

Arbitration as a Tool for Management of Community Land Conflicts in Kenya

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Abstract

Arbitration and other forms of Alternative Dispute Resolution (ADR) mechanisms have been designated as some of the methods of dealing with disputes and conflicts involving community land as expressly provided under section 39 (1) of Community Land Act. However, the Community Land Act fails to appreciate the distinction between disputes settlement and conflicts resolution.

This paper therefore focuses on the management of community land conflicts through arbitration in Kenya. While the Community Land Act 2016 envisages the use of various ADR mechanisms as conflict management mechanisms, the scope of this paper is limited to examining the effectiveness of arbitration as a tool for management of community land conflicts. The main hypothesis is that arbitration is ordinarily conceived is coercive and results in outcomes similar to those found in litigation and this, based on African communities desire for reconciliatory approaches, makes it inappropriate in addressing community land disputes and conflicts.

The paper also seeks to prove the following hypotheses: firstly, arbitration is not an effective tool in the management of natural resources with regard to community land in Kenya; secondly, the apparent conflict between the characteristics and nature of community land conflicts and the nature and process or arbitration, devoid of any harmonization, may defeat the intentions of Article 159 of the Constitution; and thirdly, the viable panacea to settling community land-based conflicts is to adopt a hybrid ADR mechanisms so as to achieve a customised approach.

It also attempts to contribute to the legal debate and suggest the best way forward in making arbitration and to an extension ADR, a much more effective tool for the management of community land conflicts in Kenya.

1.0 Introduction

Law is a social mechanism, a means to further the ends of society.¹ Thus, it is arguable that the use of law as a tool in dealing with social conflicts in any society should not be done in a rigid manner but should instead respond to the particular circumstances and needs of the society in question. This approach thus informs this study in coming up with the most responsive conflict management mechanism(s) for managing community land conflicts in Kenya.

Land is a natural resource² and undoubtedly, the management of land as a natural resource and the resultant conflicts thereof has important ripple effects in a given country.³ In Kenya, the case is 'worsened' by the contentious history of land laws, the emotive nature of the land question as well as the real or perceived land injustices in the country since the pre-colonial era.⁴ This study takes cognizance of the fact that various efforts have been commissioned in a bid to provide expeditious, affordable and just mechanisms that enable smooth and practical processing of land disputes and conflicts. One of the issues under examination in this paper, however, is the adequacy and effectiveness of arbitration as a tool for managing community land-based conflicts.

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¹Gardner, J.A., "The Sociological Jurisprudence of Roscoe Pound (Part I)," *Villanova Law Review* 7, no. 1 (1961): 1 at, p.12.

²See Article 260 of the Constitution of Kenya on definition of 'Natural Resources'.

³ K Muigua, D Wamukoya F kariuki, *Natural Resources and the Environmental Justice in Kenya*. Glenwood Publishers 2015 Nairobi; See also B. Wehrmann, 'Land Conflicts A practical guide to dealing with land disputes' Eschborn, 2008.

⁴ L. Adam, 'Land reform and Socio-Economic Change in Kenya' in Wanjala C. Smokin, *Essays on Land Law; The Reform Debate in Kenya* (Faculty of Law University of Nairobi 2000) p 192.

The Constitution of Kenya 2010 recognizes the principle of promoting alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms as one of the principles that should guide the courts and tribunals when exercising judicial authority.⁵ While this provision is not specific on the kind of disputes and conflicts to be submitted to alternative forms of dispute resolution, there are other provisions that contemplate such disputes or conflicts as including community land conflicts. For instance, the Constitution also requires that land in Kenya should be held, used and managed in accordance with the principles of, *inter alia*, encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution.⁶ Notably, one of the recognized classifications of land under the Constitution is community land.⁷

Community Land Act 2016⁸ was enacted to give effect to Article 63 (5) of the Constitution. It provides for recognition, protection and registration of community land rights, management and administration of community land and for the role of county governments in relation to unregistered community land.⁹ It also allows a registered community to use Alternative Dispute Resolution mechanisms including arbitration where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.¹⁰

The Community Land Act allows the parties to community land disputes to jointly refer the dispute to arbitration.¹¹ Furthermore, 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 are to apply.¹²

One of the issues that may have informed the need for inclusion of ADR mechanisms including arbitration as part of available mechanisms for management of community land disputes and conflicts is the inadequacy and the hurdles that bedevil litigation.¹³ While Community land disputes may easily be managed using dispute settlement mechanisms, community land conflicts are *sui generis* in nature requiring a carefully customized approach. In as much as arbitration is a voluntary and an alternative resolution process, it is similar to litigation in some aspects considering that they are both settlement mechanisms. It is adversarial in nature with minimal or no chances of saving existing relations. It is in light of this that this paper discusses the effectiveness of arbitration in managing community land conflicts as provided for under the Community Land Act 2016.

One of objectives of the Constitution and the Community Land Act 2016 is to promote reconciliation amongst community members especially in land management matters.¹⁴ Arbitration is arguably not one of the most viable mechanisms of promoting reconciliation in the context of community land disputes owing to some of its intrinsic characteristics. Unless this legal debate is broached and recommendations implemented, the objects and intentions under Article 159 and article 63 (5) of the Constitution might stand frustrated and suppressed or at most be rendered elusive.

