

## **Mediation as a Tool of Conflict Management in Kenya: Challenges and Opportunities**

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### **Abstract**

*Mediation is one of the Alternative Dispute Resolution mechanisms that have been practiced for a long time and among the most preferred modes of conflict management. This can be attributed to the fact that mediation can resolve various disputes of varying nature and the outcome is based on mutual consensus. In Kenya, mediation has become an effective method of resolving political, family, commercial and civil disputes, among others. It is deemed to be a suitable mechanism because of its distinct attributes like voluntariness, cost effectiveness, informality, less time consuming, focusing on the interest and not the rights, allowing for creative solutions and enhancing party autonomy.*

*However, despite having all these features, mediation faces a myriad of challenges which undermine its efficacy. Of major concern is the fact that mediation is non-binding. Further mediation can lead to endless proceedings where parties fail to agree. It is in light of the foregoing that this paper seeks to discuss the challenges facing mediation as a conflict management mechanism in Kenya and advocates for reforms so as to enhance the practice and outcome of the process.*

### **1. Introduction**

Mediation refers to a voluntary conflict resolution process in which a third party known as a mediator assists parties to a conflict to reach tangible and mutually acceptable agreements.<sup>1</sup> In mediation, the mediator does not make a decision on behalf of the parties but facilitates the process and assists the

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<sup>1</sup> Moore, C.W, *The mediation process: Practical strategies for resolving conflict*, (John Wiley & Sons, 2014), p. 1.

disputants to reach a consensus. Mediation has been in practice for a long time and has been seen to be efficient because of the long lasting solutions parties agree on based on mutual consensus and without any coercion. Mediation has been heralded due to its ability to help parties to a conflict to restore, redefine and transform their interactions and attitudes towards each other with the ultimate goal of reconciliation and enhancing peaceful relationships.<sup>2</sup>

Notably, at the international level, Alternative Dispute Resolution (ADR) mechanisms are recognized as viable means of dispute management. The *Charter to the United Nations* is one such treaty that recognizes the important role of ADR mechanisms in management of interstate disputes and it provides that the parties to any dispute should first seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement and other peaceful means of their own choice.<sup>3</sup> They are seen as viable means of promoting peace in and among states.

With the promulgation of the Constitution of Kenya 2010, mediation as a form of ADR was given Constitutional recognition. The Constitution requires courts and tribunals while exercising judicial authority to be guided by a number of principles which include promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>4</sup> However, the traditional dispute resolution mechanisms should not be used in a way that contravenes the Bill of Rights, is repugnant or results in outcomes that are repugnant to justice and morality, or is inconsistent with the Constitution or any written law.<sup>5</sup>

Mediation is meant to be a voluntary, informal, consensual, confidential, flexible, cost-effective, speedier and non-binding conflict management process. It can be said that mediation is an aspect of the general structure and process of negotiation, since it is considered as negotiation with the help of a

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<sup>2</sup> Ibid.

<sup>3</sup> United Nations, Charter of the United Nations, 24<sup>th</sup> October 1945, Article 33.

<sup>4</sup> Constitution of Kenya 2010, Article 159 (2) (c), (Government Printer, Nairobi, 2010).

<sup>5</sup> Ibid, Article 159 (3).

third party called a mediator where the negotiators have hit a deadlock.<sup>6</sup> It owes its widespread application in the management of conflicts and disputes in the contemporary world to these attributes that have made it possible to resolve disputes of a varied nature which have resulted in potentially binding and long lasting settlements between disputants.<sup>7</sup>

## **2. Accessing Justice through Mediation in Kenya**

Justice is considered among the basic rights which everyone should access and it is a fundamentally important element of stability and Rule of Law.<sup>8</sup> Equal access to justice is a right based on human rights obligations and it is to be guaranteed for all including the people living in poverty. Access to justice means people are capable of claiming their rights or seek a remedy against exploitation.<sup>9</sup>

Access to justice can and should be enhanced by both access to the courts as well as through Alternative Dispute Resolution mechanisms or forums for reaching consensual outcomes outside the courts.<sup>10</sup> It is also generally accepted that popular notions of access to justice are focused on empowering individuals to exercise their legal rights in the civil justice system.<sup>11</sup>

The meaning of the word justice can vary between countries and cultures. However, the idea of justice is common to all and generally depicts notions of fairness, accountability and equity. Access to justice is a broad concept,

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<sup>6</sup> Mwagiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

<sup>7</sup> Muigua, K., *“Resolving Conflicts Through Mediation in Kenya”*, (2<sup>nd</sup> Ed., Glenwood Publishers Ltd, 2017), p. 4.

