

# **Preparing for the Future: ADR and Arbitration from an African Perspective**

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## **Preparing for the Future: ADR and Arbitration from an African Perspective**

**Kariuki Muigua\***

### *Abstract*

*The paper argues a case for embracing ADR and arbitration from an African perspective. It points out that ADR mechanisms have been part and parcel of African societies since time immemorial. The paper discusses the place of ADR processes in African societies. It interrogates how these mechanisms were applied in conflict management and the principles which guided them towards this end. The paper also critically examines the current practice of ADR in Africa and highlights some of the underlying concerns. It also proposes measures towards embracing ADR and arbitration from an African perspective.*

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## **1.0 Introduction**

Alternative Dispute Resolution (ADR) denotes a wide range of dispute management techniques that function outside formal court processes<sup>1</sup>. ADR therefore entails a set of processes that are used to manage conflicts without resort to courts<sup>2</sup>. The term ADR encompasses many dispute resolution techniques including negotiation, mediation, arbitration, conciliation, adjudication, early neutral evaluation, expert determination, minitrials, traditional justice systems among others<sup>3</sup>. The *Charter of the United Nations*<sup>4</sup> provides the legal basis for the application of ADR mechanisms at the global level. It stipulates that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by *negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*<sup>5</sup>. ADR mechanisms have also been recognized at the national level in some countries. The Constitution of Kenya urges courts and tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms<sup>6</sup>.

The growth of ADR has transformed the administration of civil justice<sup>7</sup>. ADR offers numerous advantages in the administration of justice including a system with procedural flexibility, a broad range of remedial options, and a focus on individualized justice<sup>8</sup>. As a result it has been argued that ADR performs convenient and useful works that cannot be done, or cannot easily be done, through formal justice systems<sup>9</sup>. ADR mechanisms possess certain attributes which include informality, flexibility, privacy, confidentiality,

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<sup>1</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011

<sup>2</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

<sup>3</sup> Kerbeshian. L., 'ADR: To be Or...'. *North Dakota Law Review*, Volume 70, No. 2

<sup>4</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

<sup>5</sup> *Ibid*, Article 33 (1)

<sup>6</sup> Constitution of Kenya, 2010., Article 159 (2) (c)

<sup>7</sup> Main. T., 'ADR: The New Equity.' Available at [https://www.researchgate.net/profile/Thomas-Main/publication/228182886\\_ADR\\_The\\_new\\_equity/links/53d00e470cf2fd75bc5c57a5/ADR-The-new-equity.pdf](https://www.researchgate.net/profile/Thomas-Main/publication/228182886_ADR_The_new_equity/links/53d00e470cf2fd75bc5c57a5/ADR-The-new-equity.pdf) (Accessed on 13/10/2023)

<sup>8</sup> *Ibid*

<sup>9</sup> *Ibid*

party autonomy and the ability to foster expeditious and cost effective management of disputes<sup>10</sup>. These features make ADR mechanisms viable in enhancing access to justice. ADR mechanisms are able to address most of the challenges which clog formal justice processes such as costs, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow<sup>11</sup>.

ADR holds a special place in Africa. ADR mechanisms have been practiced in Africa for many centuries<sup>12</sup>. However, as a result of colonization, these mechanisms were disregarded in favour of western justice systems<sup>13</sup>. ADR mechanisms are now being widely embraced in Africa in addition to formal justice systems<sup>14</sup>. However, it has been observed that the current practice of ADR in Africa is heavily modernized and fails to fully capture African cultural values and conflict management practices<sup>15</sup>. On this basis, it has been argued that there is need to Africanize conflict management processes in order to fully capture the spirit of conflict management inherent in African societies<sup>16</sup>.

