

---

# Legitimising Alternative Dispute Resolution

## Introduction

Alternative dispute resolution mechanism refers to settlement of conflicts without referring the matter to the long and costly court processes. There are several ways of settling disputes that have greatly been embraced in Kenya. They include but are not limited to mediation, conciliation, arbitration, negotiation, expert opinion, mini trial, ombudsman procedures, traditional dispute resolution and adjudication. ADR and TDR mechanisms help to enhance access to justice especially to the poor who cannot afford the costly court processes and the marginalized communities such as pastoralists who do not have easy access to the courts. ADR has the sole advantage of being simple, quick, flexible and easily accessible means of dispute resolution as compared to the court processes.

The processes also fosters good relationship between parties in addition to being cost-effective. It is because of the aforementioned reasons that ADR mechanisms is widely used in solving a wide range of disputes which includes but not limited to commercial, land, intellectual property, family, succession, criminal and political disputes. ADR and TDR processes have many advantages. However, despite this advantages there is no single policy framework that has been established to guide in the use and application of these mechanisms. This paper therefore seeks to show the need of an established policy framework through showing it's formal recognition in different legislations and pick-ups that arise there of. Further the paper seeks to encourage through it's recommendations how this policy can be incorporated into different legislations.

## Problem Statement

So many people find ADR and TDR mechanisms a better option to litigation. This is because of the advantages that accrue from employing these processes. However no strict legal policy framework has been established solely for ADR therefore the process lacks confidence. At Justice and Peace Centre- Kitale one of the core functions was dispute resolution through employing ADR mechanisms. The process however experienced some pick-ups. For instance due to lack of a particular legislation and enforcement no party could be obligated to come for the sessions. A case could therefore lag behind and there is nothing the organization could do rather than to wait for the parties to respond to the appointments given.

A case between Joan Lilwe and Timothy for instance is the first case I encountered when I joined the organization. After 2 sessions however, Timothy somehow decided it was not worth to continue with the ADR and therefore he stopped coming for sessions. Another case involved division of marital property between man and wife. The parties were advised to go back and collect all the evidence showing the property was acquired during marriage or not so as to enable smooth running of the ADR processes. That was the last time the organization heard from the man. ADR and TDR processes experience a bit of success but with a developed policy and legal framework and a means of enactment it would experience more success and therefore an improvement of access to justice while fostering good relationships and harmony.

---

## Formal Recognition Of Adr Mechanisms

The constitution of Kenya envisions promotion of justice in many spheres. It recognizes that every citizen of Kenya is equal before the law and therefore should enjoy the benefits of the law. To give full effect to the concept of equality the state is further given a responsibility to take measures such as legislative, affirmative action and makes policies to address any disadvantage suffered by a person due to discrimination. Further every person has a right to a fast, reliable, legal, reasonable and fair administrative action. The state therefore has a mandate to ensure that every person has access to justice and no factor including the reasonable fee to be charged shall impede this right.

## The Constitution Of Kenya 2010

The constitution of Kenya 2010 gives authority to the court and an independent and impartial tribunal or body to hear and decide a matter that should be decided by application of law, in a fair manner. In accomplishing this duty the judicial authority has been allowed to apply ADR mechanism in dispute management and dispute resolution hence the emergence of court annexed arbitration. The act goes further in allowing application of TDR mechanisms as long as the application of this mechanisms does not contravene the Bill of Rights, is not repugnant to justice and morality and neither should the outcomes and is not inconsistent with the constitution or any other written law.

In *Pauline Ndeti Kinyota Maingi v Rael Kinyota Maingi* the deceased will stated the manner in which his body was to be disposed. However, the court dismissed this provision. The court gave the executor burden of proof to show that disposal of the body in the traditional kamba way was repugnant to justice and morality. The court therefore held a position for the body to be disposed in the kamba way. Despite its position however the court allowed the body to be buried in the expressed intentions of the will. The point therefore is the court wanted a repugnancy in justice and morality to deviate from its intention to dispose off the body in the traditional manner. It therefore is important to recognize repugnancy clause in recognition of traditional systems vis-à-vis the modern system.