<sup>8</sup> See generally, Muigua, K. & Kariuki, F., ‘ADR, Access to Justice and Development in Kenya,’ *Strathmore Law Journal*, Vol. 1, No. 1, June 2015.

<sup>9</sup> Muhanda, P., *“The Advocate: Access to Justice”*, The LSK Magazine | Volume 1, Issue 6 | March - June, 2016, p. 24.

<sup>10</sup> Aina, K., *“Court Annexed Mediation: Successes, Challenges and Possibilities”*, *Lessons from Africa Session* (Nigeria) Available at <http://www.conflictdynamics.co.za/files/217/mediation--lessons-from-Nigeria--Mandela-Institute-Presentation.pdf> (Accessed on 20/05/2018).

<sup>11</sup> *Ibid.*

encompassing people's effective access to the formal and informal systems, procedures, information and locations used in the administration of justice.<sup>12</sup> People who feel wronged or mistreated in some way usually turn to justice systems including in relation to civil, administrative and criminal law for redress.<sup>13</sup>

The barriers can be encountered in relation to a country's normative framework or national laws, or be faced in terms of a country's institutional framework for justice, which includes law enforcement and court systems.<sup>14</sup> With regard to the latter, barriers and impediments are often complex, involving combined forms of inaccessibility as well as other forms of discrimination. The implications of such barriers are significant, as lack of access to justice can compound the disadvantages faced by different groups of persons in the society. Equally, justice delayed is justice denied, so timely access to justice is important.<sup>15</sup>

The right of access to justice in Kenya is constitutional and it gives the mandate to the State to ensure that this right is accessible to every person without due regard to procedural technicalities, and, if any fee is required, it should be reasonable and should not impede access to justice.<sup>16</sup>

The Constitution of Kenya also provides that every person has the right to institute court proceedings claiming that a right and fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.<sup>17</sup> There is the provision that every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>18</sup> In an effort to implement these provisions of access to justice, the State through Article 48 has implemented various measures to ensure that justice is brought closer to the people.

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<sup>12</sup> United Nations, "*Access to Justice for Persons with Disabilities: Toolkit on Disability for Africa*", Module 8.

<sup>13</sup> Ibid.

<sup>14</sup> Haley, J., "*Mediation and Access to Justice in Africa: Perspectives from Ghana*", Harvard Negotiation Law Review, Vol. 21, 59, Fall 2015, page 59.

<sup>15</sup> Ibid.

<sup>16</sup> The Constitution of Kenya, 2010, op cit pg 4, , Article 48.

<sup>17</sup> Ibid, Article 22 (1).

<sup>18</sup> Ibid, Article 27.

The State is in the process of promoting the use of Alternative Dispute Resolution mechanisms through various ways such as introduction of Court Annexed Mediation which is mediation under the supervision of the courts. This has led to reduction of court cases and quick dispensation of justice to the people of Kenya. Highlighting this point, the World Bank reports that mediation has reduced the time it takes to resolve a dispute in Kenya from 24 months to 66 days.<sup>19</sup> The practice of mediation has become effective because of its flexibility and versatility in handling a variety of disputes. It would be necessary to point out that mediation can be used in conflict management as well as in dispute prevention. An example of this would be in facilitating the process of contract negotiation. Mediation can be used in many areas to resolve disputes. The areas include workplace disputes, commercial disputes, family disputes, public disputes that evolve around environmental or land-use, school conflicts, violence prevention among many other areas.<sup>20</sup>

One reason why disputants would choose mediation as a means of resolving their disputes is the fact that mediation increases the control which parties have in the resolution of disputes unlike in litigation. Parties appoint a mediator