The paper argues a case for embracing ADR and arbitration from an African perspective. It points out that ADR mechanisms have been part and parcel of African societies since time immemorial. The paper discusses the place of ADR processes in African societies. It interrogates how these mechanisms were applied in conflict management and the

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<sup>10</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>11</sup> Ojwang. J.B , "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

<sup>12</sup> Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

<sup>13</sup> Ghebretekle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' available at <https://www.ajol.info/index.php/mlr/article/view/186176> (Accessed on 13/10/2023)

<sup>14</sup> Muigua. K., 'The Modernisation of other ADR Processes in Africa: Experience from Kenya and her 2010 Constitution.' Available at <http://kmco.co.ke/wp-content/uploads/2018/12/The-Modernisation-of-Other-ADR-Processes-in-Africa-Experience-From-Kenya-and-Her-2010-Constitution-SOAS-Conference-Paper-Kariuki-Muigua-4th-DECEMBER-2018.pdf> (Accessed on 13/10/2023)

<sup>15</sup> Ibid

<sup>16</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <http://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Movingfrom-Alternative-to-Appropriate-Dispute-Resolution-1.pdf> (Accessed on 13/10/2023)

principles which guided them towards this end. The paper also critically examines the current practice of ADR in Africa and highlights some of the underlying concerns. It also proposes measures towards embracing ADR and arbitration from an African perspective.

## **2.0 ADR and Arbitration in African Societies**

Before colonialism, most African societies, if not all, were living communally and were organized along clan, village, tribal or ethnic lines<sup>17</sup>. It has been observed that conflicts are a common occurrence in any human interactions due to incompatibility of goals or misalignment of interests among other causes<sup>18</sup>. Conflicts were therefore a common phenomenon in African societies. The major sources of conflict in African societies were land, chieftaincy, personal relationship issues, family property, honour, murder, and matrimonial fall-outs among others<sup>19</sup>.

It has been argued that the process of conflict management is largely influenced by culture<sup>20</sup>. Differences in attitudes, belief systems, religious practices, language, social set ups and economic practices among different cultures means that conflicts may take different forms in each culture<sup>21</sup>. Culture therefore plays an important role in conflict management. African societies had their own traditional methods and mechanisms of preventing, managing and resolving conflicts<sup>22</sup>. It has been observed that these societies had frameworks in place for the resolution of conflicts and for preventing their escalation

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<sup>17</sup> Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf> (Accessed on 13/10/2023)

<sup>18</sup> Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579–603

<sup>19</sup> Ademowo. A., 'Conflict Management in Traditional African Society.' Available at [https://www.researchgate.net/publication/281749510\\_Conflict\\_management\\_in\\_Traditional\\_African\\_Society](https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society) (Accessed on 13/10/2023)

<sup>20</sup> Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

<sup>21</sup> Ibid

<sup>22</sup> Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

into violence, thus threatening the social fabric<sup>23</sup>. It has been pointed that the process of conflict management in African societies was well-entrenched in the traditions, customs, norms and taboos of the people<sup>24</sup>.

African societies upheld norms and values geared towards promoting social cohesion and smooth running of the community<sup>25</sup>. These values include respect and honor for elders, unity, cooperation, forgiveness, harmony, truth, honesty and peaceful co-existence<sup>26</sup>. Conflicts were therefore seen as a threat to the social fabric that holds the community together<sup>27</sup>. As a result, there was need for expeditious and efficient management of conflicts and for preventing their escalation into violence, a situation which could threaten the social fabric<sup>28</sup>. African communities therefore developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community<sup>29</sup>. These mechanisms gave prominence to communal needs over individual needs<sup>30</sup>.

African societies therefore developed conflict management strategies that were designed to uphold the values and norms that held such societies together. Conflict management in African societies took the form of informal negotiation, mediation, reconciliation and arbitration among other techniques which were administered by institutions such as the council of elders<sup>31</sup>. These techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation<sup>32</sup>. The mechanisms adopted towards conflict prevention, management and resolution in African societies were largely

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<sup>23</sup> Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

<sup>24</sup> Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

<sup>25</sup> Awoniyi. S., 'African Cultural Values: The Past, Present and Future' Journal of Sustainable Development in Africa , Volume 17, No.1, 2015

<sup>26</sup> Ibid

<sup>27</sup> Ibid

<sup>28</sup> Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

<sup>29</sup> Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

<sup>30</sup> Ibid

<sup>31</sup> Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

<sup>32</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

effective and respected, and their decisions were binding on all parties, since the identity of an individual was linked to that of the community<sup>33</sup>. There was thus an impetus to comply with decisions for the well-being of the community<sup>34</sup>. In addition, social ties, values, norms and beliefs and the threat of excommunication from society provided elders with legitimacy and sanctions to ensure their decisions were complied with<sup>35</sup>.