⁵Article 159 (2) (c), Constitution of Kenya 2010.

⁶ See also Article 67 (2) which tasks the National Land Commission—(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts.

⁷ Article 63, Constitution of Kenya.

⁸Community Land Act, No. 27 of 2016, Laws of Kenya.

⁹Ibid.

¹⁰Section 39 (1), Community Land Act, 2016.

¹¹Section 41(1), Community land Act, 2016.

¹²Ibid, Section 41(2).

¹³ See generally, K. Muigua, *Settling Disputes through Arbitration in Kenya*, (3rd Ed., Glenwood Publishers, Nairobi, 2017); See also K. Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya*, (Glenwood Publishers, Nairobi, 2015).

¹⁴ Article 60: (1) (f) elimination of gender discrimination in law, customs and practices related to land and property in land; and (g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.

2.0 Background

Some authors observe that in the traditional African setup, indigenous resource management systems reflected the way communities organized their lives within the constraints of the environment in which they lived.¹⁵ Decision-making institutions focused on utilizing and managing environmental resources based on the knowledge of the community and within the framework of their ethics, norms and beliefs.¹⁶ They also observe that resource use systems relied upon building reciprocal relations among families and communities, for example, through livestock sharing, and with other groups and communities through trade, marriage and advisers. These relations redistributed risk and strengthened social obligations to be utilized during times of drought, pestilence or war. The indigenous tenure systems thus provided high levels of tenure security. They however acknowledge that over time customary tenure systems in Africa have spontaneously evolved “from more diffuse and collective to more specific, exclusionary individual rights” in response to population pressure and commercialization of agriculture.¹⁷

Undoubtedly, customary land law tenure and colonial administration are critical factors that have shaped the evolution of property laws and the existing property regimes and proprietary transactions in Kenya.¹⁸ Community ownership of land stems from the pre-colonial period.¹⁹ Colonialists then introduced land tenure systems of private land when they settled in Africa. Despite several spirited attempts by the colonial government to erase the concept of African commons, community land ownership persisted, as a parallel and informal system. Due to the lack of a comprehensive legal framework, it was not recognized as a legitimate form of ownership, which in turn encouraged its conversion to private land.²⁰

It was with the development of the National Land Policy, 2009²¹ and the promulgation of the Constitution of Kenya 2010²² that community land was given a seat at the table of legitimate land tenure systems. This part of the paper shall consider the pre-colonial, colonial and post-colonial history of community land in Kenya.

The pre-colonial era

Kenya's pre-colonial era was that before 1895. During this period, Kenyan communities held land in common and used the land either for agrarian activities or pastoralism.²³ One of the prominent scholars made the following observations with regard to the ownership of community land before colonial administration: ‘These African commons were managed and protected by a social hierarchy organized in the form of an inverted pyramid; the tip represented the family, the middle, the clan and lineage and the base, the community. The ownership of the land lies in all members of a community, past, present and future and access to the resources of the Commons is open to persons who qualify on the basis of socially defined membership criteria reinforced internally, by obligations which are assumed on the basis of

¹⁵Juma C. & Ojwang J.B (eds), *In Land We Trust: Environment, Private Property and Constitutional Change*, (African Centre for Technology Studies (ACTS) Press, Nairobi 1996).

¹⁶Ibid, p. 17.

¹⁷Ibid, p. 18.

¹⁸H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991), 7-19.

¹⁹Haki Blog, ‘Taking Community Land Matters Seriously in Kenya.’

Available at <https://kituochasheria.wordpress.com/2015/05/19/taking-community-land-matters-seriously-in-kenya/> [last accessed on 4/6/2017].

²⁰Kariuki F., ‘Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology’ Strathmore Law School (2015).

²¹Session Paper No. of 2012 on National Land Policy, Laws of Kenya.

²²Article 63, the Constitution of Kenya 2010.

²³Wamicha W N and Mwanje J I, ‘Environmental management in Kenya; Have the national Conservation Plans Worked?’ Organization for Social Science Research in Eastern and Southern Africa, (2000) Addis Ababa, Ethiopia.

reciprocity and to each member of the social hierarchy.²⁴ Land ownership and use was also governed by the respective customary laws of the various ethnic communities.²⁵

The African Commons were considered to be the primary economic and social asset individuals and which communities drew on, from which the fountain form their spiritual life and political ideology sprung and thus could not be subject to transfer or sell to any person outside the community.²⁶

The Colonial Era

The beginning of this period was marked by the British Government's declaration of the East African Protectorate as a protectorate of the Queen of England in 1895.²⁷ This era saw the implementation of colonial laws and practices which led to mass disinheritance of the Kenyan communities.²⁸ Colonialism had an impact on African landholding in these ways: land alienation from Africans, imposition of English property law and transformation of customary land law and tenure.²⁹