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<sup>19</sup> The World Bank, 'Court Annexed Mediation Offers Alternative To Delayed Justice for Kenyans.' Available at, <http://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> Accessed on 28/05/2018

<sup>20</sup> Nyaribo, J. and Ouma, E., "Keeping disputes out of Court...Mediation gaining ground in Kenya" Available at <http://mman.co.ke/content/keeping-disputes-out-court%E2%80%A6mediation-gaining-ground-kenya> (Accessed on 22/05/2018); See also Edelman, L.B., Erlanger, H.S. and Lande, J., "Internal dispute resolution: The transformation of civil rights in the workplace" *Law and Society Review*, 1993, pp.497-534; Hensler, D.R., "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Reshaping Our Legal System," *Penn St. L. Rev.*, 108, 2003, pp.165-1295; Lipsky, D.B. and Seeber, R.L., "In Search of Control: The Corporate Embrace of ADR," *University of Pennsylvania Journal of Business Law*, Vol. 1, No.1, 1998, p.133; Crowfoot, J.E. and Wondolleck, J.M., *Environmental Disputes: Community Involvement in Conflict Resolution*, (Island Press, 1990); cf. Lerman, L.G., "Mediation of Wife Abuse Cases-The Adverse Impact of Informal Dispute Resolution on Women," *Harvard Women's Law Journal*, Vol.7, No. 1, 1984, pp.57-113.

and decide on the rules and procedures to govern the process. This is unlike litigation where parties obtain a settlement but control resides with a judge. As a result, mediation is likely to produce a result that is mutually agreeable to the parties as they both participate and have control of the decision-making process. Further, the cost payable to a Mediator is incomparable to that one would pay an Advocate in litigation as the mediation process generally takes much less time than moving a case through the standard legal channels. In addition, mediation is private and confidential and only limited to the parties unlike court hearings which are public in nature. No one but the parties and the Mediator know what has happened. This creates confidence in the process. Lastly, in mediation, there is an element of mutuality in that the parties to a mediation process are typically ready to work mutually towards a resolution.<sup>21</sup> Therefore, it is important to address the barriers hindering the effective dispensation of justice through mediation both in and out of Kenya so that we can pave way for a better future for the practice of mediation.

### **3. Challenges Facing Mediation in Kenya**

Mediation has become a popular means for resolving disputes for a variety of reasons. A primary reason is because mediation works and more often than not produces a resolution or begins a dialogue that results in a resolution.<sup>22</sup> It

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<sup>21</sup> Ibid; See also Faridkian, S. and Bahar, M.M., “The Definition of Mediation with an Emphasis on Family Mediation,” *Social Research Quarterly*, Vol. 6, No. 4, Winter 2014. available at

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1018.1381&rep=rep1&type=pdf> ; See also Goodman, A., “Specialist mediation advocates,” *Counsel*, February, 2016, available at

<https://www.counselmagazine.co.uk/articles/specialist-mediation-advocates>

<sup>22</sup> Resolution of conflicts is believed to give rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to get an outcome that is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power-based outcomes. For difference between settlement and resolution, see Muigua, K., *Resolving Conflicts through Mediation in Kenya*, (2<sup>nd</sup> Ed., Glenwood Publishers, 2017), Chapter six, pp. 66-76; See Cloke, K., *The Culture of Mediation: Settlement vs. Resolution*, The Conflict Resolution Information Source, Version IV, December 2005; See also Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 42; See also Bercovitch, J., *Mediation Success or Failure: A Search for the Elusive Criteria*, *Cardozo Journal of Conflict Resolution*, Vol.7.289, p.296; See also Bloomfield, D., *Towards Complementarity in Conflict Management: Resolution and*

has been regarded as the most effective conflict management mechanism in Kenya and its widespread practice is because of its attributes and flexibility which favour the parties to the dispute. However, the process is affected by a number of challenges which have hindered the effectiveness of the mediation process.<sup>23</sup>

