 60 (1) (g).
[161] Ibid., Article 67 (2) (f).
[162] Section 20 of the Environment and Land Court Act, 2011; See *Kennedy Moseti Momanyi v Gilta Investment Co. Ltd & another* [2017] eKLR, Case No. 16 of 2015:

> *Para. 4. I have considered the entire pleadings and the written consent signed by the plaintiff's counsel and defendant's counsel. I am conscious of Article 159 (2) (c) of the Constitution of Kenya 2010 and Section 20 of the Environment and Land Court Act, 2012 on the promotion of alternative forms of dispute resolution. I note that the consent is relevant thereto.*

c. Land Act 2012

The Land Act is the substantive regime for matters pertaining to land in Kenya. It was enacted to harmonize land regimes. Section 4 of the Land Act lays down the guiding values and principles of land management and administration. These include:

(a) equitable access to land;
(b) security of land rights;
(c) sustainable and productive management of land resources;
(d) transparent and cost-effective administration of land;
(e) conservation and protection of ecologically sensitive areas;
(f) elimination of gender discrimination in law, customs and practices related to land and property in land;
(g) *encouragement of communities to settle land disputes through recognized local community initiatives*;
(h) *participation, accountability and democratic decision making within communities, the public and the Government*;
(i) technical and financial sustainability;
(j) affording equal opportunities to members of all ethnic groups;
(k) non-discrimination and protection of the marginalized;
(l) democracy, inclusiveness and participation of the people; and
(m) alternative dispute resolution mechanisms in land dispute handling and management.

The Land Act 2012 also encourages communities to settle land disputes through recognized local community initiatives and using alternative dispute resolution mechanisms.[163] It promotes the application of ADR mechanisms which include traditional dispute resolution mechanisms within the framework of providing access to justice especially in disputes involving communal land.

d. Community Land Act 2016

The Community Land Act 2016[164] was enacted to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land.[165] The Act provides for mechanisms for settlement of community land

Para. 5. I accordingly adopt the consent dated 25th February 2015 as the Judgment of this court. The dispute is hereby marked as fully settled. Per G. M. A. Ongondo, J.

[163] Section 4 of the Land Act 2012.
[164] No. 27 of 2016, Laws of Kenya.
[165] Ibid.

disputes, in accordance with the constitutional provisions.[166] Section 39(1) of the Community Land Act provides that a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land. Section 41(1) thereof also provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration. Additionally, where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of Arbitration Act relating to the appointment of arbitrators shall apply.[167]

5.2.5 Civil Justice and ADR Mechanisms

a. High Court (Organization and Administration) Act, 2015

The High Court (Organization and Administration) Act, 2015[168] was enacted to give effect to Article 165(1) (a) and (b) of the Constitution; to provide for the organization and administration of the High Court of Kenya and for connected purposes. The Act provides that 'in civil proceedings before the Court, the Court may promote reconciliation amongst the parties thereto and shall encourage and permit the amicable settlement of any dispute'.[169] The Court is to, in relation to alternative dispute resolution be guided by the Rules developed for that purpose.[170] Furthermore, 'nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution'.[171] 'Where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall by order, stay the proceedings until the condition is fulfilled'.[172]

b. Magistrates' Courts Act, 2015

[166]Ibid.
[167]Section 41(2).
[168] High Court (Organization and Administration) Act, No. 27 of 2015, Laws of Kenya.
[169] Sec. 26(1), High Court (Organization and Administration) Act, 2015.
[170] Sec. 26(2), High Court (Organization and Administration) Act, 2015.
[171] Sec. 26(3), High Court (Organization and Administration) Act, 2015.
[172] Sec. 26(4), High Court (Organization and Administration) Act, 2015.

The *Magistrates' Courts Act*, 2015[173] was enacted to give effect to Articles 23(2) and 169(1)(a) and (2) of the Constitution; to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. In exercise of its judicial authority, a magistrate's court is to be guided by the principles specified under Articles 10, 159 (2) and 232 of the Constitution.[174] The objective of this Act is to enable magistrate courts to facilitate just, expeditious, proportionate and accessible judicial services in exercise of the criminal and civil jurisdiction in this Act or any other written law.[175] Reference of matters for ADR mechanisms as contemplated under the Constitution can go a long way in realizing this objective.

c. The Use of Alternative Dispute Resolution in Tribunals

Tribunals are bodies established by Acts of Parliament to exercise judicial or quasi-judicial functions. They supplement ordinary courts in the administration of justice. Tribunals, however, do not have penal jurisdiction. Tribunals, like the courts, have to respect the Bill of Rights in their decisions and not be repugnant to justice and morality or be inconsistent with the Constitution or other laws of the land. Most tribunals are subject to the supervision of the High Court.[176] Although this Report only contains information on the use of ADR by select tribunals, the list of existing tribunals includes: Political Parties Disputes Tribunal – PPDT; The National Environment Tribunal; Sports Disputes Tribunal; Cooperative Tribunal; Auctioneers Licensing Board; Water Appeals Board; HIV and AIDS Tribunal; Public Private Partnership Petition Committee; Rent Restriction Tribunal; Business Premises Rent Tribunal; Competition Tribunal; Standards Tribunal; Transport Licensing Appeals Board; Industrial Property Tribunal; and the Energy Tribunal.[177]

1) Sports Disputes Tribunal

i. Introduction

The Sports Dispute Tribunal was established under the Sports Act No. 25 of 2013 and has the jurisdiction to determine appeals against decisions made by national sports organizations, umbrella

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

[174] *Magistrates' Courts Act*, sec. 3.

[175] *Magistrates' Courts Act*, sec. 4.

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

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

sports bodies and associations whose rules specifically allow for appeals to be made to the Tribunal, other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and appeals from decisions of the Sports Registrar.

The Tribunal, in resolving disputes may employ alternative dispute resolution methods (ADR) as well as expertise and assistance where necessary. The Tribunal has so far resolved several cases filed using ADR to the delight of the parties involved.

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ii. Background

The Sports Act No. 25 of 2013 that commenced on 1st August, 2013 was enacted to harness sports for development, encourage and promote drug free sports and recreation; to provide for establishment of sports institutions, facilities, administration and management of sports in the country.

An analysis of the cases filed at the Tribunal indicates that disputes experienced in the sports arena are governance related. The Sports Act of 2013 requires Sports Federations to register with the Sports Registrar and abide by the dictates of the Act for instance having legally elected office bearers, conducting federation issues transparently and accordance to the Act, making regular returns to the registrar among others. Prior to the Sports Act of 2013, Federations were registered under the Societies Act which was general hence most federations got away with issues related to governance and factions were the order of the day

iii. Examples of cases resolved using ADR by the Sports Tribunal

1. SDT No. 12 of 2015; Mathews Opwora and others v Asava Kadima and others

The case involved the management of AFC Leopards SC in the Kenya Premier League. Two factions were wrangling over its management. After the decision, the tribunal appointed Mr. John Ohaga (chairman) to arbitrate and bring the 2 factions together. The arbitrator formed an Interim Management Committee drawing membership from the 2 factions. The committee with the guidance of the arbitrator paved the way and held successful elections that ushered in new office bearers hence resolving the long dispute.

2. SDT No. 27 of 2016; Chess Kenya v Kenya National Sports Council.

The tribunal through its appointed arbitrator, Mr. John Ohaga brought the 2 factions together and once again successfully guided them to elections resolving the long-standing dispute.

3. SDT No.21 of 2017; Conrad Thorpe v Kenya Swimming Federation and others.

This is latest case and the tribunal is guiding the Kenya Swimming Federation to resolve the long-standing dispute. So far, great strides have been made and elections have been planned.

iv. Challenges experienced

1. The tribunal has only one qualified arbitrator/ mediator among the 9 members appointed. This means a heavier work load limiting the number of disputes that can be resolved

2. Inadequate budget. This mode of resolving disputes involves more sessions outside the normal permitted sittings. It also involves supervising activities like competitions and elections which the current budget cannot sustain.

v. Recommendations

1. Appointment of more members with arbitration/ mediation qualifications and experience.

2. The ADR in the tribunals should be incorporated in the main ADR frame work of the Judiciary and arbitrators compensated adequately to entrench the practice.

b. Transport Licensing Appeals Board

The Transport Licensing Appeals Board (TLAB) is a body established under section 39(1) of the National Transport and Safety Authority Act, 2012[178], which may, on any appeal, affirm or reverse the decision of the Authority, or make such other order as the Board considers necessary and fit.[179]

Although they have embraced ADR, according to communication from the Board[180], during the financial year 2017/2018, the TLAB only had one case employing ADR. This was case No. 60 of

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

[179] Sec. 39(5), National Transport and Safety Authority Act, No. 33 of 2012.

[180] Memo from Transport Licensing Appeals Board Secretary to Ag. Registrar of Tribunals, MOT/TLAB/003 VOL. 1 (34), dated 28th June 2018.

2018, Zamzam Forty-Five Sacco, which Sacco had appealed against the National Transport and Safety Authority (NTSA) decision to blacklist their vehicles. NTSA sought ADR through mediation which was granted. Both parties resolved to have the Sacco continue normal operations.

The Board considers ADR as important for expeditious justice execution since it fosters cooperation between parties. The Board however, recommends the following:

1. There should be public awareness creation so as to exploit the use of ADR.

2. Training is required for Boards/Tribunals on ADR mechanisms.

5.2.6 Criminal Justice and ADR Mechanisms

The *United Nations Principles on Access to Legal Aid in Criminal Justice Systems*[181] provides for principles and guidelines that are based on the recognition that States should undertake a series of measures that, even if not strictly related to legal aid, can maximize the positive impact that the establishment and/or reinforcement of a properly working legal aid system may have on the proper functioning of the criminal justice system and on access to justice.[182]

Section 176 of the Criminal Procedure Code[183] provides for the promotion of reconciliation. It encourages and facilitates the settlement of criminal disputes in an amicable way. Reconciliation is promoted in proceedings for common assault, any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court. However, such reconciliation efforts must be initiated before the court makes its final decision or discharged its duty in the matter. However, it should be noted that the use of ADR in criminal justice for serious cases involving capital offences is still a matter in contention especially with decision of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, where a murder suspect was set free on the request of the victims' Counsel citing grounds that an out of Court agreement had ensued. The decision has also been cited[184] in the more recent decision of *Republic v*

[181] Resolution A/RES/67/187, December 2012.
[182] Ibid.
[183] Criminal Procedure Code, Cap 75, Laws of Kenya.

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

Ishad Abdi Abdullahi [2016] eKLR[185] where the Director of Public Prosecutions through prosecuting counsel requested the court to allow the discontinuance of the criminal proceedings under Article 157 of the Constitution and Section 25(1) of the Office of the Director of Public Prosecutions Act, relying on an agreement reached between two families, the family of the deceased on the one hand, and the family of the accused on the other hand. The argument was that they had met and decided to compromise the matter through blood compensation as allowed under custom and Islamic law. The Court ruled that 'considering that the two families of the victim and the accused herein, had agreed and compensation had been paid already, the request of the Director of Public Prosecutions was justified. It thus allowed the request for discontinuance of the criminal proceedings herein. The criminal proceedings were therefore discontinued and the accused discharged forthwith.

These two cases have set the ball rolling and the jury is still out there on the suitability of ADR in serious criminal cases involving capital offences.

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

Notably, the current law on criminal justice in Kenya has always promoted reconciliation in smaller matters. Arguably, the only challenge was lack of an implementation framework, which lacuna brought about the Criminal Procedure (Plea Bargaining) Rules 2018. The courts have also been using reparation and reconciliation, amongst other forms of ADR, with the only challenge being that parties do not at times understand at what point they should approach the courts for referral to ADR or stay of proceedings to allow for ADR. Sometimes, the parties approach the courts with the request too late in the process, as evidenced in some cases such as *Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR*, where Lady Justice Lesiit pointed out to the parties that while the court appreciated the good will of the accused family and that of the deceased in their quest to have the matter settled out of court, the charge against the accused was a felony and as such reconciliation as a form of settling

[185] Criminal Case No. 32 of 2012.

the proceedings is prohibited. Furthermore, this request was being made too late in the day, when the case had been heard to its conclusion. The application was therefore disallowed. This case captured the two challenges of using ADR in criminal matters, namely, prohibition of ADR in some matters and failure of parties to understand the stage at which they should seek ADR in criminal matters.

The Criminal Procedure (Plea Bargaining) Rules 2018 gazetted in February 2018 set out the circumstances in which plea-bargaining negotiation can be conducted. However, these rules are yet to be fully adopted within the criminal justice system as they are yet to achieve wide acceptance among the participants within this justice system due to allegations of lack of wider participation by stakeholders. The system also encourages reparations of the victims of crimes through compensation from the offenders.[186] There has also been some concerns that some of the provisions therein may not be applicable to the local setup.

5.2.7 Employment and Labour

a. Industrial Court Act, 2011

The *Industrial Court Act*[187] was enacted to establish the Industrial Court as a superior court of record; to confer jurisdiction on the Court with respect to employment and labour relations and for connected purposes.

The *Industrial Court Act, 2011* contains provisions allowing the court to stay proceedings and refer the matter to conciliation, mediation or arbitration.[188] The court may adopt alternative dispute resolution and traditional conflict resolution mechanisms as envisaged in Article 159 of the constitution.[189]

Section 15 of the Act provides for use of Alternative dispute resolution in the following words:

> (1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means

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

[187] No. 20 of 2011, Laws of Kenya.
[188] Section 15 (4) of the Industrial Court Act, 2011.
[189] Ibid, Section 15 (3).

of dispute resolution, including internal methods, *conciliation*, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.

(2) The Court may refuse to determine any dispute, other than an appeal or review before the Court, if the Court is satisfied that there has been no attempt to effect a settlement pursuant to subsection (1).

(3) Subject to any other written law, a certificate issued by a conciliator accompanied by the record or evidence of the minutes of the conciliation meetings giving reasons for the decisions as arrived at by the conciliator, shall be sufficient proof that an attempt has been made to resolve the dispute through conciliation, but the dispute remains unresolved.

(4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

(5) In the exercise of its powers under this Act, the Court may be bound by the national wage guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.

5.2.8 Energy and Mining Sectors Disputes Settlement

a. Energy Regulatory Commission (ERC)

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

b. Energy (Energy Management) Regulations, 2012

The *Energy (Energy Management) Regulations, 2012* provide that where a dispute arises between an energy facility owner or occupier and the energy auditor, the dispute shall be referred to the Commission for determination. A person aggrieved by a decision of the Commission may appeal to the Energy Tribunal.[190]

[190] *Energy (Energy Management) Regulations, 2012,* Regulation 11(1) (2).

c. Energy (Complaints and Dispute Resolution) Regulations, 2012

The *Energy (Complaints and Dispute Resolution) Regulations, 2012*[191] provide the means by which the Commission can help resolve complaints and disputes between a licensee and its customers where any party remains dissatisfied after exhausting the licensee's complaints resolution procedures.[192] Where a dispute has been referred to the Commission under the Rules, the Commission is required to appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment.[193] Regulation 15 thereof requires the Commission to identify and maintain a database of persons who are skilled in alternative dispute resolution techniques and who are experts in various fields relevant to energy matters, from among whom the Commission may from time to time select an expert or constitute a Dispute Resolution Panel on such terms and conditions as the Commission may determine, to assist it in the resolution of disputes. Under Regulation 16, the Commission may refer the dispute filed with it to an by experts, expert or to a Dispute Resolution Panel, appointed from among persons in the database maintained pursuant to regulation 15 in the manner described in paragraph (2).

The costs of the dispute resolution process are, unless the Commission decides otherwise, to be borne equally by, the parties.[194]

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

The First Schedule to the *Energy (Complaints and Dispute Resolution) Regulations*, 2012 provides for Guidelines for Complaints Handling Procedures. They provide that procedures for dealing with complaints relating to an) undertaking or activity performed pursuant to a licence or permit under the Act must explain: how other persons can gain access to the procedures; how the procedures work; the timeframes within which the procedures may he carried out; the complainant's right to access the

[191] Published as Legal Notice No. 42, Kenya Gazette Supplement No.49 (Legislative Supplement No. 15) on May 25, 2012.
[192] Energy Regulatory Commission, 'Electricity Regulations,' available at https://www.erc.go.ke/images/docs/Energy-Complaints%20and%20Disputes%20Resolution-Regulations%202012.pdf
[193] Energy (Complaints and Dispute Resolution) Regulations, 2012, Regulation 7(3).
[194] Regulation 16(3), Energy (Complaints and Dispute Resolution) Regulations, 2012.