One of these practices was that colonial white settlers, either erroneously or purposely, perceived any tract of land left fallow as no man's land or annexed it.³⁰ In 1901, the East Africa Lands Order in Council came into force. It vested crown lands in the entire Protectorate in the Commissioner and such other trustees as might have been appointed, to be held in trust for her Majesty. The Commissioner also had power to make grants and leases on such terms as he saw fit.³¹

Individual ownership of land was also introduced as tenure of land for white settlers.³² The Settlers displaced African communities such as the Maasai from the productive lands and settled them in less productive lands.³³

The full effect of the 1915 Ordinance was well captured in the judgment of Barth CJ in the case of *Isaka Wainaina v Murito*.³⁴ In this case, the plaintiffs had claimed ownership of a parcel of land on the basis that they had purchased it from the Ndorobo Community before the European settlement.³⁵ Barth CJ's held as follows;

*In my view, the effect of the Crown Lands Ordinance 1915 and the Kenya (Annexation) Order-in-Council, 1920 by which no native private rights were reserved and the Kenya Colony Order-in-Council, 1921 ... is clearly inter alia to vest land reserved for the use of a tribe in the Crown. If that be so then all native rights in such reserved land, whatever they were... disappeared and natives in occupation of such Crown land become tenants at the will of the Crown...*³⁶

Colonization thus caused great upheaval to local communities, whose means of livelihood, spiritual and cultural structures were disrupted. The Colonial government consistently undermined community land

²⁴HWO Okoth Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' Amplifying Local Voices: Striving for Environmental Justice, Centre for International Environmental Law, et. al.". In: Cent. Afri. J. Pharm.Sci. 5(3): 60-66. Cent. Afri. J. Pharm.Sci. 5(3): 60-66; 2002.

²⁵ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, op. cit.; See also F. Kariuki, S. Ouma & R. Ng'etich, *Property Law*, Strathmore University Press, 2016.

²⁶ Ibid.

²⁷ Clayton A. and Savage D.C., 'Government and Labour in Kenya 1895-1963' Routledge, 1974.

²⁸ Republic of Kenya, *National Land Policy*, (2009, Government Press).

²⁹ S. Wanjala, 'Land Ownership and Use in Kenya: Past, Present and Future' in Wanjala S (ed), *Essays on Land Law: The Reform Debate in Kenya*, University of Nairobi, Nairobi, 2000, 27.

³⁰ [Wamicha W N and Mwanje J I] Ibid.

³¹ Ojienda, T., *Principles of Conveyancing in Kenya, A Practical Approach*, op cit.

³² J. Bruce, 'Kenya Land Policy: Analysis and Recommendations', USAID-Kenya, (April, 2008)

³³ [Wamicha W N and Mwanje J I] Ibid.

³⁴ [1923] 9 (2) KLR 102.

³⁵; F. Kariuki, S. Ouma & R. Ng'etich, *Property Law*, (2016) Strathmore University Press.

³⁶ Ibid.

ownership, through enactment of laws that facilitated their acquisition of rich, arable land. Both the Trust Land Act and the Land (Group representatives) Act were meant to transition customary to individual tenure in areas where immediate individualization of land could not be undertaken.³⁷

The Swynnerton reforms mainly proposed the establishment of individual title to land, which proposal led to policy recommendations that worked to the disadvantage of African communities. The Swynnerton Plan conceptualized the issue of access to land as one of tenure and the technology of production and made recommendations to modernize agriculture. One of the results of the Swynnerton Plan was the establishment of African gentry which was groomed to succeed the colonial administration and to dispel the nationalist movements which were forming at the time.³⁸

The Post-Colonial Era

At independence, it was expected that the transfer of power to indigenous communities would dramatically change the policies that were in place, especially with regards to land; this was not the case. The decolonization process of Kenya was instead an adaptive, co-optive and pre-emptive process, installing the African elites in power and allowing them to gain access to the European economy; this resulted in a general re-entrenchment and continuity of colonial land policies, laws and administrative structures.³⁹

The independent government thus only made superficial changes to the laws, changing them from 'Ordinances' to 'Acts', while the 'Crown' was substituted with 'President' who now had authority to allocate and alienate land.⁴⁰ The problem of landlessness remained unsolved, and there developed a culture of selective land allocation by the political elite to gain political support and mileage which intensified in the 1990s.

The 1999 Njonjo Report⁴¹ and the 2002 Ndung'u Report⁴² were key instruments in legal land reforms especially with respect to community land. They both recommended a land policy that would recognize and address historical land injustices, customary land rights and conflict resolution.⁴³

The *National Land Policy 2009*, for the first time in Kenya's history, designated customary land as a category of land in Kenya.⁴⁴ It recommended a number of measures in order to secure community land, including but not limited to documenting and mapping of existing forms of communal tenure, whether customary or contemporary, rural or urban, in consultation with the affected groups, and incorporate them into broad principles that would facilitate the orderly evolution of community land law. Although the full implementation of this Policy has been slow, Kenya now has a legislative framework governing community land comprised of Article 65 of the Constitution of Kenya⁴⁵, *Land Act*⁴⁶ and the recently enacted *Community Land Act 2016*.⁴⁷

³⁷Odote C, 'The Legal and Policy Framework Regulating Community Land in Kenya: An Appraisal' Friedrich Ebert Stiftung, Nairobi, Kenya, 2013.