### **3.1 Inadequate Information on Mediation as A Form of Conflict Management**

To begin with, there is limited information among most Kenyans on mediation as a mechanism for conflict management. This can be clearly seen from the fact that most Kenyans resort to litigation whenever a dispute arises as it is the most recognized mechanism for settlement of disputes. The Judiciary in its annual report has noted that there were 533,350 pending cases at the end of the Financial Year 2016/2017 an increase of 7% from 499,341 pending cases at the close of the Financial Year 2015/2016.<sup>24</sup> This high number of cases in the judiciary is a pointer to the fact that most Kenyans lack adequate information on alternative forms for conflict management, which include mediation. This limits the right of access to justice as a result of the ensuing backlog of cases. Access to information is an essential element of access to justice since it enables citizens to make informed decisions on the course of actions to take in case of infringement of their rights and fundamental freedoms. This is highlighted by Article 35 of the Constitution that enshrines the right to access information held by the state or any person necessary for the protection of any right or fundamental freedom. For the country to fully reap the benefits of mediation and other Alternative Dispute Resolution

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*Settlement in Northern Ireland*, Journal of Peace Research, vol. 32 no. 2 May 1995, pp. 151-164).

<sup>23</sup> FennP.,” Introduction to *Civil and Commercial Mediation*” (Chartered Institute of Arbitrators, London, 2002), Available at <http://www.adrgroup.co.uk/DisputeResolution/civil-and-commercial-mediation> Accessed on 23/05/2018).

<sup>24</sup> The Judiciary, ‘State of the Judiciary and the Administration of Justice’ Annual Report 2016-2017, Available at <https://www.judiciary.go.ke/.../state-of-the-judiciary-and-the-administration-of-justice-> Accessed on 31/05/2018

mechanisms, it is essential for citizens to be aware of such mechanisms, the processes involved and their benefits over the adversarial nature of litigation.

Further, there is limited public information and awareness on the existence of Court Annexed Mediation largely owing to the young nature of the project. It is therefore the role of professionals such lawyers who are better placed to understand Court Annexed Mediation to educate the public about this novel concept.<sup>25</sup>

It is very important that the Kenyan citizen gets to know and access the available conflict management processes such as mediation and the other mechanisms so that they can have diverse means by which they can seek remedy for the violation of their rights. Mediation has come to the aid of such persons as it is readily available even in the communities. The reason for this assertion is because mediation is a flexible conflict management process which can be conducted anywhere so long as the parties to the dispute appoint a neutral third party such as elders, to assist them in resolution of their disputes.<sup>26</sup>

The State is also obligated to make known to the public on the various ways they can access justice in Kenya pursuant to Article 48 of the Constitution of Kenya 2010. The Article states that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.<sup>27</sup>

### **3.2 Non-Binding Nature of Mediation**

The non-binding nature of mediation presents another challenge with regard to its efficacy. It is a voluntary process that depends on the good will of the

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<sup>25</sup> Joy Kubai Namachi, “*Court Annexed Mediation: Dawn of a New Era in the Kenya Judicial System*” LawQuery Blog, Available at <https://www.lawquery.co.ke/our-blog/court-annexed-mediation-dawn-of-a-new-era-in-the-kenyan-judicial-system> (Accessed on 22/05/2018).

<sup>26</sup> R. Dawson, “*5 Basic Principles for Better Negotiation Skills*”, Available at <http://www.creonline.com/principles-for-better-negotiation-skills.html> (Accessed on 23/05/2018).

<sup>27</sup> Ibid (n 11).



parties to a dispute for its acceptance.<sup>28</sup> This poses the danger of non-compliance with settlements with the consequence that disputes may remain unresolved even after the mediation process. There is need to guarantee the enforceability of the mediated agreement to ensure that mediation competes meaningfully with the formal and binding dispute settlement mechanisms such as courts and arbitral tribunals.<sup>29</sup> The introduction of court annexed mediation seeks to cure this problem since the settlement arrived at through mediation can be enforced as a court order. This urges disputants to prefer court annexed mediation over the traditional form of mediation in order to create certainty in the outcome of the process. It has also been argued that the enforcement of a mediation settlement should not be left to the goodwill of the parties. Rather, it should be conferred on a public authority while at the same time being delinked from the requirements of form or process.<sup>30</sup>