Former Chief Justice, Justice Mutunga went further and recognized adoption of ADR processes by judicial authority in his speech during the first East African ADR summit in Nairobi. The adoption would be done across family and commercial divisions of the high court as an initial step. This adoption would help reduce backlog of cases in the judiciary. This step helped to show formal recognition of ADR mechanisms by the judiciary according to article 159 of the Constitution as a means of alternative forum for an expeditious, easily approachable and yet cheap means of access to justice by Kenyan citizens.

## Civil Procedure Act

The act generally guides civil courts by providing procedure to be followed in handling civil matters. One of its guiding principles is the fair, fast, accurate and affordable means of settling civil disputes. In realizing this first disposal of civil matters the court is therefore permitted to make any orders necessary which includes employment of TDR mechanisms. Furthermore this provision serves to make it easy and cheap to solve civil disputes because most civil disputes are subject to customs and traditions of a community which the law may necessarily not provide

---

for.

The act even goes further and establishes a Mediation Accreditation Committee whose main role is come up with a creteria for certifying one to be a mediator and also provide rules for the mediators. This translates to mean that not only does the act support court use of TDR mechanisms, it goes further and allows formation of a committee to ensure a panel of mediators is always set to solve civil disputes. The act is further supported by the civil procedure rules which allows courts to employ the most appropriate means of dispute resolution, which includes mediation by it's own discrepancy or by application of the parties. The court is not only allowed to employ alternative dispute resolution mechanisms but it also has powers to facilitate the use of these mechanisms.

## **Land Act**

Land matters are mostly a communal matter subject to the believes and practices of a particular community. Community land for instance is land held on the basis of the interests, ethnicity and culture of the community. It is for this reasons that even the land act champions for land management and administration to encourage communities to settle land disputes using local community initiatives. This is a way chosen by the act in promotion of TDR as a means of dispute resolution in land matters.

## **Commission On Administrative Justice Act, 2011**

The act establishes a Commission whose function among many others is to address any complaints relating to public administration. In realizing it's function the community has been given authority under the act to employ alternative means of dispute resolution in order to maintain a working relationship between citizens, organizations and public administration. ADR mechanisms have been known to try and establishes the root course of a dispute by showing each of the parties there wrongs and therefore working towards a common understanding therefore being recommended as the most appropriate means of settling disputes in regards to public administration.

## **National Land Commission Act, 2012**

The main objective of the act is to govern the management and administration of land in Kenya. In performing this function the interpretation of the act should be done giving due respect to the principles of land policy and the Constitution at large. Section 5 of the act encourages application of TDR mechanisms in resolving land disputes. The act even goes further and gives the commission powers to develop and encourage the use of ADR mechanisms in land disputes.

## **Environment And Land Court Act, 2011**

The main objective of the act is to guide the court on how to preside over matter relating to environment and land to ensure just and expeditious handling of land matters. The act enables the court to employ ADR mechanisms as it seems fit either on it's own motion or by application of the parties. If the parties in their contact chose ADR to be the first means of dispute resolution before litigation the court is obligated to stay proceedings until fulfillment of this

---

condition. In *Lubaru M'Imanyara v Daniel Murungi* the court referred a land matter to the Njuri Ncheke for resolution being that the Njuri Ncheke were the council of elders in the community.

## **National Cohesion And Intergration Act, 2008**

The act seeks to guide the national Cohesion and Integration commission in its objective of enhancing and promoting a just and peaceful society by ensuring equality, good relations and peaceful co-existence between people of different ethnic backgrounds. Therefore the commission has been allowed to apply arbitration, conciliation, mediation and other forms of dispute resolution mechanisms in order to enhance and secure ethnic harmony. This has been interpreted to mean that the act has a very specific interest in peace and harmony no matter the ethnic background of individuals. Therefore the act seeks to profess that ADR mechanisms is the best method to be employed in dispute resolution in order to promote this co-existence.