However, colonialism resulted in subjugation of African conflict management strategies<sup>36</sup>. The indigenous practices and institutions on conflict management were largely weakened and even destroyed in many African societies, since the colonial powers introduced formal justice processes such as law courts, which came to pronounce judgments rather than resolve conflicts according to the African concepts of justice<sup>37</sup>. Conflicts that were hitherto handled through traditional amicable settlements practices, with emphasis on reconciliation and the restoration of social harmony, were now being handled on the basis of punishment of the conflicting parties<sup>38</sup>. The introduction of western justice systems resulted in disregard for traditional dispute resolution mechanisms as evidenced by reforms such as the introduction of the repugnancy clause in Kenya<sup>39</sup>. Traditional justice systems could only be applied in Kenya to the extent that they were not repugnant to the western conception of 'justice and morality'<sup>40</sup>.

However, there has been progress towards reintroduction of African conflict management strategies. The Constitution of Kenya mandates tribunals to promote ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms<sup>41</sup>. It has been pointed out that ADR mechanisms such as

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<sup>33</sup> Ademowo. A., 'Conflict Management in Traditional African Society.' Op Cit

<sup>34</sup> Ibid

<sup>35</sup> Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

<sup>36</sup> Ghebretkle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' Op Cit

<sup>37</sup> Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

<sup>38</sup> Ibid

<sup>39</sup> Judicature Act, Cap. 8, Laws of Kenya, S 3 (2)

<sup>40</sup> Ibid

<sup>41</sup> Constitution of Kenya, 2010., Article 159 (2) (c)

arbitration are enjoying a thriving present and a promising future in Africa<sup>42</sup>. ADR techniques can enhance access to justice by strengthening dispute management systems and bridging the gap between formal legal systems and traditional modes of African justice<sup>43</sup>. They may have particular value in stabilization and state building efforts when judicial institutions are weak and social tensions are high<sup>44</sup>. It has been observed that the values inherent in African societies which informed the process of conflict management remain virtually unchanged<sup>45</sup>. It is thus imperative to embrace ADR and arbitration from an African perspective in order to fully capture the spirit of conflict management envisaged by African societies.

### **3.0 Current Practice of ADR and Arbitration in Africa: Promises and Pitfalls**

ADR in Africa has risen as an increasingly popular alternative to the formal legal channels, particularly in managing civil disputes, promising efficiency and increasing the perception of justice<sup>46</sup>. Problems such as costs, bureaucracy, complex legal procedures, illiteracy, corruption, distance from formal courts, backlog of cases in courts and lack of legal knowhow have continued to clog the formal justice systems in most African countries<sup>47</sup>. As a result of these problems, it has been observed that many African countries are still struggling to establish functional, timely, and trusted judicial systems<sup>48</sup>. These problems have resulted in lack of confidence and hindered realization of the right

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<sup>42</sup> Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Available at <https://hsfnotes.com/africa/2022/11/25/2022-soa-arbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/> (Accessed on 13/10/2023)

<sup>43</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

<sup>44</sup> Ibid

<sup>45</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

<sup>46</sup> Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' *Pepperdine Dispute Resolution Law Journal*, Volume 18, Issue 3

<sup>47</sup> Ojwang. J.B, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op Cit

<sup>48</sup> Ibid

of access to justice<sup>49</sup>. ADR has emerged as an increasingly popular channel outside formal procedures to resolve disputes in timely manner, while restoring the parties' sense of justice<sup>50</sup>.

ADR mechanisms are being used in countries across Africa because the techniques used, which include negotiation, conciliation, mediation and arbitration, fit comfortably within traditional concepts of African justice, particularly its core value of reconciliation<sup>51</sup>. There has been growth of institutions in Africa offering ADR services especially arbitration and mediation<sup>52</sup>. African countries are also becoming preferred seats for ADR processes in the international arena such as international commercial arbitration and international commercial mediation<sup>53</sup>. Further, there have been progress towards institutionalizing and fusing ADR mechanisms with formal justice processes in some African countries<sup>54</sup>. This is geared towards recognizing and affirming ADR processes and establishing a clear interface between them and the formal justice processes<sup>55</sup>. For example, in Kenya, mediation has been fused with the formal justice system through the Court-Annexed Mediation (CAM) programme<sup>56</sup>. CAM is geared towards promoting management of disputes in a reconciliatory and cost-effective manner and helping to restore broken