Commission if dissatisfied with the respondent's decision or the way it has been reached; and any other matter of relevant importance.[195]

In preparing the procedures contemplated in paragraph I, the guiding principles are that those procedures shall to the extent possible- be simple, quick and inexpensive; preserve or enhance the relationship between the parties; take account of the skills and knowledge that are required for the relevant procedures; observe the rules of natural justice; place emphasis on conflict avoidance: and encourage resolution of complaints without formal legal representation or reliance on legal procedures.[196]

d. Mining Act 2016

The *Mining Act 2016*[197] was enacted to give effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes. It provides that 'a mineral agreement shall include terms and conditions relating to, inter alia: the procedure for settlement of disputes; and resolution of disputes through an international arbitration or a sole expert.[198] It also provides that 'any dispute arising as a result of a mineral right issued under this Act, may be determined in any of the following manners: by the Cabinet Secretary in the manner prescribed in this Act; through a mediation or arbitration process as may be agreed upon by the disputing parties or as may be stated in an agreement; or through a court of competent jurisdiction'.[199]

5.2.9 Public Administration and Intergovernmental Disputes

Article 189 (4) of the Constitution of Kenya provides for the use of alternative dispute resolution mechanisms in settling intergovernmental disputes. Similarly, the commissions and independent offices established under Chapter 15 of the constitution have been clothed with the necessary powers for reconciliation, negotiation and mediation.[200]

[195] Para.1, First Schedule to the *Energy (Complaints and Dispute Resolution) Regulations*, 2012.
[196] Para.4, First Schedule to the *Energy (Complaints and Dispute Resolution) Regulations*, 2012.
[197] No. 12 of 2016, Laws of Kenya.

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

[199] Mining Act 2016, Sec. 154.

[200] Ibid., Article 252.

a. Commission on Administrative Justice Act, 2011

The *Commission on Administrative Justice Act, 2011*[201] (CAJ Act) was enacted to restructure the Kenya National Human Rights and Equality Commission and to establish the Commission on Administrative Justice pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission on Administrative Justice, and for connected purposes.

Under the CAJ Act, the functions of the Commission include, inter alia, to— facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs; work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration; and promote public awareness of policies and administrative procedures on matters relating to administrative justice.[202]

b. Intergovernmental Relations Act, 2012

The *Intergovernmental Relations Act, 2012*[203] was enacted to establish a framework for consultation and co-operation between the national and county governments and amongst county governments; to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution, and for connected purposes.

The *Intergovernmental relations Act* provides for resolution of disputes arising: between the national government and a county government; or amongst county governments.[204]

The national and county governments are required to take all reasonable measures to: resolve disputes amicably; and apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.[205]

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

[201] No. 23 of 2011, Laws of Kenya.
[202] *Commission on Administrative Justice Act, 2011*, section 8.
[203] No.2 of 2012, Laws of Kenya.

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

[205] Sec. 31, Intergovernmental relations Act, 2012.

agreement; and provide for an alternative dispute resolution mechanism with judicial proceedings as the last resort.[206]

5.2.10 Initiatives on National Peacebuilding through ADR Mechanisms

As a Member of the international community, Kenya has continued and is expected to promote peace at the national, regional and international fronts.

a. National Steering Committee on Peace Building and Conflict Management

The National Steering Committee on Peace Building and Conflict Management was established in 2001 by the Government of Kenya as part of the framework on addressing threats and challenges to national unity which have become increasingly sophisticated and complex over time. The same was informed by the need for meaningful responses to conflict, particularly at a structural level and a viable institutional policy framework to mobilize, coordinate and consolidate various initiatives into a more cohesive and action-oriented mechanism to strategically drive peace-building activities in Kenya.[207] The establishment of this multi-agency peace architecture to coordinate peacebuilding and conflict management in the country was borne out of the need to incorporate traditional justice resolution mechanisms into the formal legal-judicial system of conflict mitigation and partner with Government and Civil Society Organizations (CSOs) in order to engender conflict sensitivity to development as it has been largely accepted that a peaceful, stable and secure society is a prerequisite for sustainable development.[208]

b. National Cohesion and Integration Act, 2008

The *National Cohesion and Integration Act*, 2008[209] was enacted to encourage national cohesion and integration by outlawing discrimination on ethnic grounds; to provide for the establishment, powers and functions of the National Cohesion and Integration Commission, and for connected purposes.

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

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

[208] Ibid.

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

The Act established the National Cohesion and Integration Commission[210] whose object and purpose is to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of the different ethnic and racial communities of Kenya, and to advise the Government on all aspects thereof.[211] One of the ways of achieving this is through promoting arbitration, conciliation, mediation and similar forms of dispute resolution mechanisms in order to secure and enhance ethnic and racial harmony and peace.[212]

c. National Policy on Peacebuilding and Conflict Management, 2012

The main objectives of the National Policy on Peacebuilding and Conflict Management, 2012 were to:

i. Promote and establish an institutional framework for peace-building and conflict management that fosters strong collaborative partnerships between the government, the private sector, the civil society, development partners, grass roots communities and regional organizations for sustainable Peace, Conflict transformation and national development.
ii. Develop peace-building and conflict management guidelines that promote sustainable conflict sensitive planning, implementation, monitoring and evaluation.
iii. Mainstream gender issues in conflict management with emphasis on the empowerment of women towards long-term conflict mitigation and peace making.
iv. Promote application of conflict early warning and response to prevent violent conflict in collaboration with Regional Bodies e.g. IGAD-Conflict Early Warning and Early Response Mechanism, EAC – Early Warning and Early Response System.
v. Establish a Mediation Support Unit to provide and coordinate mediation and preventive diplomacy capacity to Kenya and its neighbouring states.
vi. Develop conflict prevention strategies and structures that will address root causes of internal and cross-border conflicts.

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

[211] Sec. 25(1), National Cohesion and Integration Commission Act, 2008.

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

vii. Propose policy options to regulate, transform and strengthen relationships between actors in different sectors and levels of society for sustainable peace.

viii. Propose strategic options for resource mobilization to initiate, establish and sustain proactive peacebuilding and conflict management interventions.

ix. Establish mechanisms for regular review and monitoring of the policy implementation.

x. Provide a framework in which best practices of peacebuilding and conflict management institutions will be harmonized, enhanced and coordinated.

xi. Formulate strategies for research, documentation and dissemination in collaboration with other stakeholders.

The principles underlying the formulation of this Policy were:

i. **Proactive & Preventive**: Kenyans either individually or collectively, have the responsibility to build and nurture a culture of peace for both present and future generations. This principle requires every Kenyan, relevant government sectors and state organs, private organizations, civil society and the general public to take proactive early response measures to prevent violent conflict.

ii. **Cultural Sensitivity**: Peacebuilding and conflict management interventions must take cognizance of political, social and economic dimensions of conflicts. They must be sensitive to the cultural values and norms of the affected communities and build on the existing traditional conflict handling methods that have fostered peaceful coexistence within and among communities. Cross-cultural activities as a means of helping communities appreciate unity in diversity and the interdependence between security of the citizens and the state will be a vital emphasis of this policy.

iii. **Human Rights Based**: Every Kenyan is entitled to live in a peaceful and secure environment that is conducive to sustainable human development. Kenyans have the basic right to justice and enjoyment of their rights. Interventions to prevent and resolve conflicts will uphold human rights in accordance with the international human rights law, respect the rule of law and sanctity of human life.

iv. **Conflict Sensitivity**: Development, security, commercial initiatives and media reporting, if not well designed and implemented, all have the potential to cause or escalate conflict. Thus, development initiatives must be designed as to maximize peace and minimize conflicts. Interventions should be conflict sensitive.

v. **Participation and Inclusivity:** Citizens are a prime resource. Their active participation in the process of conflict analysis, decision-making and formulation of appropriate conflict response approaches and mechanisms is essential for effective management of conflicts. All stakeholders will be encouraged and/or facilitated to participate in all the processes towards peacebuilding and conflict management.

vi. **Research-Based**: Sound conflict analysis and best practices from previous interventions will be one of the key pillars that will inform intervention strategies. Intervention strategies must be formulated from an informed perspective. In this regard, stakeholders are encouraged to undertake research that will interrogate theory and best practices to inform interventions.

vii. **Gender Sensitivity**: This Policy recognizes that, men and women experience conflict differently. The role of men and women in peace-building shall be strengthened and their involvement in decision-making improved. In doing so, gender equality must be considered as an integral part of all programmes and projects. Gender equality as a cross-cutting theme requires those women's views, interests and needs shape intervention strategies as much as men's. Further, women and men, girls and boys in conflict areas have different perspectives, needs, interests, roles and even resources reinforced by class, economics, politics, ethnicity or age. This is critical in progressing toward more equal relations between women and men, boys and girls in peacebuilding and conflict management.

viii. **Equity**: All individuals are equal as human beings and are entitled to their human rights without discrimination on the basis of sex, race, colour, ethnicity, age, political or other opinion, religion, disability and other status recognized under human rights treaties.

ix. **Collaboration and Co-operation**: The Policy emphasizes collaboration, partnership and co-operation among all actors at all levels of government, Civil Society Organizations, private sector, communities and donors.

x. **Accountability and Transparency:** The involvement of many actors in conflict management activities call for high adherence to the code of conduct that guide working relationships. Among this is the high level of accountability and transparency particularly on resources.

The Peace Policy acknowledged that the conflicts experienced in Kenya have international, regional and national dimensions. This is due to the fact that the spill-over of conflicts from the neighbouring

countries have an effect on the Kenyan scene. The policy framework contextualised conflict with regard to its generalities, social, economic, political and environmental dimensions.[213]

Social, economic, political and cultural contexts have over time determined the nature of peace-building and conflict management approaches and interventions. These interventions often depend on the availability of external funding.[214]

Some of the civil society interventions focused on reconciliation and building new relationships amongst the warring communities. Such activities include dialogue, negotiations, and problem-solving workshops, information, education and communication.[215]

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

The Policy recommended that there is a need to harmonize the operation of the various Acts of Parliament that relate to peace-building and conflict management. There is also need to institute an enduring rather than an ad hoc or time bound legislative framework for addressing issues of conflict. This is particularly so because conflict is recognized as a social justice and human development issue that is best addressed through focused and comprehensive legislation and equitable development.[216]

The National Policy on Peace-building and Conflict Management was formulated based on six key pillars that were critical to the achievement of the overall goal. It underscored the need for conflict sensitive planning and programming at all levels of regional, sub-regional, national and community development. These pillars were:[217]

i. Institutional Framework
ii. Capacity Building
iii. Conflict Prevention
iv. Mediation and Preventive Diplomacy

[213] Para. 45, National Policy on Peacebuilding and Conflict Management, 2012.
[214] Para. 68, National Policy on Peacebuilding and Conflict Management, 2012.
[215] Para. 86, National Policy on Peacebuilding and Conflict Management, 2012.
[216] Para. 138, National Policy on Peacebuilding and Conflict Management, 2012.
[217] Para. 141, National Policy on Peacebuilding and Conflict Management, 2012.

v. Traditional Conflict Prevention and Mitigation

vi. Post-Conflict Recovery and Stabilization.

The Policy specifically recommended the need for a mediation support unit to be established to provide and coordinate mediation and preventive diplomacy support to conflict situations. The Unit would establish a core team of rapid deployment associates who can be deployed at a short notice for interventions regarding peace making issues within the country and cross-border areas.[218]

The policy also recognized the critical role of traditional conflict resolution mechanisms such as community declarations and social contracts in line with the Constitution. The mechanisms would be strengthened to provide ownership and cultural relevance to the interventions in each conflict context. The Policy would facilitate the harmonization of the traditional conflict resolution procedures with basic international human rights standards and the Constitution in particular, with respect and protection of human rights. The policy would promote the tolerance for cultural diversity by judicious conflict management. All interventions would embrace the principles of building peace such as inclusiveness, impartiality, non-violence, gender equity, community ownership and sustainability.[219]

The Peace Policy also tasked the government to establish a National Peace Council whose mandate would be to promote sustainable peace and human security in Kenya, and its broad functions would include promoting peaceful resolution of conflicts and building inter-group trust and confidence. It would create spaces for dialogue between and amongst various actors, and engage in *inter alia* negotiations, mediation, and reconciliation with parties in conflict at both National, County and Community level, with a view to achieving a non-violent resolution of conflicts.[220]

The Council would work with County Peace Secretariat and Local Peace Committees.

5.3 INSTITUTIONAL FRAMEWORK ON PROVISION OF ADR SERVICES IN KENYA

Kenya, like other jurisdictions, has seen an explosion of the number of private firms, institutions and outfits offering ADR services. The Rules of Procedure for Mediation and Arbitration were gazetted on 18th and24th December 2015 respectively. Further, the Code of Conduct and Rules for mediators and arbitrators have been developed and tested by the various institutions including the office of the

[218] Para. 146, National Policy on Peacebuilding and Conflict Management, 2012.
[219] Para. 147, National Policy on Peacebuilding and Conflict Management, 2012.
[220] Paras. 153-166, National Policy on Peacebuilding and Conflict Management, 2012.

NCIA and Attorney General.[221] Globally ADR is viewed as a commercial necessity that provides a range of advantages over litigation in resolving both domestic and international commercial disputes. As the World Bank indicates in its preeminent "Doing Business Report" (2015-16) global consensus on the importance ADR is evidenced by ADR development being the most common area of international justice system reform in that period. ADR has become an important means for reducing domestic commercial disputes, and a critical means for attracting foreign direct investment (FDI).

Due to the costs and time involved in utilizing the formal justice system, there is increased preference to divert cases from the Court to other methods of dispute resolution, including arbitration or mediation. There is a need to 1) clarify the various systems and their relationships as it pertains to commercial justice in Kenya, and 2) establish clear standards for the accreditation and training regarding mediation and arbitration in Kenya.

Often though, there is lack of consistency and standardization of practices and qualifications across ADR mechanisms that instil confidence in the private sector when engaging these actors. In addressing mediation, arbitration, and other ADR mechanisms, there is a need for interrelation and coordination so as to ensure sustainability and in order to prevent duplication of efforts.

One other area of ADR is that of tribunals in Kenya, many of which also play a pivotal role in administering commercial justice.

> "[Kenya's] Tribunals are set up on statute by statute basis without any common characteristics. On a conservative estimate, there are probably more than sixty Tribunals in existence in Kenya today. An examination of the various Tribunals existing in Kenya today show an area mired in confusion and uncertainty. There exist many Tribunals each independent of the other, appointed and constituted differently, operating on different procedural rules and with different degrees of accountability. This raises fundamental questions whose answers must impact greatly on the ability of Tribunals to deliver justice to Kenyans."[222]

The Judiciary in partnership with the Kenya Law Reform Commission (KLRC) developed a Bill to help bring all tribunals under one administrative regime and streamline their operations in 2015. There

[221] See http://www.statelaw.go.ke/mediation-takes-root-in-kenya/.
[222] See Kenya Law Reform Report by the Committee on the Review of the Rationale for the Establishment of Tribunals in Kenya (December 20, 2015).

remains a strong need to revisit these issues and assist in finalizing necessary legislative and policy interventions.

5.3.1 The Judiciary: Court Annexed Mediation Programme (CAM)

The Kenyan Judiciary is an independent, impartial, transparent and accountable institution anchored under Article 159 of the Constitution. It derives its authority from the people of Kenya and it is bound by the National Values and Principles of Governance as enshrined in Article 10. Its mission is to deliver justice fairly, impartially and expeditiously, promote equal access to justice, and advance local jurisprudence by upholding the rule of law. The 2011 Judicial Service Act governs the administration of the Judiciary as well as its functions.

The Judiciary has also been mandated under Article 159(2) (c) of the Constitution promote the use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms as part of the tools used in enhancing access to justice.

One of the Kenyan Judiciary's vehicles for developing ADR is its Court Annexed Mediation Programme (CAM) (2016-17), serving the commercial and family divisions. After a yearlong pilot, and comprehensive assessment, it is now a permanent programme in these divisions, with Judiciary plans for countrywide expansion. Since April 2016, the Judiciary has been implementing a pilot Court-Annexed Mediation Project (CAMP), including in the Commercial and Family Division. February 2015, the Chief Justice of the Republic of Kenya appointed the Mediation Accreditation Committee (MAC) with the mandate to develop mediation pilot rules, accredit mediators, develop a register of mediators and enforce code of conduct governing mediators. MAC developed Mediation (Pilot Project) Rules that were gazetted by the Chief Justice on 9thOctober 2015 and has commenced the process of accrediting mediators with the view to develop a register of mediators.

MAC works hand-in-hand with the AOC to ensure mediation is conducted by experienced mediators. Achievements of the project to-date include: the development of mediation pilot rules; the operationalization of the Mediation Accreditation Committee (MAC); compilation of a register of accredited mediators; the development of accreditation standards by the MAC; and the identification of mediation premises for the pilot.