### **3.3 Adversarial Aspects of Mediation**

The seemingly limited understanding of the nature and purpose of mediation by professionals especially lawyers has also hampered the success of mediation in the country. The professionals have ended up transferring their adversarial skills from the courtroom to the mediation room. Consequently, mediation is now facing similar challenges to those of litigation which parties sought to avoid when they resorted to it. Advocates costs and adjournments which occasion delay in conclusion of disputes are increasingly becoming part and parcel of mediation. In addition, taking adversarial skills to the mediation process based on arguments and desire to win undermines the nature of mediation which aims at restoring relationships based on consensus that creates a win-win situation. This challenge may end up leading to ineffectiveness of the mediation process.<sup>31</sup>

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<sup>28</sup> Muigua, K., 'Resolving Conflicts Through Mediation In Kenya' 2<sup>nd</sup> Ed., 2017, op cit., p. 4

<sup>29</sup> Ibid.

<sup>30</sup> Bettina, K. & Zach, E., "*Taking the Best from Mediation Regulations: The EC Mediation Directive and the Austrian Mediation Act*" (Arbitration International, 2007) page 686. Available at [https://hl=en&as\\_sdt=0%2C5&q=Knotlz+B.+%26+Zach+E.%2C+%E2%80%9CTaking+the+Best+From+Mediation+Regulation%22&btnG=](https://hl=en&as_sdt=0%2C5&q=Knotlz+B.+%26+Zach+E.%2C+%E2%80%9CTaking+the+Best+From+Mediation+Regulation%22&btnG=) (Accessed on 21/05/2018).

<sup>31</sup> Ibid.

The problems of adversarial litigation imported lawyers into the mediation process is also evident from the fact that in some court cases, parties litigate for many years without any exchange of communication about an out of court settlement. Many lawyers avoid settlement initiatives to dispel any suggestion of weakness. This becomes a challenge when such a matter is referred to resolution through a mediation process. Hence, a skilled mediator is required so as to facilitate good communication about settlement in cases where the parties are reluctant to do so, on their own.<sup>32</sup> Settlements can occur, sometimes rather easily if the parties communicate earlier and more openly.

Differences between an advocate and the client can create barriers to resolution of a dispute. In many mediation processes, parties are unprepared to make realistic assessments because advocates have overstated the likelihood of success at the outset of the dispute or failed to communicate with the client on an adequate basis. Mediators are in a good position to determine and deal with any disconnect between an advocate and a client.

### **3.4 Lack of an Effective National Regulatory Framework on Mediation**

It can also be argued that the lack of an effective national regulatory framework that controls the practice and process of mediation such as an Act of Parliament hinders the success of mediation. The only regulatory frameworks that exist in mediation are different sets of rules of procedure formulated by various institutions such as the Judiciary, the Nairobi Centre for International Arbitration and the Chartered Institute of Arbitrators which only make provision on how to conduct mediations administered in the particular institution. These rules include the Mediation (Pilot Project) Rules, 2015<sup>33</sup> which govern Court-Annexed Mediation and the Nairobi Centre for International Arbitration (Mediation) Rules, 2015 which govern mediations conducted in that Centre. Such a fragmented approach creates problems such as lack of uniformity and certainty in mediation. The enactment of an Act of Parliament to govern mediation would contribute widely to its efficacy due to the ensuing certainty as to its nature, process and decisions.

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<sup>32</sup> K. Muigua, *“Alternative Dispute Resolution and Access to Justice in Kenya”* (Glenwood Publishers Limited, 2015) ISBN 978-9966-046-07-9, page 31.

<sup>33</sup> *Mediation (Pilot Project) Rules, 2015*, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9<sup>th</sup> October, 2015, (Government Printer, Nairobi, 2015).