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<sup>49</sup> Ibid

<sup>50</sup> Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?' Op Cit

<sup>51</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

<sup>52</sup> Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' <https://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf> (Accessed on 13/10/2023)

<sup>53</sup> Muigua. K., 'Looking into the Future: Making Kenya a Preferred Seat for International Arbitration.' Available at <https://kmco.co.ke/wp-content/uploads/2020/12/Looking-into-the-Future-Making-Kenya-a-Preferred-Seat-for-International-Arbitration-Kariuki-Muigua-Ph.D.-28TH-DECEMBER-2020.pdf> (Accessed on 13/10/2023)

<sup>54</sup> Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (Accessed on 13/10/2023)

<sup>55</sup> Ibid

<sup>56</sup> Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

relationships<sup>57</sup>. Further, in Kenya, the *Alternative Dispute Resolution Bill*<sup>58</sup> has been introduced into parliament. The Bill seeks to provide a legal framework for the management of civil disputes through ADR mechanisms such as conciliation, mediation and traditional dispute resolution mechanisms<sup>59</sup>. It seeks to achieve certain objectives inherent in the African conceptions of justice including promoting a conciliatory approach to dispute resolution, enhancing community and individual involvement in dispute resolution and fostering peace and cohesion<sup>60</sup>.

Other African countries are also having a positive experience with ADR including Ghana which has been hailed for enacting the most comprehensive ADR legislation in Africa<sup>61</sup>. The Alternative Dispute Resolution Act of Ghana sets out the legal framework for settlement of disputes by arbitration, mediation and customary arbitration<sup>62</sup>. It also establishes an Alternative Dispute Resolution Centre<sup>63</sup>. The Act also upholds the binding nature of ADR outcomes including mediation agreements which are recognized as binding and enforceable as court judgments<sup>64</sup>. The Act also embraces customary arbitration a move geared towards upholding customary management of disputes in line

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<sup>57</sup> Business Daily., 'Judiciary Counts gains of Court Annexed Mediation' available at <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/judiciary-counts-gains-of-court-annexed-mediation-3420850> (Accessed on 13/10/2023)

<sup>58</sup> Republic of Kenya., 'The Alternative Dispute Resolution Bill, 2021.' Available at <http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf> (Accessed on 13/10/2023)

<sup>59</sup> Ibid

<sup>60</sup> Ibid

<sup>61</sup> Onyema. E., 'The New Ghana ADR Act 2010: A Critical Overview.' *Arbitration International*, Volume 28, No. 1 (2012)

<sup>62</sup> Republic of Ghana., 'Alternative Dispute Resolution Act, 2010.' Available at <https://www.dennislawgh.com/law-preview/alternative-dispute-resolution-act/1324#:~:text=AN%20ACT%20to%20provide%20for,ASSENT%3A%2031st%20May%2C%202010.> (Accessed on 13/10/2023)

<sup>63</sup> Ibid

<sup>64</sup> Ibid, S 82

with African conceptions of justice<sup>65</sup>. As a result of these measures, it has been asserted that ADR mechanisms are enjoying a thriving present and a promising future in Africa<sup>66</sup>. However, despite the progress towards promoting ADR mechanisms in Africa, it has been observed that most of the ADR mechanisms including arbitration, mediation and adjudication are largely influenced by the western conceptions of justice<sup>67</sup>. The practice of ADR as we know it today originated and developed within specific cultural, ideological and political contexts inherent in the West and therefore, its application in non-Western societies especially Africa may turn out to be counter-productive since the latter exhibit markedly different social, historical and political conditions<sup>68</sup>. One of the most important distinctions between the institutional settings of Western societies and African societies has to do with the former's focus on the individual rather than the collective as the unit of social organization and public policy as envisaged in African societies<sup>69</sup>. As a result, it has been argued that the transfer of ADR can be politically driven and readily used to justify the imposition of Western values and ideals on post-colonial cultures and societies of the developing world including Africa<sup>70</sup>. Further, it has been argued that the current practice of ADR in Africa might be used to benefit the interests of a few including national elites and multinational corporations<sup>71</sup>. ADR mechanisms such as arbitration in Africa are now largely associated with formal justice systems due to the aspect of court involvement and emerging challenges of costs and delays<sup>72</sup>. Further, it has been argued that the institutionalizing and fusion of ADR