³⁸F. Kariuki, 'Securing Land Rights in Community Forests: Assessment of Article 63(2)(d) of the Constitution' University of Nairobi, Thesis 2013.

³⁹Kameri-Mbote P, *The Land Question in Kenya: Legal and Ethical Dimensions*, International Environmental Law Research Centre (2009) Strathmore University and Law Africa.

⁴⁰[Odote C.] Ibid. See also Friedrich Ebert Stiftung, Nairobi, Kenya.

⁴¹ Republic of Kenya, *Report of the Commission of Inquiry into Existing Land Law and Tenure Systems*, (Njonjo Commission Report, 2002).

⁴² Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Ndung'u Commission Report, 2004).

⁴³ Issues and Recommendations Report of the National Land Policy, Ministry of Lands and Housing (August 2005).

⁴⁴ Sessional Paper No. 3 of 2009 on National Land Policy, Government Press

⁴⁵ Constitution of Kenya 2010.

⁴⁶ Section 37, Land Act No. 6 of 2012, Laws of Kenya.

⁴⁷ Community Land Act, No. 27 of 2016.

3.0 Nature of Community Land Conflicts

Under the Community Land Act, there are possible types of conflicts that can occur as far as community land in Kenya is concerned. Some of these would include, *inter alia*; Conflict between communities over community land interests; Conflict between an individual community member and the community; Conflict between the community and county or national government over community land interests; and Conflicts between county governments for community land that crisscross county boundary.

Some authors have rightly pointed out that land conflicts can result from historical injustices, ill-advised government policies, conflicts of interest, corrupt leadership, or more generally from competition over land and resources.⁴⁸ Furthermore, Conflicts can be clearly apparent, involving violence or damage to property, or may be latent or dormant.⁴⁹

These are the various kinds of conflicts that the Constitution and the Community Land Act contemplate may require ADR and other methods of conflict management to address them.

4.0 Management of Community Land Disputes through Arbitration

Before the promulgation of the current Constitution of Kenya, the now repealed *Land Disputes Tribunal Act* (Cap 303A)⁵⁰ was enacted to limit the jurisdiction of magistrates' courts in certain cases relating to land; to establish Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes. Subject to the Act, all cases of a civil nature involving a dispute as to— the division of, or the determination of boundaries to land, including land held in common; a claim to occupy or work land; or trespass to land, were to be heard and determined by a Tribunal established under section 4.⁵¹

When a claim was filed, the Tribunal was to adjudicate upon the claim and reach a decision in accordance with recognized customary law, after hearing the parties to the dispute, any witness or witnesses whom they wished to call and their submissions, if any, and each party was to be afforded an opportunity to question the other party's witness or witnesses.⁵² Any appeals would be lodged with the Land Disputes Appeals Committee or the High Court.⁵³ Notably, while this Act provided for the use of customary law, it did not have any express provisions recognizing the use of ADR mechanisms in managing land disputes, whether community or group held. This however changed with the promulgation of the current Constitution as it formally recognized the use of formal and informal methods of dispute and conflicts management in land and environmental matters.

Chapter ten⁵⁴ of the Constitution of Kenya 2010 vests judicial authority in the constitutionally established courts and tribunals.⁵⁵ The Constitution further empowers the Parliament to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.⁵⁶ As a result of this provision, Parliament enacted the *Environment and*

⁴⁸ Boudreaux, K, Vhugen, D. & Walter, N., 'Community Land Conflicts: How Local Land Disputes Affect Private Sector Investments and Development Projects,' (IGAD, 2017), p.1. Available at <http://land.igad.int/index.php/documents-1/countries/kenya/investment-3/628-community-land-conflicts-how-local-land-disputes-affect-private-sector-investments-and-development-projects-1/file>

⁴⁹ Ibid, p.1.

⁵⁰ Repealed by Environment and Land Court Act, No. 19 of 2011.

⁵¹ Sec. 3(1), *Land Disputes Tribunal Act*.

⁵² Sec. 3(7), *Land Disputes Tribunal Act*.

⁵³ Sec. 8, *Land Disputes Tribunal Act*.

⁵⁴ Articles 159-173, Constitution of Kenya 2010.

⁵⁵ Article 159 (1), Constitution of Kenya.

⁵⁶ Article 162 (2) (b), Constitution of Kenya.

Land Court Act, 2011⁵⁷, 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.⁵⁸The Act established the Environment and Land Court (ELC),⁵⁹ which 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.⁶⁰

In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court can hear and determine disputes on environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources, compulsory acquisition of land, land administration and management public, private and community land and contracts, choses in action or other instruments granting any enforceable interests inland and any other dispute relating to environment and land.⁶¹

In addition to the matters referred above, the Court can entertain appeals over the decisions of subordinate courts or local tribunals in respect of the above listed matters.⁶² In exercise of its jurisdiction under this Act, the Court order reliefs may include interim or permanent preservation orders including injunctions, prerogative orders, award of damages, compensation, specific performance, restitution, declaration and/or costs.⁶³ The effectiveness of the specialized court as a panacea for management of land based conflicts has however been contested. For instance, it has convincingly been argued that the creation of the Environment and Land Courts is likely to result in a more convoluted and inefficient legal framework with an additional Court being formed into an already overcrowded legal system, resulting in the application of the provisions of the Constitution in a manner that was not envisaged.⁶⁴ One of the authors strongly advocates for the use of ADR in managing land disputes.⁶⁵ However, there is no discussion on the distinction between dispute settlement and conflict resolution, which distinction is important in key in this study.