An external end-pilot evaluation conducted identified the CAMP's strengths and weaknesses. It provides a comprehensive set of recommendations for taking mediation forward that includes the establishment of an ADR Taskforce. The Judiciary recognizes that CAM is but one part of an ADR

system that includes the important work of arbitration centres, private mediation practices, and tribunals.

A Taskforce composed of the Judiciary, Law Society of Kenya, JSC, JTI, ADR groups, and business associations has since been formalized through terms of reference in Gazette Notice No. 6969 of 2017. The Taskforce's role has been to oversee the management of CAM programme and examine issues relating to ADR in Kenya. To achieve these ambitious plans, the Taskforce is strengthening its technical capacity through the appointment of a range of technical experts and administrative support. It is considered an opportune moment for developing an integrated framework for governing the work of all ADR mechanisms, and developing training to scale, and ensuring the development and adherence of uniform standards. This is essential in promoting the value of ADR expanding the access of citizens and other stakeholders, and towards building the international credibility for Kenyan ADR which is essential for foreign direct investment and trade. Increased confidence in Kenyan ADR is expected to increase the adoption of Kenyan ADR as dispute resolution mechanism in international commercial contracts.

5.3.2 Institutional Framework on Mediation

There are a number of institutions dealing with mediation in Kenya, some of the institutions are as listed below:

a. The Chartered Institute of Arbitrators (Kenya Branch),
b. Dispute Resolution Centre (DRC)
c. The Nairobi Centre for International Arbitration (NCIA)
d. The Strathmore Dispute Resolution Centre (SDRC)
e. Tatua Centre
f. FIDA
g. Kituo Cha Sheria

a. The Chartered Institute of Arbitrators (Kenya Branch)

The Chartered Institute of Arbitrators (Kenya Branch) is the Arbitration umbrella body charged to oversee, promote and facilitate the determination of disputes by Arbitration and other forms of Alternative Dispute Resolution (ADR) including mediation. The institute provides training and accreditation in mediation for both members and non-members of the Institute who are involved

directly or indirectly with commercial disputes and is a prerequisite for those who wish to join the Institute as Associate Members. The Course is also a pre-requisite for all those who intend to take the 40-hour commercial mediation training and subsequent mediator accreditation by the Institute. The institute assisted in the developed and formulation of the CNIA Mediation rules of 2015.

b. Dispute Resolution Centre

The Dispute Resolution Centre is yet another institute that provides ADR services. It is non-profit founded to offer a myriad of ADR services including mediation as appropriate to the dispute.

c. The Strathmore Dispute Resolution Centre (SDRC)

The Strathmore Law School established a mediation centre at the Law School; this promotes mediation and other forms of dispute Resolution. It offers training an accreditation to mediators as well as mediation services to the legal profession. The training is 40 hours and is effected with collaboration with a United Kingdom Partner. Within the year 2014, the Centre had trained 14 accredited mediators.

One of the initiatives of the Centre is introducing Mediation within the workplace initiative through tailor made corporate training, commercial mediation training programs and the ADRC awareness programs and restorative programs. This has been achieved with institutions such as the KPLC and EAPC. The Centre also links their trainees with other ADR professionals and bodies for experience in mediation practice.[223]

d. The Nairobi Centre for International Arbitration (NCIA)

The Nairobi Centre for International Arbitration (NCIA) is a regional Centre for international commercial ADR that was established in 2013 by an Act of Parliament[224], as a Centre for promotion of international commercial arbitration and other alternative forms of dispute resolution. The Centre has come up with the NCIA Mediation Rules that have been applied in mediation.

NCIA is an independent institution administered by a Board of Directors composed of professionals from the East Africa Region. The directors are accomplished practitioners with multiple skills that

[223] Otieno. H., 'Strathmore Dispute Resolution Centre.', Cultivating A Robust Coordinated Alternative Dispute Resolution (ADR) Framework for Kenya Towards Sustained Economic Growth and Access to Justice forum held on APRIL 12 – 13, 2018 – Crowne Plaza, Nairobi, Kenya.
[224] Nairobi Centre for International Arbitration Act No. 26 of 2013.

assure the proper functioning and administration of the Centre. The daily management of the NCIA is tasked to a Registrar/Chief Executive Officer with technical staff of the Secretariat.

e. Tatua Centre

This Centre provides commercial mediation services for disputes that fall within the credit reference centres. Consumers of financial services who hose credit information has been listed erroneously or negatively with the credit reference bureaus can resolve their disputes with their credit providers using this platform by the use of mediation.

f. FIDA

FIDA is a non-profit organization dealing in access to justice, women and governance. The organization has used mediation to resolve family, custody and property related issues since 1985. The organization has made mediation a core dispute resolution mechanism; for every complaint made to their offices, they invite the affected parties for mediation by way of letter.

In the year 2017, FIDA attended to 8218 cases and out of these, only 157 of the cases were eventually filed in court and only 24 of these have been since concluded. On the other hand, the organization invited 1314 of these cases for mediation, out of which 70% were resolved by the use of mediation. [225]

[225] FIDA Kenya, 'FIDA' Cultivating A Robust Coordinated Alternative Dispute Resolution (ADR) Framework for Kenya Towards Sustained Economic Growth and Access to Justice forum held on APRIL 12 – 13, 2018 – Crowne Plaza, Nairobi, Kenya.

Summary	Nairobi	Kisumu	Mombasa	Total
Invitations	691	283	340	1314
External mediators recruited	50	8	15	73
Total number of mediations conducted	232	158	130	520
Successful mediations	172	101	76	349
Unsuccessful mediations	60	57	54	171

Source: FIDA, 2018

Summary	2016	2017
Total client attendances	7,674	8,218
Cases filed in court	107	157
Cases concluded	59	24

Source: FIDA, 2018

g. Kituo Cha Sheria

The Legal Advice Centre also known as Kituo Cha Sheria deals with issues of legal aid education, forced migration, advocacy, and governance and community partnerships. We represent the poor and marginalized through advocating, networking, legal aid and representation as well as lobbying. The Centre has used mediation to resolve a number of employment and labour related disputes that have seen a reduction of the cases filed in the Labour and Employment Court.

5.3.3 Institutional Framework on Arbitration

There are a number of institutions dealing with Arbitration in Kenya, some of the institutions are as listed below;

a. The Chartered Institute of Arbitrators (Kenya Branch),
b. Dispute Resolution Centre (DRC)
c. The Strathmore Dispute Resolution Centre (SDRC)
d. The Nairobi Centre for International Arbitration (NCIA)
e. Kenya Sports Disputes Tribunal

a. The Chartered Institute of Arbitrators (Kenya Branch)

The Chartered Institute of Arbitrators (Kenya Branch) is the Arbitration umbrella body charged to oversee, promote and facilitate the determination of disputes by Arbitration and other forms of Alternative Dispute Resolution (ADR). The Arbitration Act, 1995 recognizes, arbitration can be conducted by institutions or individual arbitrators.

b. Dispute Resolution Centre

The Dispute Resolution Centre is yet another institute that provides ADR services. It is non-profit founded to offer a myriad of ADR services as appropriate to the dispute.

c. The Strathmore Dispute Resolution Centre (SDRC)

The Strathmore Law School established a mediation Centre at the Law School; this promotes mediation and other forms of dispute Resolution.

d. The Nairobi Centre for International Arbitration (NCIA)

The Nairobi Centre for International Arbitration Act, 2013 establishes The Nairobi Centre for International Arbitration whose functions include promoting, facilitating and encouraging international commercial arbitration, to administer domestic and international arbitration. It is the regional Centre for international commercial ADR.

e. Kenya Sports Disputes Tribunal

The Tribunal, which falls under the Ministry of Sports and Heritage, is established under the *Sports Act 2013*[226] to arbitrate on Sports related disputes. Its functions are: Determination of appeals against decisions made by national sports organizations or umbrella national sports organizations whose rules specifically allow for appeals to be made to the Tribunal; and other Sports –related disputes that all parties to the disputes agree to refer to the Tribunal and that the Tribunal agrees to hear.[227]

[226] Sec. 56(1), *Sports Act 2013*, No. 25 of 2013, Laws of Kenya. This Act was enacted to harness sports for development, encourage and promote drug-free sports and recreation; to provide for the establishment of sports institutions, facilities, administration and management of sports in the country, and for connected purposes.

[227] Sec. 59, *Sports Act 2013.*

The Act provides for arbitration of sports disputes.[228] The Tribunal is empowered under the Sports Act, in determining disputes, to apply alternative dispute resolution methods for sports disputes and provide expertise and assistance regarding alternative dispute resolution to the parties to a dispute.[229] Notably, Kenyan courts have recognised and upheld sports arbitration as was witnessed in the case of the case of *Republic v Kenya Cricket Association & 2 others Ex parte Maurice Omondi Odumbe (2006 eKLR*. In this case, the ex parte applicant had approached the courts seeking prerogative orders of certiorari and prohibition against the Kenya Cricket Association (KCA) and the International Cricket Council (ICC) who had banned him from playing cricket for 5 years. The court, declined to grant the reliefs sought, and noted that the process that had been used by KCA and the ICC in determining the matter was a private arbitration within the rules governing the membership of KCA and ICC and as such the process was not subject to judicial review. Such an approach by Courts will go a long way in encouraging the use of ADR especially in sports disputes.

5.3.4 Administrative/Institutional framework on TDRs

The Constitution of Kenya, 2010 provides for application of TDRs and ADR mechanisms in dispute resolution.[230] This in turn enhances access to justice.[231] The state should ensure that access to justice for all persons and if any fee is required, it shall be reasonable and not impede access to justice.

The Constitution observes the overriding objective in dispute resolution systems and promote access to justice through informal systems such as TDRs and ADR mechanisms in addition to the Court systems.

A huge percentage of disputes in Kenya are resolved outside courts or before they reach courts by use of TDRs or ADR mechanisms. Communities utilize TDRs systems since they are easily accessible and legitimately relevant.

i. Courts and Tribunals

The Constitution of Kenya stipulates that all courts and tribunals in the exercise of judicial authority shall promote the application of ADR and TDRs.[232] The constitution contemplates the over overriding

[228] Part II (SS. 56-62), *Sports Act 2013.*

[229] Sec. 60, *Sports Act 2013.*

[230] Art 159 (2) (c).
[231] Article 48
[232] Article 159 (2) (c).

objective of justice systems. The civil procedure Act, 2010 compliments on this overriding objective, it is to facilitate the just, expeditious, proportionate and affordable resolution.[233]

The judiciary exercises its powers giving effect to the overriding objective[234] thus in furtherance of this objective, Courts have the power to explore ADR including TDR in dispute resolution.

ii. County Governments

The Constitution of Kenya establishes County Governments; there are a total of 47 Counties established. Each county consists of a county assembly and a county executive.[235] However, it is important to note that the justice system is not devolved.

The constitution provides for the objects of county governments to promote public participation in decision making and to recognize the rights of communities to manage their own affairs.[236] County governments are thus best placed to promote dispute resolution by TDRs.

iii. Constitutional Commissions

Independent Commissions created by Constitution 2010 created to enhance service delivery in various sectors including ensuring that access to justice is enhanced.

The constitutional commissions have an establishing Act which also provides for their constitution, mandate and powers, some of the provisions in the establishing Acts envisage provisions for promoting ADR and TDRs.

Each Commission has establishing Acts, including; The National Land Commission Act, the National Integration and Cohesion Act, Commission on Administrative Justice Act and the Kenya National Human Rights Act.

These commissions generally ensure the protection of the Kenyan people and their sovereignty; to ensure that all state organs observe democratic values and principles; and to promote constitutionalism.

[233] Sections 1A.
[234] Section 1A (2).
[235] Art 176.
[236] Art 174.

iv. Rules Committee of the Judiciary

The Civil Procedure Act[237] establishes the Rules committee.[238] The committee is mandated to enact rules of practice for efficient dispensation of justice by the civil courts.

The Civil Procedure Act[239] enlists matters for which such rules may be enacted and stipulates for the rules for selection of mediators and hearing of matters referred to mediation pursuant to court mandated mediation[240]

v. Civil Society Organizations

Kenya hosts numerous civil society organizations which spearhead advocacy and community programmes on areas of public interest, civil societies undertake community outreach and advocacy generally encouraging communities to resolve dispute through ADR and TDR initiatives. Most organizations conduct peaceful campaigns and are religious based with elaborate dispute solving mechanisms.

Some of the civil organizations include; The National Council of Churches of Kenya and the Council of Imams and Preachers of Kenya (CIPK), Maendeleo ya Wanawake, FIDA Kenya, Kenya Human Rights Commission, Muslims for Human Rights, Kituo Cha Sheria, amongst others.

vi. Community Council of Elders

Kenyan communities have for long maintained a council of elders who are responsible to resolve disputes.

In Kenyan communities, the preferred mode of settling disputes is through the council of elders, they resolve a myriad of interpersonal disputes relating to land, marriage and inheritance, their jurisdiction also stretches to such as assaults as well as inter-community disputes.

Some of the Community council of elders include the Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the Luo community.

[237] CPA, 2010.
[238] Sec 81.
[239] Ibid.
[240] Sec 81(2).

vii. Local Administration

The local administration also provides an avenue for dispute resolution for communities. Chiefs preside over local administration and attend to local communities including enhancing dispute resolution mechanisms.

Chiefs are by statue allowed to summon people in their locality and conduct hearings involving minor conflicts such as family feuds, inheritance/succession and breach of peace. This is done working in tandem with community leaders and elders to promote peace and harmony in the community.

5.4 Stakeholders' Consultative Forums

The Consultant engaged with key stakeholders being, the Judiciary, IDLO, NCIA, Office of the Attorney General, the Registrar of Tribunals, ADR Taskforce, Law Society of Kenya and ADR practitioners, amongst others, so as to identify key areas where there are conflicts and gaps to facilitate their alignment with Articles 48, 50 and 159 of the Constitution. It involved active participation in strategic outreach and liaison activities with sector stakeholders, the main activities being site/field visits, sector-wide consultative meetings and a national stakeholders' forum.

5.4.1 National ADR Stakeholder Forum

This involved the facilitation of a National ADR Stakeholder Forum[241] on 12-13 April 2018, with key stakeholders to lend a participatory and evidence-based approach to the consultancy and ensure that there would be a shared understanding of the ADR sectoral needs for alignment of synergies across the sectors and institutions. The final outcome would be geared towards harmonised legal and policy frameworks to deepen the use of ADR in Kenya for access to justice and settlement of commercial disputes.

The need for a forum was informed by the experience the Judiciary has gained through the implementation its own ADR mechanism, the Court Annexed Mediation Programme, which has underlined the need to support the development of the ADR sector as a whole. Integration with the initiatives of the NCIA would ensure cross sectoral approach to these initiatives.

A multi-stakeholder forum was proposed to concretely chart a way for the development of an integrated support framework of legislation, policy, and development plans for the sector. Such plans

[241] Theme: Cultivating a Robust Coordinated Alternative Dispute Resolution (ADR) Framework for Kenya towards Sustained Economic Growth and Access to Justice. Hosted by the IDLO, Judiciary ADR Taskforce and NCIA| April 12-13, 2018 | Crowne Plaza, Nairobi, Kenya.

would include both technical capacity development and actions to popularize the use of ADR as frequently the most cost-effective and appropriate solution for resolution for civil disputes – especially commercial in nature. The forum's aim was to reach a shared situational understanding amongst forum stakeholders of the status and needs of the sector and its discrete mechanisms. The aim was to provide an ADR development roadmap and establish a representative ADR committee mandated to implement it.

A comprehensive baseline assessment of the ADR sector with recommendations for action, commissioned by the Judiciary, guided multi-stakeholder discussion on the current status of ADR and its developmental requirements. Support from a range of ADR technical experts that the Judiciary appointed was expected to give impetus to the ADR Taskforce's work.

5.4.2 Scope of Stakeholders' Input

The role of these stakeholders was limited to the area of enforcement, oversight and adjudication. The stakeholders, such as the civil society, proposed the various ways in which the duty bearers can be accountable to the claim holders and how to prevent impunity. They also assessed their perceived capacity or limitations to perform this oversight role and functions. This question of capacity here includes the issue of the availability of funds and resources, the budgetary independence, their independent investigative capacity, their flexibility and their ability to communicate directly with governmental and ADR agencies.[242]

The stakeholders were also to evaluate the level of effectiveness and capacity of due process of the existing ADR conflict management systems. For instance, the court the Registrar of Judiciary provided information and evaluation of the number of filed court awards/settlements, the congestion rates in court matters, the number of matters referred to ADR, the resolution time for those matters and cost elasticity.