## **Enacting A Policy And Legal Framework**

As much as ADR AND TDR processes have received formal recognition, a lot still has to be done to enable the process to acquire confidence and improve the objective of access to justice as stated in the Constitution of Kenya. One of the key factors that should be done is coming up with a framework for alternative dispute resolution mechanisms. Since different communities have different cultures the framework should try to embrace the believes of these communities and unify them into an acceptable term for all the communities. This can only be done by recognizing the diversity of different communities and finding a point of agreement through consultations. It should be designed in a way that it embraces the African customs and traditions and merges it with the Constitution and international principles to allow for access to justice. The policy should also provide for qualifications for one to become a practitioner. Due to diversity and modernization continuous training should therefore be done for these practitioners to enable them to be well equipped and also improve linkages with the formal justice systems. Informal justice systems have received wide recognition but no particular matters have been subjected to this process therefore providing a wide discretion for matters subject to informal justice systems. The policy therefore should come up with matters that are subject to this system. Informal justice systems are widely communal based and therefore the linkages with formal justice system is very minimal. In embracing informal justice system however, this linkage is very necessary in order to enable those aggrieved by decisions of informal justice system are given a chance to appeal to the formal justice system. This therefore becomes a mandate of the policy to establish this linkage.

## **Recommendations**

Repugnancy clause states that customary law can only be applied to the extent that it does not contravene the bill of rights, is repugnant to justice and morality or it's results are repugnant or is inconsistent with the Constitution or any other written law. The repugnancy clause only serves to undermine the application of TDR mechanisms. The concept of justice and morality has been greatly interpreted to impose the Western morals yet the African morals have always been so different from the Western morals. Therefore there is need to redefine the repugnancy clause to be inclusive of interpretation of African concept of justice and morality so as to make application of TDR mechanisms. In *Nyali Limited v Attorney General* Lord Denning stated that "common law may only be applied in foreign lands with modifications that fit local circumstances, since in

---

foreign lands people have their own laws and customs that they respect”The Civil Procedure Rules provide that the court may adopt ADR mechanisms for settling disputes or may facilitate and issue directions on the appropriate ADR mechanisms that can be adopted for settling disputes. To ensure that the courts do this in the correct they therefore must have full information on use and application of ADR and TDR mechanisms therefore imposing a need to train judges.

The evidence act need to be loosened up a bit in relation to evidential rules in order to allow for application of ADR and TDR mechanisms to be efficient. This is because ADR and TDR mechanisms are left to the expertise and knowledge of the practitioners who mostly are non-lawyers. Strict evidential rules proves a difficulty and therefore limits the advantages that this mechanisms can have in resolving a dispute. Further for customary law to be taken as evidence in court the customary law has to be proven which is limiting in the juridical order. In Ernest Kinyanjui v Muiro Gikanga and Another the court held that where customary law is being used and is not notorious or written then the party relying on it must prove it’s existence in court.

Customary law is broad and it is understandable that it is not codified but it’s recognition and mechanisms there of would go along way in access to justice. Limitations of Actions Act also proves to be a hindrance to those who would choose to employ TDR mechanisms in dispute resolution. This is so because the act provides for a period which after an action cannot be brought for litigation. What the act failed to put into account is matters subjected to ADR and TDR mechanisms. The act should therefore be amended to incorporate this aspect to make people free to employ ADR mechanisms. Rwanda passed a mandatory mediation framework which recognizes the role of local mediators in dispute resolution. Before any matter is subjected to litigation, it has to have first undergone mediation. Kenya can embrace the same policy to reduce instances of discrepancy of which matters to be subjected to ADR. Further the policy will enable input of community elders in matters of TDR.

## **Conclusion**

Kenya has identified the existence of ADR and TDR mechanisms through it’s different statutes. This has been a huge step for the country in allowing and enhancing the principle of access to justice to all it’s citizens. However a loop hole still exists. The recognition does not give a way of actualization of this phenomenon and therefore problems in identifying the success of the mechanisms. Some of the African traditional mechanisms might contravene against the Constitution most especially the bill of rights. In weighing contravention however an African understanding of the problem will be better than the Western mode of thinking for example while defining morals. To rid of any negative effects, before making the policy an African understanding of the Constitution should be weighed against the mechanisms employed then a unified policy framework for the use of the mechanisms.

The need of an elaborate legal and policy framework will go along way in establish and ensuring sustainability of ADR mechanisms. It is only through the policy framework that the country will be able to fully experience advantages of the mechanisms and therefore realizing the principle of access to justice.