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<sup>65</sup> Ibid, Part III

<sup>66</sup> Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Op Cit

<sup>67</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

<sup>68</sup> Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1612865](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612865) (Accessed on 13/10/2023)

<sup>69</sup> Ibid

<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers Limited, 4<sup>th</sup> Edition, 2022

mechanisms with formal justice processes could result in the loss of some of the key attributes of these mechanisms such as informality, confidentiality and privacy which were pivotal for their success<sup>73</sup>.

Despite the foregoing concerns, ADR mechanisms including arbitration if properly harnessed, have the potential to enhance access to justice especially for the poor and marginalized in Africa<sup>74</sup>. It is therefore imperative to embrace ADR and arbitration from an African perspective in order to fully capture the spirit of conflict management inherent in African societies for enhanced access to justice.

#### **4.0 Way Forward**

ADR mechanisms including arbitration have been part and parcel of the African culture since time immemorial<sup>75</sup>. These mechanisms were the first point of call whenever a dispute arose in African societies and were administered by institutions such as the council of elders who ensured compliance with outcomes<sup>76</sup>. It has been observed that conflict management in African societies took the form of informal negotiation, mediation, reconciliation and arbitration among other techniques<sup>77</sup>. These mechanisms were considered 'Appropriate' and not 'Alternative' in management of disputes since they were able to safeguard values that were inherent in African societies and foster peace and social cohesion<sup>78</sup>. It is therefore imperative to consider and embrace ADR mechanisms in Africa as 'Appropriate' and not 'Alternative' in the quest towards access to justice<sup>79</sup>.

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<sup>73</sup> Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

<sup>74</sup> Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf> (Accessed on 13/10/2023)

<sup>75</sup> Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

<sup>76</sup> Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Op Cit

<sup>77</sup> Ibid

<sup>78</sup> Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

<sup>79</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

It is also imperative to embrace the spirit of conflict management inherent in African societies while fostering ADR mechanisms. It has been asserted that African communities developed and embraced conflict management strategies that were aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community<sup>80</sup>. These mechanisms gave prominence to communal needs over individual needs<sup>81</sup>. The purpose of conflict management in African societies was therefore to foster peace, reconciliation and restoration of social harmony<sup>82</sup>. ADR techniques fitted comfortably within traditional concepts of African justice, particularly its core value of reconciliation<sup>83</sup>. However, the current practice of ADR in Africa through mechanisms such as arbitration and some forms of mediation has shifted focus from the true purpose of conflict management that was upheld in African societies<sup>84</sup>. Some of the ADR mechanisms such as arbitration have become coercive resulting in settlement of disputes as opposed to resolving disputes<sup>85</sup>. Some ADR mechanisms in their current form therefore lack the ability to foster reconciliation and restoration of parties' relationships which was the true purpose of conflict management in African societies<sup>86</sup>. This is due to the fact that the current practice of ADR in Africa was transplanted from the West without considering the underlying social, historical and political conditions in African societies<sup>87</sup>. It is therefore important to (re)focus ADR mechanisms in Africa to the true purpose of conflict management upheld in African societies which is reconciliation and restoration of parties' relationships<sup>88</sup>.

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<sup>80</sup> Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

<sup>81</sup> Ibid

<sup>82</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>83</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

<sup>84</sup> Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit

<sup>85</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

<sup>86</sup> Ibid

<sup>87</sup> Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit

<sup>88</sup> Ibid

Further, while the progress made towards legitimizing and institutionalizing ADR mechanisms in Africa including arbitration, mediation and traditional justice systems is meritorious, it is imperative to ensure that this is done in a manner which preserves the key features of these mechanisms<sup>89</sup>. This process is important in providing elaborate legal and policy framework and guidelines for the application of ADR mechanisms and further linking these mechanisms to formal justice systems<sup>90</sup>. It is also vital in upholding ADR mechanisms as part of the justice system<sup>91</sup>. However, it has been pointed that this process could result in the loss of some of the salient features of ADR mechanisms such as voluntariness, confidentiality and party autonomy<sup>92</sup>. These features are the hallmarks of ADR and losing them will hinder the viability and efficacy of ADR mechanisms in access to justice. It is therefore crucial to preserve the key features of ADR mechanisms in modern legal practice in order to ensure their viability in promoting access to justice<sup>93</sup>. Further, it is essential to establish a clear interface between ADR mechanisms and formal courts through measures such as formulating clear referral systems providing for referral of disputes from courts to ADR and vice versa<sup>94</sup>.