5.0 Efficacy of Arbitration in Management of Community Land Disputes

From the outset, an understanding of the nature of these conflicts and the parties involved is critical. It in turns informs the particular challenges and opportunities for arbitration as a form of ADR mechanisms and far as the inaptness of arbitration is concerned, this question remains focal throughout this research. The averments of the Report by the Njonjo Commission on the ownership and control of land have significance to the nature of community land conflicts.⁶⁶ The fact that issues around ownership and control of community land rights are more often influenced by the structure of social and cultural relations rather than juridical principles is critical to the analysis of arbitration mechanism as a suitable means of solving disputes. Most importantly, this assertion speaks into the nature of community land conflicts. Further, the truism in the statement that they are not spawned by strict legal principles and

⁵⁷Environment and Land Court Act, No. 19 of 2011, Laws of Kenya.

⁵⁸Preamble, Environment and Land Court Act, No. 19 of 2011.

⁵⁹Sec. 4(1), Environment and Land Court Act, No. 19 of 2011.

⁶⁰Sec. 13(1), Environment and Land Court Act, No. 19 of 2011.

⁶¹Ibid, Sec. 13(2).

⁶²Ibid, Sec. 13(4).

⁶³Ibid, Sec. 13(7).

⁶⁴Maina, M.W., *Land Disputes Resolution in Kenya: A Comparison of the Environment And Land Court And The Land Disputes Tribunal*, LLM Thesis, (University of Nairobi, September 2015), p. 81. Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/95229/Maina_Land%20Disputes%20Resolution%20In%20Kenya%20%20A%20Comparison%20Of%20The%20Environment%20And%20Land%20Court%20And%20The%20Land%20Disputes%20Tribunal.pdf?sequence=1&isAllowed=y

⁶⁵ Ibid.

⁶⁶ [Njonjo Report]

conflicts *inter se*; essentially means that the option to litigate on these issues would be a misleading approach. On this basis, it is safe to conclude that indeed ADR mechanisms are more preferable resolution methods compared to litigation when attempting to determine and resolve conflicts relating to community land matters. The former goes into the root of the conflict. Community land conflicts are usually subject to resolution by traditional justice systems.⁶⁷ These systems or traditional dispute resolution mechanisms (TDRs) are as vast as there are tribes in Kenya; they are specific to each context. All the same, certain characteristics are common. It has been suggested that in using arbitration to settle claims over land, there are some issues that must be addressed. It is important to know what substantive law arbitration will be based upon? It is also vital to find out what value of certainty the awards render and the relative enforcements?⁶⁸

Some scholars have argued that the major problems with the general use of arbitration alone are its adjudicatory nature and its lack of efficiency. Although arbitration is not as formal as adjudication, it does follow the same general style as a courtroom proceeding. The process resembles a courtroom because "the arbitrator accepts evidence, listens to witnesses called by the parties, and hears the arguments of the parties."⁶⁹ This may not be the ideal setting for disputes or conflicts with need for or close relationship as it can feel adversarial, even if it is less formal than going to court. Additionally, the added procedural requirements inherent in arbitration can increase the costs of the process. To some, these aspects of the procedure can make it almost indistinguishable from litigation.⁷⁰ Moreover, arbitration is criticized because of its lack of efficiency as far as saving time is concerned.⁷¹

It is not very clear on how the issue of fees should be handled especially in conflicts between one or more communities against another. Disputants are not only looking to resolve the issues of ownership but may also have other underlying issues that they may wish addressed. As already pointed out, arbitration is adversarial in nature and resembles litigation. As such, it may not address any psychological issues that may arise in community land conflicts. Unsatisfied parties may seek to appeal decisions. This may present a challenge in the case of arbitration since parties may have agreed not to appeal. Arbitration may also suffer from power imbalances which may adversely affect the process and outcome of the process.

6.0 Recommendations: Enhancing the Effectiveness of ADR Mechanisms in Managing Community Land Disputes

The paper sought to prove the following hypotheses: firstly, arbitration is not an effective tool in the management of natural resources with regard to community land in Kenya; secondly, the apparent conflict between the characteristics and nature of community land conflicts and the nature and process of arbitration, devoid of any harmonization, may defeat the intentions of Article 159 of the Constitution; and thirdly, the viable panacea to settling community land-based conflicts is to adopt a hybrid ADR mechanisms so as to achieve a customised approach. Effective settlement of community land conflicts in Kenya is critical in preserving social order in the country. As such, there is need for involvement of all stakeholders including the county and national governments to ensure that such conflicts are amicably resolved. As the custodian rights, the government has a higher obligation in ensuring that this is achieved. This will be with the aim of guaranteeing the proprietary rights of Kenyan communities. Further, the National Land Policy places an obligation on the government to establish a system for community land

⁶⁷ Human Rights and traditional Justice Systems in Kenya, United Nations Human Rights, Office of the High Commissioner (New York and Geneva, 2016).