5.4.3 Outcome of the Stakeholders' Forum

During the Forum, there was a concern on the rising costs of ADR, especially the Arbitration process, as well as the integrity of Arbitrators that has been subjected to scrutiny.

[242]Teehankee, J.C. "*Background Paper on Access to Justice Indicators in the Asia-Pacific Region"* La Salle Institute of Governance with the Support of the United Nations Development Program (2003).

Other emerging concerns from the participants included the culture of litigation among Kenyans, insufficient law and uptake of ADR, negative perceptions and integrity of practitioners. The NCIA encouraged the sector specific stakeholders to make their submissions on the same and the participants to find a way to harness the input of each stakeholder as well as incorporate previous insights on the same

The participants were in agreement that there is need for partnership with judiciary to establish a robust National policy on ADR and undertake a baseline survey and situational analysis on ADR mechanisms.

The chair to the taskforce highlighted that the Judiciary has been collaborating with the NCIA on CAM and that there is need for a robust, not silent or inward-looking approach on ADR mechanisms.

It emerged from the forum that there is need for a policy framework to coordinate the application of ADR for Access to Justice to be achieved. It was also pointed out that the role and strengths of each institution, such as the NCIA and the two taskforces are not in competition; they should work together in order to complement each other's strengths and deliver access to justice through various mechanisms including AJS, ADR and TDRM.

Regarding the role of tribunals, it was indicated that tribunals like the PPDT encourage ADR as opposed to litigation. The Honourable Judge in charge of the Judiciary Taskforce acknowledged FIDA which embraces mediation hence bringing families together. The Honourable Judge also indicated that KRA has a robust mediation component and the IEBC also embraces ADR as they engage a lot in dispute resolution. The Hon Judge also observed that indeed ADR is not alternative but the main form of dispute resolution and there needs to be caution in making ADR too formalized.

It was reported that there is need to embed ADR; it could be incorporated by the academia to universities, primary and secondary schools. Caution must however be exercised to avert the risk of developing too many rules and too much formality within the ADR dispute resolution mechanisms that makes them less flexible as they are intended to be in order to meet their proper role in facilitating access to justice.

The forum was invaluable since it captured the stakeholders' input on how they interact with ADR, the National consultant emphasized that ADR is an invaluable avenue to enhance access to Justice.

It was agreed that there is need for collaboration between state and non-state actors to formulate laws, review and monitor periodically and evaluate the framework on ADR use.

It was explained that for a harmonized approach to ADR, there is need for a legal and policy framework and the need to ascertain clarity on policy roadmap of ADR in Kenya to inform legislative and institutional framework. Moreover, there is need to have synergies across sectors to influence access to justice, economic development, poverty reduction and inclusivity.

5.4.4 Feedback from Participating Institutions/Bodies

a. **The Honourable Deputy CJ, Key note address**

The Hon DCJ officially opened the Stakeholders the forum. The Deputy CJ assured the Legislature that the Judiciary is willing and working on the challenges identified from the Pilot Project evaluation. For instance, there are various ICT projects going on in the Judiciary. As a way of reducing backlog of cases and enhancing Courts' efficiency, the DCJ further indicated that the bench ought to be more responsible while handling litigants since they manage business appearing before them and that they need to make firm decisions and compel counsel to proceed with their matters. It was indicated that some reasons for adjournment are often not genuine.

The COK 2010 envisions a multifaceted judicial authority that recognizes alternative justice systems, and the CJ hence observed that the Judiciary is operationalizing and rationalizing ADR and the taskforce on ADR by Hon. Justice Ochieng is a testament of the tremendous effort.

AJS and CAM training and sensitization of Judicial Officers is at the centre of the SJT blueprint. The SJT 2017-2021 clearly mirrors the objectives of access of Justice.

It was also indicated that ADR is key to increase Kenya's ease of doing business ranking since some of the key indicators assessed by the World Bank included the amicable system of settling commercial disputes.

The Hon DCJ further indicated that vision 2030 envisions the justice system to be aligned with the needs of a developing economy. Vision 2030 aims at making Kenya a mid-income state, where rule of law and respect of human rights are upheld. There is also need to align the needs of a market-based economy, reduce the barriers to access to justice, interstate cooperation, culture of obedience to laws and good behaviour. This requires the judiciary to be more accessible and enhance consumer friendly attitudes.

ADR contributes to expedited resolution of disputes, maintains relationships, its cost effective and enables quick mutual resolution of disputes.

ADR expedites resolution of conflicts in private, maintains cordiality and relations, and is less expensive than litigation. This makes it better for the settlement of commercial disputes.

The Hon DCJ reiterated that case load in the judiciary is a challenge that can be resolved by ADR. ADR can help tackle backlog and that it is incumbent upon the judiciary to support ADR in all sectors of the justice systems.

b. **Asset Recovery Agency –Representing the AG**

It was indicated that NCIA has done a lot in spearheading ADR use which has occasioned tremendous progress in coordinating the formation of a blue print. Asset recovery Agency fully pledged their support for NCIA.

It was reported that the Executive has made tremendous efforts in the NCIA policy formulation framework. This is because the 4th key agenda in the vision 2030 includes the improvement of Kenya's dispute resolution mechanisms and that includes the ADR mechanisms. It was stated that the role of policy cannot be overemphasized. It is imperative to formulate the policy that will govern the draft framework in the broad policy statement.

Concerns were raised over derailed justice and delayed justice. Too much emphasis has been placed on litigation yet, in dealing with commercial matters, it is important to have speedy resolution of disputes. There is still hope and belief that the NCIA will reduce the cost of litigation, there is need to prove the reduction of costs. The policy framework will allow us to come up with ways of measuring these reduced costs.

c. **Ministry of Industry, Trade and Cooperatives - Cabinet Secretary**

The CS indicated that the ministry is mandated to improve the business climate in Kenya to ensure it is the best place to do business through collaboration with different counties, ministries and public bodies. As at 2017 World Bank Report, Kenya has made improvements to number 80 out of 190 from the previously rank of number 137 out of 190 states with ease of doing business. Previously enforcing commercial disputes has been challenging since it took about 500 days to resolve disputes. This leads to delays in access to justice. The CS also pointed out that the balance sheet of Kenyan banks is 3 trillion, where the nonperforming is 10% of these bank's books of accounts, and which translates to

approximately 3 billion shillings. Interest rates go up due to pricing in the delays. It follows that the rate at which people resolve disputes affects the interest rate, the economy and profitability.

The CS indicated that non-performing contracts are on the rise and this leads to high interest rates and as such, ADR will go a long way in resolving disputes at a reduced cost. The Honourable CS added that the judicial systems have to put up with the challenges of a lot of stress, intimidation, delays and win-lose outcomes which are not favourable for commercial contracts. He added that in promoting access to justice, the people would as a result reap advantages that include financial gains, job creation, reduced costs of lending and creating a good business environment.

The CS recommended that there is need to reduce the amount of time and cost and indicated that such delays were mostly occasioned by lawyers who hide under the guise of natural justice to occasion delays. It was highlighted that there is need to look at the areas that cause inefficiencies in ADR and especially arbitration to the issues of jurisdiction and the seat of arbitration that often sees the cases in court for applications.

Generally, the following recommendations were proposed;

a. The amount of time and cost that people incur to resolve disputes in courts ought to be reduced e.g. time, fees, procedures etc. –lawyer adjournment vis a vis rules of natural justice.
b. How do cases get assigned to judges? There is need for automatic assignment of cases to judges to avoid bias/ create perception of fairness.
c. The rules of adjournment should be reviewed - what number of adjournments are fair to give to people and when does it get unfair?
d. Development of electronic case management issues- private sector can support the judiciary achieve this through funding.
e. Implementing court automation processes/e-services/e-filing/e-payment.

d. **National Assembly Speaker – Hon William Cheptumo representing the speaker**

The legislator indicated that access to Justice is mandatory as provided under Article 48. The government must thus ensure that every Kenyan can Access Justice and ADR ensures Access to Justice.

Access to justice is no longer an option because the COK 2010 ensures that every citizen irrespective of the status of Kenya accesses justice. The no of pending cases translates to delayed justice.

Parliament has the role of allocating resources and the Legislature is committed to dispense resources to the Judiciary to dispense with these programmes. The Legislator affirmed Parliament's commitment to support the implementation of ADR aligned policy and Legal framework. He intimated that the ADR regulations were fully supported and passed by Parliament and this indicated the goodwill the National Assembly espoused. The MP observed that litigation is usually time consuming, with complicated and rigid settlements and that access to Justice is hampered in this regard. Various Legislations already supported ADR and the MP indicated the need to support ADR tutorship in Law schools.

There is need to establish ways of making ADR vibrant and how to cascade the same to the people. It is important to blend with the formal laws.

e. **NCIA**

The NCIA indicated that they aim at promoting dispute resolution to resolve a wide array of disputes; the NCIA demonstrated their support for CAM. Further the NCIA is desirous to ensure Government earnings are invested to develop the Kenyan justice system.

It was explained that an environment with efficient dispute resolution mechanisms ensures effective enforcement of contracts thus enhancing the ease of doing business. The NCIA also reported that Arbitration and mediation rules have been developed and that there is need to develop a harmonized structure and aligned policy on ADR.

The NCIA reported that at the international front, the government saw fit to export the arbitration services from Kenya as an export commodity. There was concern that while contracts are negotiated, drafted, signed and executed in Nairobi, the parties live and execute the contracts terms in Nairobi but yet when disputes arise, arbitration and dispute resolution services are exported abroad to other jurisdictions such as Paris. Arbitration has become a revenue earner in Kenya and these revenues ought to be reinvested in Kenya.

It was indicated that the World Bank indicated in its preeminent "Doing Business Report" (2015-16) that the efficient and expedient enforcement of judgments is an indicator of ease of doing business in Kenya. Currently, the value of matters being handled by the NCIA stood at USD120-150 million in value.

The NCIA reiterated that there is need to promote effectiveness, harmonized system of conflict resolution and linking systems with the judiciary. This has been effective in the CAM through hosting at least 75% of the cases that are handled by the centre; there is also need for developing the national policy of ADR.

The NCIA has been working to enhance ADR space in the justice chain. It was indicated that the NCIA published the code of conduct and has been working on capacity building.

NCIA offers ADR services including Arbitration, mediation, capacity building, training and Transcription, video conferencing and teleconferencing.

f. **Ministry of Devolution**

It was indicated that the ministry has developed ADR regulations which are in draft form to facilitate settlement of intergovernmental disputes. It was further stated that the cost of litigation escalating on the two levels of government and the minimum cost of legal fees was about 20 million shillings.

There is need to amicably address the rising number of disputes between county and the National Governments as well as within the counties. There is also a rising number of disputes arising between different counties and as such there is need to embrace ADR.

g. **AJS taskforce**

The task force relies on numerous provisions in enhancing Alternative Justice Systems. The constitution of Kenya envisages application of AJS on the following provisions the preamble, Articles 10, 11, 44, 48, 159(2) (c) amongst others.

It was indicated that there is need to establish clarity into the jurisdiction of AJS, the selection and appointment procedure of personnel and the minimum requirements. It is therefore important to align AJS to Art 159 for sustainability.

h. **KNCHR**

The representative Commissioner indicated that there is need to marry ADR to the role of paralegals and legal aid to enhance expansive outreach of the services proposing that there is need to establish a single aligned nature of regulations.

There is also need for post judgment implementation framework, and ADR is highly desirable in this instance. The Commissioner suggested that there is need for better stakeholder engagement and proper utilization of opportunities presented thus building ADR capacity.

i. **PILPG**

The PIPLG indicated the need for transitional justice. PIPLG has been working with other stakeholders including Kituo cha Sheria to enhance Access to Justice at the grassroots level.

On plenary, it was suggested that it was crucial to interrogate the formalization of ADR and its impact on the effectiveness of ADR. There is need for proper interface between AJS and CAM.

It was further indicated that an informal system should not be formalized and that there is need to classify disputes to establish clarity on ADR and criminal disputes. There is need to categorize criminal and civil matters and that when dealing with ADR one should desist from thinking about the Judiciary but focus on access to justice.

It is important to ascertain definitions of informal and formal systems; there is an erroneous mentality that African systems are backward and uncultured especially after colonization. Africa's set values have been with time devalued.

j. **CIarb**

The CIarb highlighted on their mandate, their experiences, key practices and emerging issues. They highlighted that parties to Arbitration have a leeway to choose the body to undertake ADR. They offer facilities for arbitration, mediation and adjudication as well as training.

Role of Lawyers on ADR was highlighted and recommended that lawyers should be excluded from the small claims court to give the users of ADR the opportunity to choose how they want their disputes adjudicated.

k. **Academia**

The Academia indicated the possibility applying ADR between University student organizations

They also indicated that ADR was tutored as a unit in the law schools and that it should be encouraged to teach ADR as a core unit in universities to equip students with the relevant skills salient in ADR.

l. **SDRC**

The SDRC explained that the centre was formed due to the overwhelming demand of alternative dispute resolution mechanisms. The objective of SDRC is to enhance efficient mediation mechanisms aiming at being a top tier dispute resolution centre.

It was stated that the SDRC offers a 40-hour mediation n training annually to equip practitioners with the relevant skills needed in undertaking mediation; SDRC envisions a restorative Justice program and proposed the introduction of mediation as a unit in MBA masters programs.

SDRC also suggested that public and private universities should acquaint themselves with ADR strategies.

The SDRC further pointed out challenges experienced including the need to reduce costs while maintaining the quality of service offered, it was also suggested that there is need to coordinate and align all institutions offering ADR services.

It was suggested that aligned guidelines on ADR application should be established but there is need to be careful as too much regulation risks formalizing ADR.

SDRC further proposed that an elaborate curriculum be established but content should specifically be left to the institutions to develop.

m. **Kituo cha Sheria**

Kituo cha Sheria indicated that Legal aid lay at the core of what they deal with, they indicated that mediation has been immensely utilized especially in labor matters. Kituo cha Sheria proposed that there is need to introduce ADR in prisons and establish prison Justice centres.

Kituo also explained that they have been dealing with a lot of public interest litigation but there is always a challenge with enforcement. A proposal was thus raised as to whether ADR can be used as a post judgment mechanism to enable decrees in public interest achieve enforcement.

It was further indicated that Kituo cha Sheria has been working with rural women peace link and that there is need for sensitization especially in sexual offences and societal culturalisation should enhance empowerment.

In plenary, Honourable Justice Fred Ochieng indicated that in order to enhance effective enforcement of public interest litigation judgments, there is need for clarity in the pleadings and prayers sought and to allow Courts to avoid giving an order to impose policy on government. The Honourable Judge indicated that it all depends on how the pleadings are crafted and the relief being sought. It was further stated that ADR can empower communities and victims and in the context of economy, an economy

cannot grow in the context of unresolved conflicts, ADR can enhance democratic governance within the economy.

n. **KEPSA**

KEPSA highlighted the role of ADR in commercial transactions. It was indicated that ADR is relevant in settling business disputes amicably to ensure business thrives in the economy since disputes negatively affect the business environment.

KEPSA highlighted that on the ease of doing business World Bank ranking, ADR is a key component since it is interrogated on how fast disputes are resolved. Economic ranking makes Kenya more attractive business wise.

It was proposed that there is need for sensitization to business persons on the application of ADR; ADR is highly recommended in settling business feuds as it ensures continuity of relationships. Workplace mediation should also be encouraged.

It was also suggested that workplace and marital disputes can be supported by ADR by enhancing family mediation to the work place human resource personnel.

KEPSA pointed out that so far, the uptake of mediation was not satisfactory since there is deficit of trust and erosion of values amongst Kenyans which also affects institutions. There is thus need for more sensitization in this regard.

o. **FIDA**

FIDA indicated that they have been utilizing ADR in settling family issues. Mediation is practised in the first instance and that FIDA only goes to Court as a matter of last resort.

FIDA also observed that mediation can resolve issues that have been dragging on for years. In cases like custody and maintenance, widow rights, amongst others, ADR is a better option when compared Court orders. This is because ADR preserves relationships, which is extremely important.

It was pointed out that FIDA has been supporting AJS and so far, women can sit in the traditional council of elders in some communities. Every ADR mechanism starts with negotiation.

FIDA reiterated that there is need to expand the scope of ADR since it encourages peace building, ownership and poverty reduction.

In suggesting an ADR national policy, FIDA indicated that there is need to establish clarity as to whether there is need to classify certain cases as not admissible in the registry unless ADR has been given a chance.