Finally, there is need to continue embracing ADR in Africa and putting in place measures that will foster the uptake of ADR mechanisms. Government support is vital in promoting ADR in Africa by putting in place adequate legal regimes and infrastructure to enhance the uptake of ADR mechanisms<sup>95</sup>. Governments can further enhance the role of ADR mechanisms in Africa by designing laws that advocate for these mechanisms and

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<sup>89</sup> Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' Op Cit

<sup>90</sup> Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

<sup>91</sup> Ibid

<sup>92</sup> Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' *Alternative Dispute Resolution* (2017): 130

<sup>93</sup> Ibid

<sup>94</sup> Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Op Cit

<sup>95</sup> Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA-EAIA-Conference-Presentation.pdf> (Accessed on 14/10/2023)

institutionalizing ADR mechanisms in a manner which preserves their key attributes such as flexibility, informality, privacy and confidentiality<sup>96</sup>. It is also vital to enhance the capacity of ADR practitioners including arbitrations, mediators and Traditional Dispute Resolution (TDR) practitioners through education, training and mentorship<sup>97</sup>. This will enhance their skills and ability to manage disputes through ADR mechanisms in a manner that safeguards the key concepts of justice such as human rights<sup>98</sup>. There is also need for continued public sensitization and enhancing access to information on ADR in order to boost support and accelerate the uptake of ADR mechanisms in Africa<sup>99</sup>.

These measures are integral in fostering ADR and arbitration from an African perspective.

## **5.0 Conclusion**

ADR mechanisms have been practiced in Africa for many centuries<sup>100</sup>. These mechanisms were considered 'Appropriate' and not 'Alternative' in management of disputes since they were able to safeguard values that were inherent in African societies and foster peace and social cohesion.<sup>101</sup> ADR techniques fitted comfortably within traditional concepts of African justice, particularly its core values of reconciliation and restorative justice<sup>102</sup>. However, the current practice of ADR in Africa has shifted focus from the true conceptions of justice inherent in African societies<sup>103</sup>. This is a result of transplanting ADR mechanisms from the West into African societies without considering the underlying social, historical and political conditions in African societies<sup>104</sup>. Some ADR techniques

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<sup>96</sup> Ibid

<sup>97</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

<sup>98</sup> Ibid

<sup>99</sup> Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Op Cit

<sup>100</sup> Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Op Cit

<sup>101</sup> Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' Op Cit

<sup>102</sup> Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' Op Cit

<sup>103</sup> Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Op Cit

<sup>104</sup> Ibid

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have therefore become coercive resulting in settlement of disputes as opposed to resolving disputes.<sup>105</sup> It is thus vital to embrace ADR and arbitration from an African perspective. This can be achieved by reframing ADR mechanisms as 'Appropriate' and not 'Alternative' in Africa, embracing the spirit of conflict management inherent in African societies and its focus on reconciliation and restorative justice, preserving the key attributes of ADR mechanisms while legitimizing and institutionalizing such mechanisms and promoting ADR mechanisms in Africa as an ideal avenue for enhanced access to justice<sup>106</sup>. The time is now to prepare for the future by embracing ADR and arbitration from an African perspective.