⁶⁸ Nucci, D., 'Study on arbitration, mediation and conciliation of land and property disputes,' *Land and Property Study in Sudan* (2004), p.5. Available at <https://www.cmi.no/file/1828-UNHCRNuccilandarbitrarion12Dec2004.pdf>

⁶⁹ Vorys, Y., "The best of both worlds: the use of med-arb for resolving will disputes," p. 884.

⁷⁰ Vorys, Y., "The best of both worlds: the use of med-arb for resolving will disputes," p. 884.

⁷¹ *Ibid*, p. 884.

management and conflict resolution.⁷² It can be argued that the enactment of the Community Land Act, 2016 is a major milestone towards achieving this goal. However, from the discussion in the previous sections, it has been established that the Act has several shortcomings especially in the area of conflict resolution. As such, the following can be done to enhance an effective system of handling community land conflicts and safeguarding the proprietary rights of Kenyan communities.

6.1 Investing in Public Awareness among Kenyan Communities

Conflicts are bound to occur whenever there is more than one person claiming a stake or interest in a resource as in the case of community land. In the Kenyan context, the default rule has been to rush to court whenever any kind of dispute arises regardless of whether or not the dispute can give rise to a course of action. However as discussed, litigation has several shortcomings such as delays, costs and technicalities that may hinder access to justice among most people in Kenya. Further, as a rights-based system, litigation does not settle the root cause of a conflict creating a harbinger for the dispute to remerge in future. It is therefore important that communities be encouraged to pursue Alternative Dispute Resolution whenever disputes arise with regards to the use or management of community land. This would allow them to benefit from the advantages of most of these systems such as flexibility, expediency, low costs and settling the root cause of a problem. This will help to preserve social order and ensure that members can continue to co-exist in the community.

6.2 Streamlining the Conflict Resolution Mechanisms under the Community Land Act

By recognizing Alternative Dispute Resolution mechanisms such as arbitration, mediation and traditional dispute resolution, it is evident that the Constitution envisioned the advantages attributed to these systems. However, as discussed, the practice of Alternative Dispute Resolution in Kenya has not lived to its expectations. The Constitution advocated for a system that would guarantee efficiency, expediency, affordability and access to justice while it can be said that the contrary is true. Some of the shortcomings pointed with the current forms of Alternative Dispute Resolution include delays, costs and court interference especially in arbitration. Where this occurs, then the whole purpose of Alternative Dispute Resolution is defeated. Further, it is arguable that traditional dispute resolution may result in outcomes that are contrary to justice and morality defeating the provisions of Article 159 (3) of the Constitution. These shortcomings can be cured by streamlining alternative dispute resolution in line with the Constitutional provisions. While pursuing arbitration, parties should be discouraged from making numerous and unnecessary applications to court as this results in inordinate delays. Further, there is need to institutionalize traditional dispute resolution mechanisms in line with the Constitution to ensure their efficacy in settling community land conflicts.

6.3 Use of Med-Arb to Manage Community Land Conflicts

Med-Arb entails subjecting a conflict to mediation then resorting to arbitration if the mediation fails. The system allows parties to benefit from the advantages of mediation and arbitration in the dispute resolution process. Further, the system guarantees finality, efficiency and flexibility which are key features of both arbitration and mediation. The discussion in the previous sections points to several shortcomings with the use of arbitration to settle community land conflicts. One mechanism that can offer a better alternative to arbitration is the use of Med-Arb. This is a form of conflict resolution mechanism that combines the use

⁷² Sessional Paper No. 3 of 2009 on National Land Policy, S 66 (d)

of both arbitration and mediation.⁷³ Med-Arb is a hybrid form of Alternative Dispute Resolution that has not been specifically recognized under the current legal regime in Kenya. However, the wording of the provisions of Article 159 (2) (c) of the Constitution of Kenya 2010 can be interpreted to be allowing other forms of Alternative Dispute Resolution not specifically provided for in the Article to be employed. The Article states that, 'alternative forms of dispute resolution such including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.'⁷⁴ The list is not exhaustive and parties to a dispute may employ other forms of Alternative Dispute Resolution such as Med-Arb.

This form of conflict resolution is premised on the shortcomings of mediation and arbitration and seeks to give parties to a dispute an opportunity to benefit from the benefits of both mediation and arbitration.⁷⁵ As discussed, arbitration has become too formal and expensive whereas in mediation lack of a binding award limits its efficacy in conflict resolution. On the other hand, the finality of an arbitration award and the flexibility of mediation points to some of the advantages that these forms of Alternative Dispute Resolution possess. As such, use of Med-Arb settles the underlying issues in both arbitration and mediation by providing for finality, efficiency and flexibility.⁷⁶

In Med-Arb, parties to a conflict first resort to mediation for purposes of resolving the conflict. At this stage, the mediator attempts to make the parties reach at an amicable solution. If the mediation fails to produce an agreement, the arbitration stage sets in and the arbitrator imposes a binding award on the parties.⁷⁷ Med-Arb recognizes the advantages of mediation over arbitration and this is the reason why mediation is first utilized in the conflict resolution and arbitration sets in only where the mediation has failed.