It was also proposed that such efforts made to reconcile, should be made as a regulatory requirement and that there is need to establish a policy that ensures conflict prevention in ways and approaches that makes people realize that ADR is the solution as opposed to going to Court.

p. **ICJ**

The ICJ explained that they have been working on enhancing ADR under their program on Access to Justice. ICJ has been instrumental in enhancing various legal aid workshops.

ICJ further indicated that they have focused on AJS as a key component of ADR; they have thus been supporting MAC and AJS.

ICJ further supports the small claims Court and, in its activities, it is sensitizing communities on small claims Court.

q. **KLRC**

The commission is charged with responsibility to enhance law reform and review processes in Kenya, they indicated that there is need for tribunals to conduct their business with little formality, thus they should have the power to receive evidence, whether admissible or not. KLRC reiterated that a policy framework for ADR is highly desirable.

r. **PPDT**

The PPDT explained that the Tribunal is based on the premise of ADR. It was indicated that Sec 42 of political parties Act placed PPDT as the first instance institution in resolving political parties' disputes.

The PPDT also noted that political disputes in Kenya are highly competitive and that there is need to establish clarity as to what extent can the PPDT employ ADR mechanisms in resolving political party disputes.

s. **NPS**

The NPS indicated that they operate under the NPS commission Act. NPS expressed their support for the establishment of an aligned ADR policy.

The NPS indicated that emerging disputes in the security institutions are mostly resolved through ADR.

t. **DLA Piper UK**

A commercial arbitration practitioner and a representative from DLA Piper stated that there was high risk of investment in an environment where there is no ADR, ADR mechanisms enhances certainty of commercial investment.

DLA piper further explained that black letter law does not inspire confidence and that there is need for assessment of the circumstances surrounding all disputes, to an investor black letter law inspires confidence.

It was pointed out that there is need to classify disputes so as to clearly ascertain what disputes can go for ADR.

It was suggested that policy should ensure that Kenya is a pro arbitration jurisdiction and that there is need to empower local arbitrators and invest in sufficient arbitration facilities. Reproduced herein below is the memo dubbed, "**ADR in Kenya - An International Commercial Perspective**", as presented by the representative from DLA Piper:

> This memo follows a presentation I delivered on 13 April 2018 in Nairobi to the Kenyan National ADR Stakeholder Forum. I discussed the issues and opportunities Kenyan stakeholders should consider in order for Kenya to become an international commercial ADR forum of choice. Although it is not a verbatim record of my presentation, it summarises effectively the points made in that presentation, with some additional points which may be of assistance or interest.
>
> I outline below four perspectives on promoting Kenya as an ADR forum relating to the reasons to do so, the need for high level national support for such initiatives, ensuring party choice is respected in all instances and practical recommendations on profiling the NCIA as an arbitral institution.
>
> **Background**
>
> It is important to be clear as to the source of my perspective. I am a London based international arbitration solicitor with significant experience of disputes in and involving African countries. My practice is solely focused on commercial disputes with a particular emphasis on disputes arising in the energy and infrastructure sectors.
>
> Prior to specialising in international arbitration, I was a barrister with a general common law practice, conducting domestic litigation before the English courts, in addition to engaging with ADR, most notably mediation.
>
> It is with the benefit of that experience that I am able to give the perspective of an international commercial lawyer (with an English common law litigation background) on factors to consider when promoting the use of ADR (which I understand for the purpose of the forum includes international arbitration, on which this presentation focuses).
>
> **Perspective 1 - Why promote Kenya as an ADR forum of choice?**
>
> In November 2017, DLA Piper's London office hosted an event entitled "*Ensuring bankability of energy and infrastructure projects in Africa*"[243]. Panellists, who were in large part London based financiers with experience of investing in projects in Africa, spoke about the choices they make when reaching investment decisions.

[243] https://www.dlapiper.com/en/uk/insights/publications/2017/11/ensuring-bankability-of-energy-in-africa/

At the top of their list of priorities was selecting the right jurisdiction in which to invest. Detailed analysis of jurisdictions is conducted. That analysis looks to establish the security of an investment in a specific jurisdiction, from an economic, political, legal and geographic perspective. That analysis is important, as its outputs are taken into account when assessing the risk, and thus the cost, of any investment.

A key part of that analysis is the prevailing legal system and the way in which disputes can be resolved if required.

In part, the analysis will look to the local courts. The question will be asked as to whether the courts are reliable for foreign investors, free from corruption or government influence and quick to reach a conclusion. It may extend to asking whether effective ADR is available.

However, an international investor will also be thinking about international arbitration and will question, amongst other things, whether a particular jurisdiction is a "safe" seat for the arbitration. A seat may be considered "safe" if the courts of that jurisdiction are "pro-arbitration" and can be demonstrably relied upon to supervise an arbitration and uphold any award.

From an international commercial perspective, establishing a new and effective policy in relation to ADR (including international arbitration), with its related impact on the justice system as a whole (not least in the saving of time and cost and the reduction of the caseloads of domestic courts), is important because of the impact it can have on the investment decisions of foreign investors. It has the potential to have a significant and positive economic impact on a country.

Perspective 2 - High level national support for ADR

A related point to Perspective 1 above is that if a new system of ADR and attempts to promote the use of international arbitration are to be effective (and have the positive economic effect envisaged above), they need high profile support at the highest levels of the country in question, without contradiction or contravention.

For example, and with no suggestion that this is not or would not be the case, it needs to be clear to the international community that, amongst other things, arbitral awards will be enforced by the local courts. A track record of swift, fair and effective justice for foreign investors (whether with the benefit of ADR or in a court system which is efficient because its workload has been eased by ADR) must be established and publicised. It must also be absolutely clear that all processes of justice are free from government interference and any suggestion of corruption.

Also, international conventions, such as ICSID, must be respected. The widely reported and negative approach of the Tanzanian courts to the ICSID Convention (in what they presumably regarded as being in the domestic interest of the country) in the IPTL v Tanesco dispute several years ago, was not well received internationally. Based on the attendance at this forum, and the positive and constructive presentations of all stakeholders here, it is self-evident that this should not be a problem for Kenya.

It is worth noting here that universities (a number of whom I note are in attendance and playing a key part in the development of ADR in Kenya) can play an important role. Confidence in

ADR is undoubtedly bolstered by empirical data as to its success. For example, King's College London carried out a survey in which it, with the support of the courts, reviewed all cases which came to a conclusion before the specialist Technology and Construction Courts between June 2006 and May 2008.[244] Their findings (which were used to promote the attractiveness of ADR) found, amongst other things:

60% of the settlements were achieved through conventional negotiation.

35% of the settlements were achieved through mediation.

Within the 35%, the majority of cases would probably have settled in any event but at a later stage; the financial savings from bringing forward those settlements substantially exceeded the costs of the mediations.

Within the 35%, a small number of cases probably would not have settled absent the mediation; the costs saving achieved by mediation in those cases was enormous.

A small number of cases in the survey went to trial after unsuccessful mediations; in some of these cases the mediation costs were wasted but in others they achieved valuable benefits such as narrowing the issues.

I look forward to seeing similar statistics, evidencing the success of ADR in Kenya, in the future. Those statistics will promote confidence and confidence will compound the success of the initiative.

Perspective 3 - Respect for Party Choice

The advancement of ADR has long been a feature of English legal reform. The reforms of the civil justice system in the late 1990s led by Lord Woolf, known as the Woolf Reforms, recognised the symbiotic relationship between civil justice and ADR. For example, it established pre-action protocols which encouraged pre-action engagement between the disputing parties, encouraged stays of proceedings for mediation, and included ADR within the overriding objective of the Civil Procedure Rules (which was seen as giving a boost to the use of mediation). This encouragement of ADR through civil justice reform in the late 1990s / early 2000s was part of a wider pan-European trend.

The English Courts also provide their support for ADR by imposing costs sanctions on those who unreasonably refused to mediate. That is recognised as a positive development but also serves to illustrate where the line should be drawn between encouraging ADR and insisting upon it.

From an international commercial perspective, if an investor were to choose to submit its disputes to the Kenyan Courts, it would do so because it wanted the Kenyan Courts, which it trusted and in which it had put its faith, to resolve its case. It would not want to be compelled to a court-stipulated ADR process, which it did not choose to participate in, was unfamiliar with, was uncomfortable with and had not expected.

[244] https://www.scl.org.uk/sites/default/files/KCL_Mediating_Construction_Parts%20I-III.pdf

It must not be forgotten when devising any system of ADR, that the users of the justice system are its customers. Whilst the customer cannot always be right in this instance, their reasons for going to court must be respected. A party may simply want his day in court and, if so, that should be respected. To ignore that wish (particularly in the context of a foreign investor) may raise doubts about the legitimacy of the system as a whole.

Fundamentally, commercial parties expect to get what they bargained for (regardless of whether they are domestic or international). For that reason alone, they are likely to feel uncomfortable with any ADR system which compels the use of ADR where they have bargained for dispute resolution by the courts. That is not to say that ADR should not be encouraged, or even incentivised with costs awards against those who unreasonably refuse to engage with it, but in a commercial context compulsory ADR, or seeking to compel ADR, is unlikely to be attractive to the customers who the system is designed to serve. Respect for their choice is paramount.

Perspective 4 - Arbitration and the NCIA

On the first day of this forum, someone asked: "When I am negotiating an international contract, how do I persuade my counter-party to agree to an arbitration clause which provides for the NCIA Rules and a Nairobi seat?"

I can help with that question as I am, as matters stand, the representative of the counterparty insisting that the arbitration is seated in London, Singapore or Dubai, and that the institutional rules are those provided for by the LCIA, by SIAC or LCIA-DIFC. I expect that to change, particularly given the impressive presentations given by the NCIA to this forum. However, it is worth touching briefly on why that change will take time and what will need to happen to cause a change to occur.

Parties choose rules and seats that they are familiar with and which they have confidence in based on a long history and strong track record. That track record is mostly based on the experience of other people but it is well documented and reliable. A recent survey published by Queen Mary University found that the 'general reputation and recognition of the seat' is considered the most important reason for seat preferences among practitioners.[245] It listed London, Paris, Singapore and Hong Kong as practitioners' most preferred seats. A new institution does not have such a record but also cannot build it without people choosing the seat or the rules - this is a classic chicken and egg problem. It is only solved by a period of incubation. The number of international arbitrations seated in Kenya will grow slowly but once there is a critical mass of experience, that is recorded and documented, the pace of growth will increase.

That rate of growth will increase sooner rather than later if the NCIA can show itself to have all the capabilities of, and perhaps some advantages over, a more established institution. As such, it must show itself where it can to be quicker and cheaper with no loss to the effectiveness of the administration of an arbitration. Its rules must be up to date, reflecting the latest developments in the practice of other international institutions (such as emergency

[245] http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration.PDF

arbitration provisions). It may even want to mark itself out by introducing forward thinking changes, as the SCC did when introducing provisions for summary judgment[246].

A vocally pro-arbitration judiciary, who give confidence in the seat, makes a huge difference. There is a body of case-law, established over many years, in jurisdictions such as London and Singapore, which explicitly establishes support for arbitration at all stages of the process. That case law breeds the confidence causing a seat to be popular in an international community which, above all else, wants to be sure that its choice of dispute resolution mechanism will be respected and can be relied upon.

Good, modern facilities, with the capability to comfortably host long hearings with large numbers of people in attendance are a signpost towards an attractive seat. Maxwell Chambers[247], the world's first integrated dispute resolution complex, with its best of class hearing facilities, is a major selling point of Singapore as a seat of arbitration.

Kenya has to build a strong arbitration community. The cost benefits of hosting hearings in Kenya are lost if a client has to pay to fly in 3 English arbitrators (who only ever travel business class) and for their hotels. Kenyan arbitration lawyers need to gain experience, as international lawyers in other jurisdictions have done, of international arbitration around the world. The strength of the leading arbitrators from Paris and London and New York is not in the experience they have gained in their own jurisdictions but in the experience, they have gained around the world, such that they are seen by international businesses as being able to understand international legal disputes. By bringing international experience back to Kenya, they can be central to a Kenyan arbitration community which provides, develops and producers its own advocates, and its own arbitrators, without the need for "fly-in, fly-out" support.

An international outlook, and international standing, are also important. London is not a successful seat because of its focus on disputes involving English companies, but because of the way it is used by international businesses and business people. In a report published by the LCIA, it notes that in 2017, over 80% of the parties to LCIA arbitrations came from outside the UK.[248] The NCIA, if it focuses on the "I" rather than the "N" should also have that outlook and seek to establish itself as a regional arbitration hub. The relative strength and size of the Kenyan economy, its geographic location and its prevailing legal culture give the NCIA a number of advantages over its rivals in that regard. A truly "international" institution, rather than one which is "local" in outlook and standing, is far more attractive to an international business. The CAJAC initiative with China is precisely the sort of initiative that will promote that objective.

[246] https://www.dlapiper.com/en/uk/insights/publications/2016/05/scc-announces-revision-to-arbitration-rules/

[247] http://www.maxwell-chambers.com/

[248] http://www.lcia.org/lcia/reports.aspx

Conclusion

The development of an effective system of ADR to meet the demands of a modern and growing economy is a complex process which will take time to establish. Similarly, there is no quick way of making international arbitrations seated in Kenya, and subject to the NCIA rules, an obvious choice for all international investors, particularly when other jurisdictions and institutions have years of history in their favour.

However, even though the road may be a long one, and progress may at times be slow, the advantages of ADR and international arbitration are obvious. Indeed, they are arguably crucial to the bigger picture of building a strong, growing national economy. That goal, and the motivation which it clearly provides to all of the stakeholders in the room, give me confidence that this forum will lead to great success in the development and implementation of ADR in Kenya.

u. **LRF**

The LRF indicates that they have implemented ADR projects through its paralegal approach. It was observed that currently there are weak ADR and TDRM structures with poorly trained users, poor documentation practices and diverse delinked mechanisms.

It was suggested that there is need for proper documentation and lobbying, community justice system campaigns and collaborative partnerships.

In plenary, concern raised was whether ADR can be applied to the oil and gas sector, it was thus explained that it would be possible but there is need to change perception and build confidence of the people.

v. **LSK**

The Law Society of Kenya has vested interest in the success of the ADR mechanisms in Kenya especially mediation because their members play a key role in the dispensation of justice. Advocates have been mediating and negotiating on disputes among their clients and reaching acceptable out of court settlements before Mediation was adopted by the Kenyan court system. The lawyers usually determine the success or failure of these mechanisms as they play the advisory role to disputants and represent their clients before these decision-making tribunals. Lawyers have had a key role in the CAM project within the Family and Commercial and Tax divisions of the High court of Kenya. The role of advocates includes the preparation of the client for the mediation hearings, advising client of their rights and the preparation and filing of the documents. The LSK has conducted the external audit on the CAM project and presented its finding to its members.

However, there is a prevalent negative attitude by most lawyers towards embracing mediation. This attitude stem from the fear of declining revenues due to litigants resolving disputes through mediation. This state is aggravated by the large number of underemployed young lawyers whose niche is mainly

in litigation law practice. This crop of lawyers prefers to ventilate their client's disputes in litigation and may sabotage the chances of parties reaching an amicable settlement.

LSK has the burden to educate its members on the inherent advantages on promoting ADR practice among its members as well as provide them with the requisite training. The LSK has achieved palpable milestones in creating awareness and providing training to its members. This includes the establishment of the ADR Committee in 2006 with the objective of promoting the benefit of ADR mechanism and processes in conflict or dispute resolution. The Society also organized awareness weeks for ADR which has encouraged more lawyers to result to ADR more often than they litigate. Further, LSK has assured their full support for Law reform and suggested that the model should be a simplified and accessible one.

w. **CAM – Judiciary**

The Judiciary reported that it is exploring the possibility of a comprehensive legislative framework for mediation since they have actively involved in the implementation of the Court Annexed Mediation Project.

They further explained that so far public interest cases and complex legal issues are not referred to mediation.

The Judiciary also indicate that they aim at devolving mediation through enrolling CAM to the entire Courts in the republic to allow CAM devolve to Wanjiku.

5.5 Findings

5.5.1 Challenges, Gaps and Opportunities

The recognition of ADR and TDRs under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya. This is because TDRs existed from time immemorial and are therefore derived from the customs and traditions of the communities in which they operate. In most African communities, TDRs existed even before the other alternative dispute resolution mechanisms were invented. The key guiding principles for successful application of TDRs among traditional African communities was that the tribunal (chiefs, councils of elders, priests or kings) should be properly constituted. The disputants ought to have confidence in them and submit to their jurisdiction.[249]

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

The main aspects of TDRs 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. The main objective of TDRs in African societies is to resolve emerging disputes and foster harmony and cohesion among the people. TDRs derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDRs is to foster peace, cohesion and resolve disputes in the community. The practice of TDRs is not recorded in any form of documentation or record keeping but the rules are handed down from one generation to the next.