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<sup>105</sup> Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Op Cit

<sup>106</sup> Ibid

## References

- Ademowo. A., 'Conflict Management in Traditional African Society.' Available at [https://www.researchgate.net/publication/281749510\\_Conflict\\_management\\_in\\_Traditional\\_African\\_Society](https://www.researchgate.net/publication/281749510_Conflict_management_in_Traditional_African_Society)
- Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).
- Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015
- Business Daily., 'Judiciary Counts gains of Court Annexed Mediation' available at <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/judiciary-counts-gains-of-court-annexed-mediation-3420850> (Accessed on 13/10/2023)
- Constitution of Kenya, 2010., Government Printer, Nairobi
- Ghebretikle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' available at <https://www.ajol.info/index.php/mlr/article/view/186176>
- Judicature Act, Cap. 8, Laws of Kenya
- Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf>
- Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579-603
- Kerbeshian. L., 'ADR: To be Or...' *North Dakota Law Review*, Volume 70, No. 2
- Main. T., 'ADR: The New Equity.' Available at [https://www.researchgate.net/profile/Thomas-Main/publication/228182886\\_ADR\\_The\\_new\\_equity/links/53d00e470cf2fd75bc5c57a5/ADR-The-new-equity.pdf](https://www.researchgate.net/profile/Thomas-Main/publication/228182886_ADR_The_new_equity/links/53d00e470cf2fd75bc5c57a5/ADR-The-new-equity.pdf)
- Muigua. K., & Kariuki. F., 'ADR, Access to Justice and Development in Kenya.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf>
- Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015
- Muigua. K., 'Fusion of Mediation and other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.' <https://kmco.co.ke/wp-content/uploads/2022/11/Fusion-of-Mediation-and-Other-ADR-Mechanisms-with-Modern-Dispute-Resolution-in-Kenya-Prospects-and-Challenges.pdf>

Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf>

Muigua. K., 'Looking into the Future: Making Kenya a Preferred Seat for International Arbitration.' Available at <https://kmco.co.ke/wp-content/uploads/2020/12/Looking-into-the-Future-Making-Kenya-a-Preferred-Seat-for-International-Arbitration-Kariuki-Muigua-Ph.D.-28TH-DECEMBER-2020.pdf>

Muigua. K., 'Promoting International Commercial Arbitration in Africa.' Available at <https://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA-EAIA-Conference-Presentation.pdf>

Muigua. K., 'Reframing Conflict Management in the East African Community: Moving from Alternative to 'Appropriate' Dispute Resolution.' Available at <http://kmco.co.ke/wpcontent/uploads/2023/06/Reframing-Conflict-Management-in-the-East-African-Community-Movingfrom-Alternative-to-Appropriate-Dispute-Resolution-1.pdf>

Muigua. K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

Muigua. K., 'Settling Disputes through Arbitration in Kenya.' Glenwood Publishers Limited, 4<sup>th</sup> Edition, 2022

Muigua. K., 'The Modernisation of other ADR Processes in Africa: Experience from Kenya and her 2010 Constitution.' Available at <http://kmco.co.ke/wp-content/uploads/2018/12/The-Modernisation-of-Other-ADR-Processes-in-Africa-Experience-From-Kenya-and-Her-2010-Constitution-SOAS-Conference-Paper-Kariuki-Muigua-4th-DECEMBER-2018.pdf>

Ogbaharya. D., 'Alternative Dispute Resolution (ADR) in Sub-Saharan Africa: The Role of Customary Systems of Conflict Resolution (CSCR).' Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1612865](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612865)

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

Onyema. E., 'The New Ghana ADR Act 2010: A Critical Overview.' *Arbitration International*, Volume 28, No. 1 (2012)

Price. C., 'Alternative Dispute Resolution in Africa: Is ADR the Bridge Between Traditional and Modern Dispute Resolution?.' *Pepperdine Dispute Resolution Law Journal*, Volume 18, Issue 3

Republic of Ghana., 'Alternative Dispute Resolution Act, 2010.' Available at <https://www.dennislawgh.com/law-preview/alternative-dispute-resolution->

[act/1324#:~:text=AN%20ACT%20to%20provide%20for,ASSENT%3A%2031st%20May%2C%202010.](#)

Republic of Kenya, 'The Alternative Dispute Resolution Bill, 2021.' Available at <http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf>

Ripley-Evans. J., & De Sousa. M., '2022 SOA Arbitration in Africa Survey Reveals a Thriving Market for Arbitration on the Continent.' Available at <https://hsfnotes.com/africa/2022/11/25/2022-soaarbitration-in-africa-survey-reveals-a-thriving-market-for-arbitration-on-the-continent/>

Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' *Alternative Dispute Resolution* (2017): 130

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

Uwazie. E., 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability.' *Africa Security Brief*, No. 16 of 2011