The finality, efficiency and flexibility of Med-Arb make it a viable mechanism of resolving conflicts related to community land. The Community Land Act recognizes the use of Alternative Dispute Resolution in managing disputes under the Act and specifically advocates for the use of traditional dispute resolution, mediation and arbitration.⁷⁸ However, the Act does not appreciate the shortcomings of these methods that may affect their efficacy in managing conflicts. As such, there is a need for a kind of dispute resolution mechanisms that guarantees party autonomy, efficiency and finality to the dispute. In the case of community land, there is also the need to preserve the relationship between the parties so that they can co-exist in the society. Through the use of Med-Arb, these concerns will be effectively addressed.

It has been asserted that Med-Arb has the ability to guarantee long term notions of procedural and distributive justice.⁷⁹ This arises from the fact that in Med-Arb, the disputants are given two chances to present their case, that is, at the mediation stage and at the arbitration stage, before such a dispute is determined. As a result, there is a high likelihood that all the underlying issues in the dispute will be resolved and the final decision will be arrived at after parties have been allowed to present on the issues and the arbitrator has full knowledge of all such issues. This contributes to the finality of the process and the notion of justice. This therefore makes Med-Arb a viable mechanism of resolving disputes related to community land under the Community Land Act, 2016.

⁷³ Pappas, B., 'Med-Arb and the Legalization of Alternative Dispute Resolution,' *Harvard Negotiation Law Review*, Vol 20 (2015) pp 159-200.

⁷⁴ Constitution of Kenya 2010, Article 159 (2) (c)

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ William. H. Ross and Donald. E Conlon, 'Hybrid Forms of Third Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration.' *The Academy of Management Review*, Vol 25. No 2 (2000) pp 416-427

⁷⁸ Community Land Act, No 27 of 2016, S 39-4.

⁷⁹ William. H. Ross and Donald. E Conlon, 'Hybrid Forms of Third Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration.'

Med-Arb is a hybrid form of alternative dispute resolution and is yet to be embraced in Kenya. Owing to its potential and advantages, there is a need to embrace Med-Arb as a form of ADR in Kenya. The system can be very effective in settling community land conflicts by removing the barriers posed by both mediation and arbitration by providing finality to a conflict whilst preserving the relationship among the disputants.

6.3.1 Demerits of Med-Arb

While Med-Arb has the foregoing advantages, one should be wary of a few disadvantages. Some scholars and practitioners have argued that it is best to have different persons mediate and arbitrate. However, at times the same person acting as mediator “switches hat” to act as the arbitrator.⁸⁰ The risk in such a scenario is that the person mediating becomes privy to confidential information during the mediation process and may be biased if he or transforms himself into an arbitrator.⁸¹

The other risks have been identified as obtaining less-than-optimal assistance from the third party due to different competencies’ requirement for mediation and arbitration.⁸² This is because, the arbitrator’s strength is believed to be in intellectual analysis and evaluation, while the mediator’s strength is in balancing the legal evaluation with the creative work necessary to meet the parties’ underlying business, personal and emotional interests.⁸³ There is also the risk of delay should the mediation fail. It will take some time to get the arbitration back on track, especially if a party decides a different neutral is needed to serve as the arbitrator.⁸⁴

The other question that has been raised is whether procedural fairness requirements may tie the mediator-arbitrator’s hands in the mediation and impede (or preclude) private caucusing.⁸⁵ This may be attributed to the fact that the person mediating becomes privy to confidential information during the mediation process especially during such caucusing. The information so obtained is likely to affect their objectivity in arbitration. It may also raise confidentiality breach issues, thus affecting acceptability of the outcome.⁸⁶ This regards the question whether the Med-Arbitrator will remain unaffected as an arbitrator after engaging in caucuses and becoming privy to confidential, perhaps intimate, emotional, personal, or other “legally” irrelevant information.⁸⁷ However, it has been suggested that in reaching an ultimate arbitration decision, the med-arbiter has to be sensitive as to how to use, or if to use at all, the knowledge that he or she may have gained in confidence during the mediation phase of the process.⁸⁸ Despite the concerns for confidentiality, it is asserted that unlike normal arbitration, parties have to know, and to release, the med-arbiter from the normal restraints of an arbitrator’s prohibitions of *ex parte* contacts.⁸⁹ This is important

⁸⁰ Lieberman, A., ‘MED-ARB: Is There Such a Thing?’ *Attorney At Law Magazine*, (Greater Phoenix Edition), available at <http://www.attorneyatlawmagazine.com/phoenix/med-arb-is-there-such-a-thing/> [Accessed on 01/11/2018] (As quoted Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, p. 50).

⁸¹ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, p. 50.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ ‘Agreements to engage in ‘med-arb’ now enforceable in Ontario,’ *ADR Bulletin of Bond University DRC*, op cit.