Historically, the use of TDRs and other ADR mechanisms in dispute resolution existed even before the introduction of a formal legal system. Conflict resolution among the traditional African societies was anchored on the ability of the people to negotiate. However, with the introduction of colonial legal systems, western notions of justice such as the principles of the common law of England were introduced in Kenya. The formal courts, being adversarial in nature, greatly eroded the traditional conflict resolution mechanisms.

The use of TDRs in access to justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective. For this reason, most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. The use of TDRs fosters societal harmony 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. Unlike the court process which delivers retributive justice, TDRs encourage resolution of disputes through restorative justice remedies.

5.5.2 Challenges Affecting Access to Justice in Kenya

The access to justice in Kenya is hinged on the citizen's knowledge of the existence of rights as enshrined in the Constitution's Bills of Rights and their capacity and empowerment and to seek redress from the available justice systems. Article 22(1) of the Constitution of Kenya provides that every person has a right to institute a claim that a right or fundamental freedom has been infringed, violated or denied. Further, the Chief Justice is to make rules for the court proceedings in actualization

of this provision.[250] These rules must meet certain fundamental criteria that include that the formalities relating to the proceedings as well as the formalities of instituting such claim shall be kept at a minimum, observe the rules of natural justice and shall not be unreasonably restricted by procedural technicalities.[251]

In addition, Article 48 of the Constitution provides that the State shall ensure access to justice to all persons and the fees required, if any, shall be reasonable and shall not impede justice. The right to access to justice is further echoed under Article 159(1) of the Constitution that judicial authority is derived from the people and vested in the courts and tribunals established under the Constitution. In exercise of this judicial authority, the courts and tribunals are to ensure that justice is not delayed, that it is done to all and administered without undue regard to procedure and technicalities.[252]

The access to justice, especially by the marginalized, poor, uneducated and underprivileged in the society, has been hindered by several factors. These factors include, but are not limited to, lack of infrastructure, high advocacy fees, illiteracy, lack of information, long distance to the courts and the long durations of time it takes to resolve disputes.[253] In the past, the use of legal aid services has been utilized to promote access to justice through the courts. The legal aid services are inadequate and cannot cater for the needs of the larger population that cannot meet the legal costs.

There is a general perception by many Kenyans that their rights to access to justice have been limited. According to a survey conducted by Steadman reported that 83% of Kenyans felt that their right to access to justice was curtailed with only 17% indicating otherwise. This perception is contributed to factors that include poverty, gender, religion, corruption and illiteracy.[254]

Table 1: Distribution of respondents by factors that hinder access to justice[255]

Suggestions on what limits Kenyans' access to justice	No. of respondents	Percentage (%)
Poverty	987	59
Gender	110	7
Religion	32	2

[250] Article 22(3), *Constitution of Kenya*, 2010.
[251] Kariuki Muigua, '*ADR under the Court Process: A Paradox?'* Alternative Dispute Resolution and Access to Justice in Kenya (2015), pp.125-127.
[252] Article 159(2), *Constitution of Kenya*, 2010.
[253] Ibid, pp. 126.
[254] Mbote, P.K, & Aketh M., "Kenya: justice sector and the rule of law," African Minds, 2011, Pp. 156-176.
[255] Ibid.

Lack of knowledge of their rights	707	42
Corruption	82	5
Others (incl. poor governance, tribalism, nepotism, illiteracy, discrimination, cumbersome process, courts are far, fear, culture, etc.)	57	4
Total	1 975	100

Source: Mbote, &Aketh, 2011

There is a compelling opinion that the use of alternative dispute resolution mechanisms to promote access justice is able to bridge these gaps by providing an accessible, affordable and timely avenue to dispose of disputes including those of commercial nature.

Some of the findings that emerged from the research, fieldwork and national stakeholders' forums are as follows:

a. Knowledge of rights

The capacity to exercise and enforce one's rights is also dependent on their knowledge and understanding of the existence of such right. Kenya's literacy levels have been on the rise with a high of 78% adult literacy levels being recorded by UNESCO. In a survey conducted by the GJLOS on the awareness of political, service and economic rights in Kenya, the larger number of Kenyans can identify the rights that they feel are important to them.[256] The survey also found that most Kenyans are not aware of the rights enshrined in the Constitution and other laws and policies which remain a stumbling block to access of justice. There is lack of adequate sources of information to the public and educational programmes for awareness creation.

Notably, the role of educating the public has been left in the sole hands of civil organizations with key actors such as the FIDA and Kituo cha Sheria undertaking community based comprehensive civil rights education to the public. This education continues to play a huge role in the empowerment of the public to access justice. There is however not enough progress in the civic education on the available dispute resolution mechanisms to the public as most of the civil rights education in Kenya is court centred.

[256] Governance, Justice, Law and order Sector Reform Programme (2006).

b. Standardized Training Curriculum

There is a need to also look at the institutions that offer public training in legal education, especially those offering academic and professional training and courses in alternative dispute resolution and streamline the providers and accreditors of these institutions to achieve standards. The legal education also locks out and discriminates against the majority of TDRs practitioners who settle disputes while governed by cultural laws. These practitioners dispense justice in their communities with little awareness of the existing formal legal educational framework in place that has isolated their valuable input to the access of justice.

c. Physical Access

Alternative dispute resolution mechanisms have been an effective tool in the hands of claim holders and duty bearers to promote the right access to justice than the formal court systems because they are physically accessible. The available court stations and judicial officers within the country are inadequate to meet the increasing population that is projected to grow to up 63.9 Million by 2030.[257]

Currently, there are 7 Supreme Court Judges, 21 Court of Appeal Judges, 128 Judges of the High Court and the courts of equal status to the High Court as well as 436 magistrates. There are 38 High Court stations within 36 Counties and 2 sub registries. In addition, Kenya has a total of 59 operational mobile courts across the country that seek to serve the rural residents. These rural areas include the far-flung areas such as Faza Islands, Wamba, Bangale, Ijara, Daadab, Modogashe, Zombe, East Pokot, Karaba, Laisamis/Merille, Lokichar, Lokitaung, Lokichoggio, Merti, Archers Post, Songhor, Kapsokwony, Kisanana, Baragoi, Kasigau, Rumuruti, Kiambere, Nyatike,NorthHorr, Loiyangalani, Tago, MuruaDikir (Transmara East), Kachibor, Kuresoi, Sio Port, Ngobit, Olokurto, Bura, Habaswein, Bute, Magarini, Rhamu, Borabu, Migwani, Kikima, Kendu Bay, Navakholo, Mikinduri,Kabiyet, Gaitu, Garbatulla, Tot, Wamunyu, Alale, Marafa, Sololo, Magunga, Sigor, OlKalou, Khwisero, Elwak and Kathangacini, among others.[258]

What's more, the few who can afford to access the formal justice systems are unable to locate the physical courts and are unfamiliar with complex court processes. Most litigants from the rural areas

[257] Kenya National Bureau of Statistics, "Analytical Report On Population Projections Volume XIV "KNBS 2017. Pp 17 Assessed on 01/04/2018 fromhttps://www.knbs.or.ke/download/analytical-report-on-population-projections-volume-xiv-pdf-2/

[258] Judiciary, *"Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021*" Jomo Kenyatta Foundation, 2017, pp 20.

struggle finding the courts in which their matters are to be ventilated. They often acquire assistance from the court officers and staff to understand the procedures and language of the court. The court facilities and resources are limited with fewer courts per district and inadequate judges and magistrates per district.[259] The majority of Kenyan court facilities, for instance, have not provided suitable facilities for persons living with disabilities, special needs or children. There are few wheel chair rumps and lifts within the court facilities, further limiting the physical access to the courts.[260] The courts are therefore inaccessible to many Kenyans living in the rural areas who have to incur significant transport cost. That leaves the poor, marginalized and vulnerable with little access to formal justice.

Unlike the court systems, TDRs conflict resolution mechanisms are mainly community centred with each of the 42 tribes in Kenya having their own dispute resolution mechanisms. The institutions of these TDRs include families, clans, extended families and neighbours or elders who are physically within reach with little or no costs to the disputants. The procedures of the TDRs and ADR conflict resolution systems are well known and familiar hence has promoted the access to justice.

d. Financial Access

The financial implication of settling disputes is the largest factor limiting the access to justice among Kenyans. With more than 60% of Kenyan's living below the poverty line legal cost that include court fees and advocates fees have greatly limited the access to Kenyan courts. The average minimal cost of opening a file upon retaining the services of an advocate in Kenya is about USD60 and upon completion of a simple matter the costs including advocates fees and court filing fees add up to an average of USD300.[261] In a survey conducted to assess whether the existing court fees are prohibitive in access to justice, it showed that a majority of Kenyans who had met these court fees found them to be prohibitive.[262]

The Advocates Remuneration Order sets out and administers the advocate's fees as well as prohibits advocates from charging amounts below the stipulated amounts. Charging amounts less than the

[259] African Commission on Human and Peoples' Rights, Comm. No. 232/99 (2000).
[260] Mbote, P.K, &Aketh M., *"Kenya: justice sector and the rule of law,"* African Minds, 2011. Pp. 156-176.
[261] Ibid, pp. 158
[262] Ibid.

amounts prescribed is tantamount to undercutting which leaves the public with limited advocate representation. The legal aid provided by the state is minimal and limited to accused persons charged with murder at the High Court of Kenya or child sexual offenders who are unable to secure legal representation.[263] This leaves the majority of the Kenyans without legal representation since they do not have a choice to pick even cheap legal representation. [264] The Civil Procedure Rules have provided for application for a pauper's brief for persons who cannot afford the legal costs. These applications have an initial cost and are dependent on the availability of advocates willing to handle such matters on pro bono basis.

Unlike these limitations present in the court systems, ADR conflict resolution mechanisms have a fairly minimal financial implication. The informal systems require little or no filing fees, there is no cost of representation as the disputants either represent themselves or use close family, friends or their clan system. The reduced costs of negotiation, mediation, conciliation and traditional dispute resolution mechanisms make it a preferred avenue to venerate disputes thus enhancing the access to justice.

e. Unreasonable delay

In Kenya, access to justice has been greatly hampered by the fact that most disputes, especially those of commercial nature take a long time to be resolved by the court system. This delay is deterrent to most Kenyans to pursue disputes leading to prevalence of extrajudicial means of settling disputes. The Constitution provides for the right to fair hearing. Every person has a right to have their dispute resolved by application of law and decided in a fair public hearing before a court or another independent or impartial tribunal. This provision also includes the right to have the trial begin and conclude without delay.[265] This right is yet to be achieved by many Kenyans as envisioned by the legislators.

Ideally, simple commercial disputes involving undisputed facts and issues are fast tracked and ought to take a maximum of 180 days after the issuance of pre-trial directions to be resolved, while complex matters and issues are multi-tracked and ought to take about 240 days after the issuance of pre-trial

[263] Ibid.
[264] Ibid.
[265] Article 50, Constitution of Kenya, 2010.

directions. This, however, is not the case as a research conducted in 2004 by Kenya AIDS Consortium revealed that on average, civil matters take between two to six years to be resolved.[266]

In reality, the court system is facing a problem of backlog of cases that has hindered access to justice. An audit carried out in 2013 revealed that there was a total of 426,508 pending cases in the courts. Of these cases, 332,430 were civil disputes and 94,078 were criminal in nature. 73 % of these cases were cases that had been on court for more than a year.[267] The Judiciary has however taken steps to reduce the backlog of cases through hiring of more judicial officers and legal researchers, improvement of case management system, creating public awareness, automation of court processes, opening new courts and amendment of key laws such as the Civil Procedure Rules.[268] These efforts have seen little success in the reduction of the backlog of cases with the figures of pending cases as at December 2016 being a total of 505,315 pending cases up from 494,377 at the beginning of 2016/17. A further total of 175,770 cases have been pending within the court systems for over five years.[269] The Judiciary has initiated efforts to use ADR conflict mechanisms to settle disputed within short periods of time allowing disputants expeditious remedies for their claims. This has been pivotal in the realization of the right to access to justice as enshrined in the Constitution.

f. Women in ADR Practice

Irrefutably, the effects of conflict on women are unequal and dissimilar from the effect it has on men. This is mainly premised on the fact that when social order collapses, women are likely to be vulnerable than the male counterparts.[270] Unfortunately, the role of women in conflict resolution through ADR dispute resolution mechanisms in most African societies had often been underutilized and undervalued. Women are discriminated against and unwelcome in the negotiation discussions and are less likely to be selected to chair mediation and arbitration sittings. This is also evident in the low number of women arbitrators in Kenya.

[266] Kalla K. & Cohen, J., 'Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and Aids-related Legal Services', Law and Health Initiative, OSI's Public Health Programme, Open Society Initiative For East Africa (2007).
[267] Judiciary, "Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021," Jomo Kenyatta Foundation, 2017, p 19.
[268] Ibid Pp. 20.
[269] Ibid Pp. 21.
[270] Jonas Gahr Store, Minister of Foreign Affairs of Norway, Welcome Address at The Impact of Armed Conflict on Women Before The Norwegian Red Cross and The International Peace Research Institute (May 8, 2007), available at http://www.regjeringen.no/en/dep/ud/aktuelt/taler_artikler/utenriksministeren/2007/violence.html?id=465762.

The gender theory in conflict resolution states that a person's gender is one of the most prominent features of an individual that causes observers to notice and process it immediately in social situations.[271] This theory suggest that gender is also a defining factor in understanding the bargaining behaviour that can be observed within ADR causing disparity between the attitude, behaviour and outcomes of dispute resolution mechanisms involving men or women. According to Kray and Babcock, one such difference is the interpersonal orientation in women in negotiation and mediation that is not common among men. Women are generally more interested in, and responsive to the interaction-specific aspects on negotiations causing them to perceive the relational dimension to negotiations and lean towards creating a harmonious and amicable relationship between parties. Studies show that men are more inclined to the task-specific aspects of negotiation such as the subject matter of the dispute rather than the relational aspect of the dispute.[272]

Further, women in ADR processes have suffered the negative effects of gender stereotyping and perceived expectations and bias in their role within dispute resolution. This is because a pre-existing gender stereotypical expectation of an individual to act in a certain way may lead the individual to act in a manner evidencing those expectations. A 2001 study on gender bias showed that most people perceive men to be better negotiators than women.[273] This explicit and implicit negative bias may lead women to succumb to these expectations and perform less favourably than men. Women in dispute resolution who are able to overcome these negative stereotypes and gender bias are persistent, consistent and focused on attaining the goals often appearing as aggressive or socially inept.

In her key note address in the "Women in Arbitration Conference 2018", Adedoyin Rhodes-Vivour state the Chairwoman of CIArb Nigerian Branch, opined that Arbitration is gender sensitive and must incorporate the inclusion of all people.[274] She highlighted the need to eliminate the lack of transparency within Arbitration selection and gender bias for women to thrive and grow within arbitration practice in Africa. The problem of pipeline leak of women engaged in arbitration where the female arbitrators drop out after some years of practice has to be addressed. This is because more female arbitrators the lack of female role models and lack of female mentorship to nurture the younger

[271] Kray L. and Babcock L., "Gender in Negotiations: A Motivated Social Cognitive Analysis, in Negotiation Theory and Research," Leigh L. Thompson ed., 2006. pp. 205–09.

[272] Ibid, p. 206.
[273] Ibid, p. 210.
[274]Adedoyin Rhodes-Vivour, "Promoting Gender Diversity in Arbitration in Africa", Women in Arbitration Conference 2018, Nairobi, Key note speech available at https://www.iarbafrica.com/en/events/66-arbitral-women-conference-2018.

women. Women are also prone to the work life challenges unlike men within the arbitration practice. Women suffer from the perceived lack of experience and opportunities that makes them drop out of the practice. Further, she stated that there ought to be diversity in choosing of the arbitration panels to avoid the instances where the same arbitrators are chosen to arbitrate on matters repetitively leaving out other equally qualified and competent female arbitrators.

According to Adedoyin Rhodes-Vivour, the solution is to increase the participation of women in conflict resolution lies within making the conflict resolution mechanisms gender sensitive. Despite the numerous challenges facing women in arbitration and other conflict dispute resolution mechanisms, women in arbitration ought not to push the male practitioners out but let them corroborate within dispute resolution. There is increased efficiency and effectiveness in arbitration panels executive boards and that includes gender balanced membership.

g. Gaps within Pilot Court-Annexed Mediation Project

According to Hon. Tanui, Deputy Registrar, Commercial and Tax Division Milimani Law Courts, there are certain gaps that exist within the court annexed mediation pilot project.[275] These gaps include;

1. Once a matter is screened and referred to mediation can a party who is "aggrieved" refuse to accept the referral? There are instances where the parties refereed to Mediation make applications opposing to the referral. The law is silent on how these applications ought to be addressed within the pilot project.

2. Can one argue that the MDR's direction is a "decision" capable of being appealed to a judge or challenged by an application for judicial review?

3. Does the referral to mediation violate a litigant's constitutional rights to "have the dispute resolved before a court" or is mediation the "appropriate" body under Article 50 (1) of the Constitution? Does the court annexed mediation limit the right to have a dispute resolved within the courts of law?

4. Does compulsory mediation take away or limit the litigants' constitutional rights to participate in a forum not of his choice other than before a court of law?

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

In addition, submissions from the national ADR stakeholder forum raised the following areas that have not been addressed within mediation as a conflict resolution process.

5. Who is a mediator? The definitional question of who a mediator and what qualifications is, qualities and attributes they must possess came up. Does coming up with a single definition of who is a mediator lock out the mediation practitioners who serve in informal settings or far flank areas.

6. Is a there a need for the course content or curriculums within the mediation training within the several training institutions to be standardized for quality training in mediation courses?

7. Should mediation be a core unit in the law school's curriculum as most universities offer it as a non-compulsory course unit?

8. Should the cost involved in the mediation process be set within the law to provide cost effective mediation services?

h. Opportunities in Mediation

To deepen mediation as a dispute resolution mechanism, there are certain opportunities that must be harnessed and developed to streamline it as a mechanism of dispute resolution.

As an exemplar, there should be an effort to consolidate the efforts by the different institutions to develop rules of mediation that have a uniform application for mediation within the legal process. Currently, rulemaking mandate in mediation as a legal process has been left to the different mediation service providers. The institutions with their own mediation rules include NCIA, Strathmore Dispute Resolution Centre, COTU, FIDA and Commissions.

In addition, it was suggested during the stakeholders' forum that we Judiciary should make it standard practice to incorporate mediation as a condition precedent to filing of suits or referring a matter to arbitration. This is not a new concept as Uganda has already made rules that require all commercial disputes, other than those emanating from Small Claims Courts, to be submitted to mediation prior as part of the pretrial conference. The Judicature (Commercial Court Division) (Mediation) Rules 2007,[276] has made mediation an integral part of the Commercial Court case administration system and applies in the High Court and Magistrates court of the Republic of Uganda. These rules require

[276] S1. No. 55 of 2007.

that all matters be referred to mediation within 60-days and there is no appeal or review of any orders obtained from the mediation process.[277]

i. Challenges in Mediation

Lawyers are discouraging their clients from participating in the mediation process. The lawyers have a negative perception over mediation since they are trained to litigate cases and they cherish arguing cases in open court. Lawyers perceive mediation as a threat to their income through litigation services. In mediation, the clients are left to speak and negotiate for themselves, the lawyers get frustrated and this has even led to some lawyers discouraging their clients from participating in mediation.

Also, Court Annexed Mediation is based within the precincts of the Family and commercial and Tax Division of the High Court. There is a challenge among business-oriented parties may not attend the mediation due to their busy schedules leading to the matters taking longer than ought to.

In addition, mediation faces the challenge when deciding in multinational companies that operate in Kenya where the persons capable of making binding decisions on the company are not situated in Kenya but in the Company's headquarters.

J. Lawyers in Arbitration and ADR Practice

Arbitration and ADR in general is now a service industry, and a very profitable one at that, with the arbitral institutions, the arbitrators, the lawyers, the expert witnesses and the providers of ancillary services all charging fees on a scale. The increasingly high cost of the arbitration has made it inaccessible to many disputants. In addition, here have not been very clear guidelines on the remuneration of arbitrators and foreigners are not always very sure on what they would have to pay if and when they engage African international arbitrators to arbitrate their commercial disputes. The increase in arbitration costs has been accelerated by the following factors:

a. Lawyers who are arbitrators cannot agree on dates with other parties as they are occupied running private practices concurrently with arbitration practice.
b. Court Users Committees have identified the lack of support of ADR mechanisms by lawyers.

[277] Justice Law and Order Sector, 'Judicature (Commercial Court Division) (Mediation) Rules 2007, Accessed 15 April 2018, from ww.jlos.go.ug/index.php/projects/alternative-dispute-resolution-adr/mediation-rules

c. When lawyers are given autonomy over dispute resolution, they are more willing to litigate.

d. Lawyers do not really understand their role in ADR dispute resolution mechanisms including Arbitration.

PART VI

6. CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

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

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDRs, there is no elaborate legal or policy framework for their effective application. This is the situation despite the fact that a great percentage of disputes in Kenya are resolved through mediation, conciliation, negotiation and traditional processes. Currently, the legal framework does not provide for linkage of TDRs with the formal court process. In most instances, courts have undermined the awards reached through TDRs terming them as informal and not founded on any law. This has further frustrated the utilization of TDRs in Kenya.

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

Mediation has unlimited potential in the promotion of the right to access to justice, this is because this mechanism is speedy, cost effective, confidential and takes into the account the interests of the parties over their rights. It also has the ability to mend the pre-existing relationships between the parties. The Sustainable Development Goals (SDGs) have linked the peace with development, thus,

Kenya cannot achieve developmental goals without peace. These SDGs also opine that in order to obtain peace, there must be access to justice and respect the human rights for all citizens. Mediation is one of the dispute resolution mechanisms that promote both peacekeeping and access to justice which makes it a potent tool in the hands of the judicial systems to achieve these goals.

From the findings of the research and study conducted in this Consultancy on 'Baseline Assessment, Situational Analysis and Recommendation Report of Kenya's ADR Mechanisms', there is a need for enactment and implementation of a sound legal and policy framework for effective utilization of TDRMs and ADR to ensure full access to justice for Kenyans. The study has revealed that ADR and TDRMs are widely used by communities to resolve a myriad of disputes and therefore cannot be wished away. Therefore, it is imperative that the ADR and TDR mechanisms be anchored in the legal and policy framework. The framework should harness the recommendations made in this report for effective incorporation of TDRs and other community-based process into the justice system. An integrated approach to ADR legal and institutional framework with synergies across different sectors will go a long way in deepening access to justice for commercial and non-commercial disputes in Kenya.

The recommendations in this Report are by no means exhaustive and there is thus a need for continuous evaluation of the law and practice of ADR in enhancing access to justice in Kenya to ensure continued improvement and appreciation of the same. A continuous monitoring and evaluation programme should be undertaken to appraise the implementation of the law, policy and administrative procedures and programmes on access to justice.

6.2 RECOMMENDATIONS

The overall objective of the project was to undertake a status analysis of Alternative Dispute Resolution Mechanisms and informal community justice systems and to make recommendations and provide guidelines for formulation of policies and legislation to support ADR strategies. The recommendations are contained in this section of the Report.

6.2.1 LEGAL AND POLICY RECOMMENDATIONS

i. In order to deepen ADR mechanisms for the sustained economic growth and access to justice:

- There is a preliminary need to address the definitional issues that arise when dealing with ADR. It is imperative to first define the meaning, context and scope of Alternative Dispute Resolution. In Kenya, ADR is seemingly mysterious and a new concept yet, in reality, ADR

is really a combination of mechanisms which have been used in antiquity often involving negotiation, mediation, conciliation and adjudication of disputes which have been among us for ages. In defining ADR, the ADR Taskforce will also need to clarify the ADR roadmap in Kenya.

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

- The Draft Tribunals Bill has been drafted to streamline the role of tribunals to bring all Tribunals under one unified structure. To this end, Tribunals will be administered by a body to be known as a Council of Tribunals which shall be chaired by the Chief Justice. This will be instrumental in reducing duplication efforts by the tribunals in the area of formulation of ADR rules and the dispensation of justice. The legislature has the role to see that this bill is passed into law.

- There is need to enhance and promote the continual use of ADR in the dispensation of justice across the justice sector. This can be achieved through the following manner:

    a. Documentation and lobbying e.g. monitoring government commitment in ensuring the realization of constitutional provisions on ADR by institutions and civil society;
    b. Community justice system campaigns, training and collaborative networking;
    c. Lobbying for full implementation of provisions of civil procedure Act 2012 on mediation (ADR), promoting awareness and linkages with existing justice mechanisms e.g. tribunals;
    d. there is need to revisit and consider the roll out of court counsel desks in law courts to provide legal aid and mediation services;
    e. ADR pilots through Court User Committees;
    f. Collaborative partnerships and strategic networking; and
    g. Staff training and certification as mediators to meet demand.

- In addition, there is need to change the attitudes of practitioners within the ADR dispute resolution systems. The practitioners need to view ADR as complementary to litigation and

not an avenue for loss of revenue. They need to be sensitized and made aware of the ADR process and where is its true end; resolving conflict. This can be achieved through cooperation amongst Judiciary, LSK and professional ADR training institutions.

- There is a need for close working relations between the commercial sector stakeholders such as the government ministries and departments responsible and the KAM and KEPSA, amongst others, to work closely with NCIA in sensitising both consumers and service providers on the merits of ADR in resolving commercial disputes. They can achieve this through continuous seminars, workshops and other forums. They could also help institutions set up ADR friendly conflict management mechanisms through such measures as training the personnel responsible for running such dispute management forums in ADR.
- Closer working relations between the tribunals and government and private sectors can enhance the use of ADR before these tribunals. They could come up with reporting mechanism that help trace the effectiveness of using ADR both in internal mechanisms and in tribunals.

- There is also need to have synergies across the sectors that will enhance the access to justice, peace building, development and poverty eradication. There is need to involve the different sectors within the Kenyan economy in deepening and advancing ADR dispute resolution mechanisms.

ii. Addressing Costs in Mediation

- The establishment of mediation requires an incentive scheme to encourage the parties to engage in mediation even where there are viable alternatives:
  - Advocates involved with mediation within the legal process ought to receive remuneration in order to promote legal practice within these areas of dispute resolution.
  - Referral to mediation may happen after parties have incurred legal fees in drafting pleadings and filing the same. There is need for a reimbursement system for legal fees and other expenses to ensure that litigants are not resistant to mediation for fear of the extra costs.
  - There could also provision for taxation of costs even where a mediated agreement is reached. There is also a possibility where parties could be allowed to reclaim court fees or part of it.
  - Generally, much more needs to be done to seal the loopholes identified so that all the positive attributes of mediation can be enjoyed.

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

iii. Streamlining Costs in Arbitration

Arbitration is now a service industry, and a very profitable one at that, with the arbitral institutions, the arbitrators, the lawyers, the expert witnesses and the providers of ancillary services all charging fees on a scale. In order to manage costs:

- There is need for the ADR taskforce to work closely with the ADR training and service providers to have verifiable and clear guidelines on the remuneration of arbitrators.

iv. Selection and Appointment of AJS Agents

The communities select their AJS agents using criteria such as experience, power, gender, age and stature within the society.

- The AJS Taskforce ought to come up with a selection criterion of selecting and appointing AJS agents in the future of ADR.
- There is need to set minimum criteria for the selection of these agents to achieve some form of streamlining of these alternative justice systems.
- There is need to identify the selection and appointing authorities of these agents which could be chiefs or local magistrates.

v. Developing a clear legal and policy framework on AJS

- There is need to develop a clear legal and policy framework for the application of AJS and TDRMs that that has to guarantee the human rights and interests of the disputants, the victims, offenders, communities with regard to the African customary practices and institutions of the communities.
- This recommendation can be implemented by the AJS taskforce working in collaboration with the stakeholders and interest groups.

vi. Address gaps within the Court Annexed Mediation

- The ADR taskforce as well as the Judiciary ought to continually address the identified gaps within the court annexed mediation pilot scheme through regulation and practice directions. This will ensure efficient and effective justice dispensation once the pilot program is adopted within the court system[278].
- Some of the other issues that ought to be addressed include:

a. Once a matter is screened and referred to mediation can a party who is "aggrieved" refuse to accept the referral? There are instances where the parties refereed to Mediation make applications opposing to the referral. The law is silent on how these applications ought to be addressed within the pilot project.

b. Can one argue that the MDR's direction is a "decision" capable of being appealed to a judge or challenged by an application for judicial review?

c. Does the referral to mediation violate a litigant's constitutional rights to "have the dispute resolved before a court" or is mediation the "appropriate" body under Article 50 (1) of the Constitution? Does the court annexed mediation limit the right to have a dispute resolved within the courts of law?

d. Does compulsory mediation take away or limit the litigants' constitutional rights to participate in a forum not of his choice other than before a court of law?

While it is acknowledged that recent reports from the Judiciary shows that there are efforts towards addressing the challenges identified in the evaluation of the Pilot project, there is need for wide consultations with other players such as lawyers in order to ensure full implementation to enhance its efficiency and outreach.

vii. Establishment of Overarching Body and training of ADR Practitioners

- There is need to set up an overarching body for ADR practitioners to oversee the training and accreditation of mediators, arbitrators, adjudicators, conciliators, facilitators and conveners, amongst other ADR practitioners. Currently, there are different institutions offering the training

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

and accreditation of ADR practitioners. These institutions offer different forms of training to their mediators using different curriculum material in mediation practice.

- There is need to harmonize and consolidate mediation training materials and come up with a training guideline and a curriculum that will standardize the mediation practice.
- There is also a need for continued training of CUCs members on plea bargaining agreements.
- To address instances where delays in mediation process could be occasioned by lawyers' lack of understanding on how the process of mediation, and indeed, other ADR mechanisms work, it is recommended that there should be inclusion in curriculum detailed training of young lawyers on ADR, possibly while in Kenya School of Law and other institutions of higher learning offering legal education in Kenya.

viii. Development of the ADR policy framework

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

ix. Development of a Harmonised institutional framework on Mediation and Other ADR Mechanisms

By coming up with an Alternative Dispute Resolution Act to provide for the setting up of an institutional framework within which mediation and the other ADR processes would be carried out, the right of access to justice can be actualized. However, caution should be taken to ensure that parties engage in mediation and other ADR mechanisms voluntarily, the autonomy of the process is respected and the solutions reached are acceptable and enduring. Reforms to the current system of conflict resolution would effectively address weaknesses such as delays, costs, backlog of cases and bureaucracy[279].

x. Developing ADR Code of Conduct

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

[279] Muigua, K., Resolving Conflicts through Mediation in Kenya. Glenwood Publishers Limited 2017 Pp 173.

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

xi. Defining the Jurisdiction of AJS and TDRMs[280]

The jurisdiction of AJS and TDRMs remain vague due to the different and ununiformed customary laws that are in application within the African communities:

- The AJS and the Judiciary needs to come up with a policy that identifies, defines and categorizes the kinds of cases that ought to be resolved using AJS and TDRMs and those that should be resolved through different dispute resolution mechanisms.

xii. Defining the relationship of AJS and TDRMS with the courts

- There is need to define the relationship of the AJS and TDRMs with the formal courts towards the dispensation of justice.
- There is need to harmonize the efforts of these systems and the formal courts in resolving the disputes. Currently, these justice systems work independently from each other.
- While caution should be taken not to incorporate AJS and TDRM within the formal justice systems, there is need to map out collaboration and opportunities between the courts and these alternative systems:
    - For instance, the courts and the AJS and TDRMS can collaborate in referrals of matters.
    - The AJS may refer matters to the chiefs or police, for instance, serious criminal cases such as homicides or robberies.
    - In cases of appeals or referrals, the file opened for a case at the TJS will be used by the chief, religious leaders or formal court.

[280] Taskforce on Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya (Alternative Justice Systems), Cultivating a Robust, Coordinated Alternative Dispute Resolution (ADR) Framework in Kenya Towards Sustained Economic Growth and Access to Justice forum, Nairobi.

xiii. Minimum procedural requirements for AJS Sessions

- In light of the provisions of the Constitution to grant fair hearing:
    - There is a need to come up with guidelines on the minimum procedural requirement in the AJS and TDRMs sessions. The manner and procedures in which these sessions are conducted are mainly conducted in accordance with the local community customary laws, some of which are not in line with the requirement of the Constitution in the achievement of the right of hearing. For instances, some communities do not allow women, children and minorities to participate in the sessions procedures or make submissions to the sessions.
    - TDRs are inconsistent, uncoordinated, scattered and the jurisdiction is abstract and so is their procedures. Whereas the formal legal system is individual-oriented, the TDRs are communal-based and may often involve input from the community leaders in their sessions.
    - The AJS Taskforce ought to explore the possibility of coming up and encouraging the implementation of the minimum procedural guideline for the sessions in AJS and TDRM justice systems.

xiv. Guidelines to Deal with Cases Involving Different Cultures and Communities

Currently, there are no known means of dealing with cases of the different cultures and communities. This has posed great challenges in the past where the court has to in cases that are otherwise suited to be settled through the AJS and TDRM justice systems.[281]

- The AJS should come up with robust and clear guidelines of dealing with the conflicts involving different cultures and communities in matters of common interest.

xv. Mapping out the participation of lawyers and paralegals in AJS and TDRMs sessions

- The AJS taskforce should map out and identify the nature and extent of the involvement and participation of lawyers and paralegals with the AJS and TDRMs sessions. The lawyers have a

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

strong influence on their client's willingness to submit and participate in these alternative justice systems.