⁸⁶ Baril, M.B. & Dickey, D, ‘MED-ARB: The Best of Both Worlds or Just A Limited ADR Option? (Part Two),’ August 2014.

Available at <http://www.mediate.com/pdf/V2%20MED-ARB%20The%20Best%20of%20Both%20Worlds%20or%20Just%20a%20Limited%20ADR%20Option.pdf> (as quoted in Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, p. 50).

⁸⁷ De Vera C, ‘Arbitrating Harmony: Of Culture and Rule of Law in the Resolution of International Commercial Disputes in China’ *Columbia Journal of Asian Law*, op cit, p. 158 (as quoted in Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, p. 50).

⁸⁸ Kagel J, ‘Why Don’t We Take Five Minutes? Med-Arb After 40: More Viable than Ever’ 241, 2013, p.246. Available at <http://naarb.org/proceedings/pdfs/2013-241.PDF> (as quoted in Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, p. 50).

⁸⁹ Ibid.

considering that mediation views such contacts as essential to come up with an award that addresses the parties' interests.⁹⁰

It is argued that it is also important to let the parties know at the outset that particularly sensitive information, which they might identify in their deliberations with the med-arbiter as to matters not to be shared with the opposition, would be used only in mediation and would be ignored in arbitration.⁹¹ That way, parties may gain confidence in the process and chances of the parties readily accepting the outcome are enhanced. Yet, some authors argue that to find an adequate resolution in the arbitration phase of the process, the Med-Arbitrator will need to use his understanding of the relationship between the parties during the mediation phase, or use his prior knowledge of their respective underlying interests.⁹² This presents conflicting views on what the med-arbiter should do. However, what is more important for the third party who is retained to conduct both phases of the process is to ensure that information gathered in either phase is used sparingly and only for purposes of balancing the interests of the party. They must scrupulously guard their reputation of impartiality and independence as either the mediator or an arbitrator in the process. The debate out there is whether this is really possible and therefore, med-arb practitioners must always be aware of these misgivings about the process. There are those who still hold that the Mediation/Arbitration process can be an effective alternative dispute resolution method if parties, counsel, and neutrals alike understand the pros and cons of merging the two processes and the nuances inherently involved in the resultant combination.⁹³

It has been observed that in Kenya, the process has not yet been the subject of court discussion although it is not expressly endorsed or prohibited, in its hybrid form. However, it is possible to argue that med-arb should be encouraged, in light of the current constitutional dispensation that allows parties to explore as many ADR and TDR mechanisms as possible. Parties should be able to appreciate the challenges that are likely to arise in med-arb before settling for it. To facilitate this, the proposed mediator-arbitrator should be well trained in both mediation and arbitration. They should also be able to advise the parties accordingly on the consequences of taking up med-arb as the conflict management mechanism of choice.⁹⁴

Parties may also need to decide beforehand whether the third parties will be drawn from the communities involved or will be independent persons. They should also agree on how the potential costs of the process will be settled to avoid disagreements later on.

7.0 Conclusion

Community Land Act 2016 contemplates the use of ADR including arbitration, in management of community land conflicts. This research paper has assessed the viability of arbitration in management of these natures of conflict, based on its characteristics, and concluded that it may not achieve the best results for the parties involved.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² De Vera C, 'Arbitrating Harmony: Of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' *Columbia Journal of Asian Law*, op cit, pp. 156-157 (as quoted in Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, p. 50).

⁹³ Flake, RP, 'The Med / Arb Process : A View from the Neutral's Perspective,' *ADR Currents: The Newsletter of Dispute Resolution Law and Practice*, June, 1998, p. 1; See also Weisman, MC, 'Med/Arb-A Time And Cost Effective Hybrid For Dispute Resolution,' *Michigan Lawyer's Weekly*, October 10, 2011. Available at http://www.wysr-law.com/files/med-arb_-_a_cost_effective_hybrid_for_dispute_resolution.pdf [(as quoted in Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, p. 50).

⁹⁴ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers, Nairobi – 2015, p. 50.

The Community Land Act, 2016 was enacted to address among other issues, the management and administration of community land conflicts and the arising disputes. The Act provides an elaborate system of conflict resolution that entails mechanisms such as traditional dispute resolution, mediation, arbitration and litigation as a measure of last resort. However, as discussed in detail, the nature of community land conflicts makes some of these mechanisms especially arbitration and litigation inefficient in handling such kinds of conflicts.

As pointed out, community land conflicts are not spawned by strict legal principles or conflicts that make litigation ill-equipped to deal with them. Litigation is a right based system that places emphasis on the law and evidence when deciding disputes. In absence of these, a dispute subjected to litigation will likely be dismissed for disclosing no reasonable cause of action. Further, it has also been established that there are several underlying issues that needs to be adequately addressed in community land conflicts such as the need to preserve social relationships to ensure peaceful co-existence among members of a community. The Paper has espoused the fact that community land conflicts are most preferably disposed of through Alternative Dispute Resolution than by litigation. This is in line with the principles of land policy enshrined in Article 60 of the Constitution that advocates for settling of community land conflicts through local initiatives consistent with the constitution.⁹⁵

⁹⁵ Constitution of Kenya 2010, Article 60 (1) (g).

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