- There should be a clear guideline on the extent to which these players in the justice system should be involved so as not to formalize, avoid legalities and technicalities of the systems while taking into account their valuable input.

xvi. Enforcement of its AJS decisions

The current decisions include economic and social sanctions as well as physical sanctions. These mechanisms impose severe punishment, for instance beating, fines, public shunning, banishment as well as spiritual sanctions such as curses that they are known to impose.

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

  For example, the cases of a party's non-compliance with the decision of an AJS, the matter may also be referred to the chief. For instance, in South Africa, if a person fails to obey the decision of a traditional elder, the person is reported to a magistrate who gives the person 48 hours to show cause and if he fails to, he is punished[282].

6.2.2 SECTORAL RECOMMENDATIONS

i. Need to introduce the documentation of the AJs sessions by the AJS Taskforce

ADR & TDRM structures have been known to utilize the skills of poorly trained users, poor documentation practices, and diverse delinked mechanisms.

- There is need to introduce some form of documentation in these sessions for record purposes. This might pose a unique challenge as some community's value confidentiality in these proceedings that make the recording of the sessions a taboo. This is founded in the values of dignity, cohesion and forgiveness within these dispute resolution mechanisms.

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

- The AJS ought to come up with guidelines to set out the documentation guidelines for these mechanisms.

ii. Promoting the involvement of women and minority groups in AJS and TDRM

- There is need to establish and enquire on the possible means of promoting the inclusion of women and other marginalized groups within these alternative justice systems. In most TJS membership is open to men only, and women are therefore excluded. In the instances where they are included, their participation is limited to issues involving women's sexuality and social issues such as HIV/AIDS, FGM[283].
- In addition, female members, they do not attend AJS sessions for fear of the male members because of cultural beliefs that restrict women's interaction with men. There is a need to come up with guidelines that address the interests of women, children, vulnerable and marginalized groups, in order to ensure that some of these problems are not experienced within the Judiciary Mediation Programme.
- There is a need for the Business Court User Committee to work closely with the other stakeholders such as the AJS Taskforce to create awareness on the need for active and meaningful participation of both men and women, as well as children, in the administration of justice.

iii. Entrenching ADR in the Public Administration Disputes Settlement Framework

- ADR should be entrenched in all the administration activities of the two levels of government to enable the state to reduce litigation costs that is incurred in the formal court processes. This has been achieved to some extent within the national government but the devolved governments could benefit from a deeper reliance on mediation to resolve conflict. This also solves the problem of lack of capacity to grant the remedies sought by disputants.
- This can be effected and enhanced through the Council of Governors through formal adoption in the disputes settlement framework within in the county governments. The draft *Intergovernmental Relations (Alternative Dispute Resolution) Regulations, 2018*[284] which are

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

[284] These Regulations are to apply to the resolution of disputes arising —(a) between the national government and a county government; or (b) amongst county governments; (c) out of an agreement between the national government and a county government or amongst county governments where- (i) no dispute resolution mechanism is provided in

still at the drafting stage is a step in the right direction and will go a long way in enhancing the use of ADR in managing public administration disputes.

iv. Digitization of Judiciary

- It is imperative to harness information technology to facilitate expedition and efficient records management relating to judicial services. Although the judiciary is in the process of operationalizing ICT services in its operations (digitalization of the judiciary), only the courts in major towns such as Nairobi and Mombasa enjoy these services.
- There is additional need to train ICT staff to be able to operate ICT equipment effectively. In addition, there is a need for continuous equipping of judges, magistrates and other judicial officers with knowledge and skills in discharging their responsibilities more efficiently. This would include skills and knowledge in emerging areas of law such as ICT and ADR and traditional dispute resolution mechanisms.
- The Judiciary Training Institute was established towards the realization of this goal, and, working closely with other stakeholders can ensure that this is achieved, working with the ministry incharge of ICT.
- The training should be preceded by a needs assessment of individual officers, paralegals and the judiciary as an institution. Such training should always be synchronized with the court calendar to avoid disruption of judicial services.[285]

v. ADR in Family Law

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

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the agreement; or (ii) the agreement provides for a dispute resolution mechanism that does not accord with the provisions of section 32(2) of the Act.

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

- Matrimonial Property Act, should be reviewed to ensure that Section 11 of the Act which stipulates that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives, is expanded to provide guidelines/rules that ensure that the same is smoothly implemented.
- Rigorous awareness campaigns should be carried out sensitise the community leaders on the need to uphold and respect gender equity and equality as envisaged by the Constitution of Kenya 2010.

vi. Children's Matters and Juvenile Justice System

- There is need for proper training of CUCs members on plea bargaining agreements;
- Need to encourage more pro bono lawyers taking up children matters;
- There is need for fast tracking training and accreditation of more ADR practitioners especially under the Court Annexed Mediation program across the country. This can be done by NCAJ Special Taskforce on children matters working closely with ADR training institutions and family law and children law NGOs and practitioners.
- The current measures by the current Deputy Registrar in charge of Court Annexed Mediation program aimed at ensuring countrywide training and accreditation of practitioners should be rolled out to the whole country and accorded the requisite resource support through having special kitty on the same.
- Lawyers have a role to play in access to justice in juvenile justice system and they should continually be sensitised on the need to promote reconciliation in family and children matters and use ADR as the first port of call in order to uphold and protect the rights and best interests of the children.

vii. ADR in Commerce and Finance

a. Tax Matters and ADR

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

b. Review of the Small Claims Court Act 2016

- There is need to revisit the nature of adjudication process as envisaged under the Small Claims Court Act 2016. Notably, the Act has not defined what is meant by 'adjudication' in its usage under the Act. There may be a need to define 'adjudication' as contemplated under the Act in order to address the potential ambiguity in the process.
- There is also a need to relook into the nature of qualifications required under section 5 thereof for one to be appointed as an adjudicator. As it is now, one only needs to 'be qualified for appointment as an Adjudicator if that person— is an advocate of the High Court of Kenya; and has at least three years' experience in the legal field'. The Act may need to be amended and include a requirement for special qualifications as an adjudicator, in order to ensure that process is administered by a qualified adjudicator in line with the conventional adjudication procedures and practice.
- The Act may also need to be reviewed and omit the inquisitorial type of process currently envisaged so as to make it conform to the philosophical underpinnings of adjudication, as universally contemplated.

c. Increasing Regional Arbitration Centres

- There is a need to set up more regional centres for training of international commercial arbitrators in Africa and Kenya. The Kenyan Chapter of Chartered Institute of Arbitrators trains arbitrators across Africa and has trained arbitrators in countries like Nigeria, Zambia, Uganda and even

Malawi. Kenya can indeed play a pivotal role in nurturing international commercial arbitration, not only in Kenya but also across the African continent.[286]

- NCIA is well placed within its statutory mandate to promote training of ADR practitioners as well as cooperation with other arbitral institutions

d. Enhance the Arbitration Facilities and Infrastructure

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

e. Enhance Foreigners' Confidence in Kenyan Arbitration Institutions

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

f. Enhance Collaboration with International Arbitration Institutions

- There is also need for the existing institutions to seek collaboration with more international commercial arbitration institutions since this will work as an effective marketing tool for the exiting institutions. For instance, the Kenyan Chartered Institute of Arbitrators Branch maintains a close relationship with the International Law Institute (ILI) Kampala and the Centre for Africa Peace and Conflict Resolution (CAPCR) of California State University to conduct Courses in Mediation and other forms of ADR both locally and internationally. NCIA should work closely with other regional institutions, as mandated by law.

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

g. Global Marketing of Kenya as an arbitration Centre

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

- There is need to make the NCIA and the Centre for Alternative Dispute Resolution (CADR) as an ideal choice to solve international commercial disputes involving parties from different legal systems as it can provide for an arbitration procedure which is mutually acceptable. This can be achieved through strategic contracting; legal practitioners should recommend to their clients as an ideal arbitration centre for the contract.
- There is a need to employ mechanisms that will help nurture and demonstrate Kenya to the outside world as a place with international commercial arbitrators with sufficient knowledge and expertise to be appointed to arbitrate international arbitrators.

h. Diversity and Transparency in Appointment of Arbitrators

Despite there being individuals with the relevant knowledge, skill and experience on international dispute resolution and competent institutions, which specialize in, or are devoted to, facilitating alternative dispute resolution (ADR), there has been a general tendency by parties to appoint the same arbitrators to arbitrate on similar matters.

- There is need to diversify the arbitration panels across different ages, professions, expertise and incorporate women arbitrators in nurturing arbitration.

i. Changing the Perceptions of Corruption

- There is need to address the perception of corruption within the arbitration mechanism in Kenya. This can be achieved through rendering professional services and giving awards based on law by the arbitration practitioners.
- There is also need for very clear guidelines on the remuneration of arbitrators to ensure that foreigners are always very sure on what they would have to pay if and when they engage African international arbitrators to arbitrate their commercial disputes.

viii. Environment and Land Sector

- There is need for the Land Act, 2012, and other land laws, including the Community Land Act 2016, to be reviewed to ensure clear and substantive provisions and guidelines that ensure:
    - elimination of gender discrimination in law, customs and practices related to land and property in land especially in conflict management;
    - encouragement of communities to settle land disputes through recognized local community initiatives;
    - participation, accountability and democratic decision making within communities, the public and the Government;
    - affording equal opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; democracy, inclusiveness and participation of the people; and the active utilisation of alternative dispute resolution mechanisms, especially TDRMs, in land dispute handling and management.
    - In order to ensure that the mechanisms contemplated under the existing land laws achieve their objectives in line with the Constitution, and in order to eliminate the perception of bias and discrimination, there ought to be some guidelines on the Traditional Dispute Resolution Mechanisms to ensure inclusiveness by involving women, youth and people with disabilities through policies and legislation.

- There is also a need to train everyone involved in Traditional Dispute Resolution Mechanisms and especially the decision-makers in TDRMs on the constitutional provisions and the need to ensure that their decisions and the procedures they use to arrive at their decisions is in conformity with the constitution. Such training should especially ensure that the decision-makers are aware of the Bill of Rights.
- Introduction of technology in TDRs practice would also greatly help in documentation and record keeping in TDR processes.
- ELC should work closely with NLC and community elders to realise and enhance management of community land disputes through ADR and TDR and subsequently adopt the outcomes of such processes as court orders to enhance enforcement and compliance.

ix. Civil Justice and ADR Mechanisms

- Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive rather than procedural justice. Article 159 (2) (d) of the Constitution obligates courts and tribunal to dispense justice without undue regard to procedural technicalities.
- Courts and judicial tribunals should be obligated by policy and legislation to interpret laws in a manner that promotes substantive justice rather than the dictates of procedural technicalities.
- The use of Alternative Dispute Resolution (ADR) mechanisms in conflict management and dispute resolution should be encouraged by all relevant stakeholders.
- The various administrative authorities mandated to promote access to justice need to work on a consultative and co-operative basis. This is imperative in resolving emerging institutional conflicts due to overlapping mandate and multiplicity of institutions. They need to consult and agree on how to execute the shared mandate in a way that minimizes conflicts.
- The establishment of the National Council on the Administration of Justice (NCAJ) under the Judicial Service Act, 2011 goes a long way in facilitating such cooperation and consultation among state and non-state agencies in the administration of justice. However, there is need to strengthen the Council by conferring on it corporate status with defined linkages with court user committees in all judicial stations. This will facilitate effective response to the needs and concerns of all court users by the Council in consultation with the relevant state departments. It is unlikely that this would be achieved for as long as NCAJ remains as a consultative forum, whose recommendations are left to the discretion of various bodies represented in the Council.

- Regarding the Use of Alternative Dispute Resolution in Tribunals, there is need for the following:

i. Appointment of more members with arbitration/ mediation qualifications and experience.

ii. The ADR in the tribunals should be incorporated in the main ADR frame work of the Judiciary and arbitrators compensated adequately to entrench the practice.

iii. There should be public awareness creation so as to exploit the use of ADR in matters taken before tribunals.

iv. Training is required for Boards/Tribunals on ADR mechanisms.

x. Criminal Justice and ADR Mechanisms

- Judiciary should work closely with other stakeholders to roll out awareness creation campaigns aimed at educating parties to understand at what point they should approach the courts for referral to ADR or stay of proceedings to allow for ADR. Sometimes, the parties approach the courts with the request too late in the process.
- The public should also be educated on the cases that the law allows to be referred for ADR and the ones that are not, especially in the face of confusing jurisprudence from Kenyan courts on the same.
- The Criminal Procedure (Plea Bargaining) Rules 2018 should be reviewed and revisited to ensure wider acceptance and also ensure that the same are fully applicable to the local scenario.

6.2.3 GENERAL RECOMMENDATIONS

i. Promoting Wider application of AJS and TDRMs

- The Judiciary should adopt the use of AJS and TDRMs in the dispensation of justice through the Multi-Door Court House concept.
- In addition to using mediation as an avenue of ventilating grievances within the court system, the Judiciary should also use these AJS as the first port call in instances where it is most suited to resolve disputes. These are cases that marriage, divorce, child custody, maintenance, succession and related matters should first be referred to TJS and TDRMs before the cases can be heard before a judge.
- In addition, there is need for research and codification of key concepts, practices and norms of different TJS to protect them and to ascertain where, when, how and under what conditions they operate. This also allows for analysis to determine whether they comply with the thresholds set in the Constitution.[287] The NCIA can work closely with the AJS Taskforce and community elders in such a task.
- The African traditions and customs of the Kenyan communities should be co-opted into formal education system to enhance the respect for our cultures, especially after centuries of subjugation. Most African customs and practices are neither written nor codified since they are passed from generations to generations through word of mouth. They are at great risk of dying away and should

[287] Francis K., 'Customary law jurisprudence from Kenyan courts: Implications for Traditional Justice Systems,' Vol. 8, No.1 (2015), pp. 58-72.

therefore be taught not only for use in dispute resolution but also for posterity and appreciation by present and future generations.[288]

ii. Bridge AJS and TDRMs with the formal mechanisms

- The AJS Taskforce the ADR Taskforce and the Judiciary ought to identify and utilize mediation to create a bridge between the traditional dispute resolution mechanisms as well as the alternative justice system with the formal court system and arbitration. In achieving this, the taskforce will be able to actualize the provisions of the Constitution in Article 159(2) (C). There is much advantage to be derived from bridging and linking mediation, AJS and the court system for dispute resolution.

iii. Setting up an Over-Arching Structural and Policy Framework for ADR In Kenya

- There is need to come up with an over-arching structural framework for ADR in Kenya**,** and the first step will be to come up with a conceptual framework that guide the policy that can translate into a Draft ADR Bill.
- There is also a need to come up with an over-arching policy framework for ADR. This will ensure that stakeholders seeking to employ ADR in dispute resolution within a sector can rely on the over-arching policy to develop further legislation. The ADR taskforce has the mandate to develop and formulate these recommendations.
- In the formulation of the ADR policy, certain factors that must come into account such as: -

a. Increased mobile courts and community justice days for legal interaction;
b. Continuous legal literacy that focuses on the training TDRMs on extra judicial processes and probation modalities (Paralegal);
c. People centred delivery of justice as promoted by the Judiciary must be seen to embrace TDRMs with the same weight accorded to formal mediation;
d. Roll out ADR & TDRMS in all matters especially in the emerging areas in land and extractives;
e. Implement pro ADR statutes such as the Legal Aid Act; Small Claims Court Act;
f. Enact the Courts of Petty Sessions; and

[288]Francis Kariuki, 'Customary law jurisprudence from Kenyan courts: Implications for Traditional Justice Systems,' Vol. 8, No.1 (2015), pp. 58-72.

g. Judiciary to monitor returns on ADR in all government enabled ministries and sectors.

- NCIA by virtue of its statutory mandate, is a strategic player in ensuring that ADR use is enhanced especially in commercial matters. It can work closely with the Judiciary, and other stakeholders across various government sectors to ensure that there is synergy across the sectors to enhance the uptake and use of ADR in promoting access to justice.

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