It is observed that Court Annexed Mediation faces a myriad of challenges affecting the mediation process. First, mediation is a voluntary and consensual process of resolution of disputes. However, Court Annexed Mediation ousts this basic attribute because the parties' choice is limited to appointment of a mediator whereby the Mediation Deputy Registrar nominates three mediators from among whom the parties will choose one. There is a likelihood of a challenge arising regarding the sustainability of the project in future due to funding problems. Furthermore, there is a likelihood that if more cases go the mediation way in court without an accompanying increase in the court's capacity to handle the matters. If the two are not well handled, especially now that there has been roll out of the project to the rest of the country, Court-Annexed Mediation may be weighed down by the procedural processes such as initial screening of files and filing the settlement arrived at in the mediation proceedings which may occasion delay and costs on the disputants. Because the process is court-annexed, settlements are formally registered and get the force of a court order. Despite the fact that this is the way to go for sustainable settlements in disputes resolved through the process, failure to ensure that delays do not arise and the processes remain affordable to the majority may defeat the underlying values and principles of mediation which include cost effectiveness and timeliness, amongst others.<sup>34</sup>

#### **4. Recommendations on the Way Forward**

##### **1.1 Creating Awareness on Mediation and Other Alternative Dispute Resolution Mechanisms**

Disputes are bound to occur in any given society due to competing interests between individuals, groups and organizations in such societies. The manner in which the disputes are handled determine the overall well-being and co-existence in the society. In the Kenyan context, statistics have shown that many disputes are settled through the court process.<sup>35</sup> However, as seen in the

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<sup>34</sup> Shantam, K., "Promoting Alternative Dispute Resolution to Reduce Backlog Cases and Enhance Access to Justice of the Poor and Disadvantaged People Through Organizing Settlement Fairs in Nepal", (Asia-Pacific Rights and Justice Initiative, July 2003.

<sup>35</sup> The Judiciary, 'State of the Judiciary and the Administration of Justice' Annual Report 2016-2017,

foregoing discussion, litigation has many demerits and may not be the right tool for most disputes especially where there is need to preserve underlying relationships. Kenyans should thus be encouraged to embrace mediation as an alternative to litigation due to its inherent benefits. It is the role of professionals especially advocates, upon being approached by parties to a dispute to encourage them to resolve their disputes through mediation rather than immediately instituting court proceedings. Further, the Judiciary should refer more disputes to mediation especially those which relate to the family unit so as to preserve relationships and ensure harmonious co-existence in the society.

#### **4.2 Streamlining Court-Annexed Mediation to Enhance Party-Autonomy and Voluntariness**

Court-Annexed Mediation has been criticized as going against the cardinal principles of mediation which are voluntariness and party autonomy. It has been observed that court ordered mediation interferes with the voluntary nature of the process.<sup>36</sup> However, Court-Annexed Mediation guarantees the enforceability of settlements since they are adopted and enforced in the same manner as a court order.<sup>37</sup> Hence, the process should be streamlined to enhance party autonomy and voluntariness. Parties' control of the process should be seen on aspects such as referring the dispute to mediation, selection of the mediator(s) and the negotiation process. Court's involvement should only come in at the final stage of the enforcing of the settlement.

#### **4.3 Institutionalization of Mediation**

Institutions such as the Nairobi Centre for International Commercial Arbitration (NCIA), the Chartered Institute of Arbitrators, Kenya Branch (CIArb (K)) and the Mediation Training Institute (I) East Africa, amongst others, present great opportunities that can be explored for the success of

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Available at <https://www.judiciary.go.ke/.../state-of-the-judiciary-and-the-administration-of-justice->

Accessed on 31/05/2018

<sup>36</sup> Muigua, K., 'Court Sanctioned Mediation in Kenya-An Appraisal.' Available at <http://www.kmco.co.ke/attachments/article/152/Court%20Sanctioned%20Mediation%20in%20Kenya-An%20Appraisal-By%20Kariuki%20Muigua.pdf>

Accessed on 05/06/2018

<sup>37</sup> Civil Procedure Act, Cap 21, S 59 (B) (4)

mediation in Kenya. The NCIA and the CIArb (K) have their own mediation rules and list of accredited mediators. The existence of the institutional rules and database of mediators creates certainty in the procedure and outcome of the mediation process. Further, the Mediation Training Institute (I) East Africa offers great opportunities such as the training and certification of mediators. These efforts should be appreciated and supported. Disputants ought to be persuaded to seek their services. Mediators should thus be encouraged to undertake such courses so as to sharpen their skills and ensure competence during the process.

#### **4.4 Consolidation of Mediation Rules and Regulations into an Act of Parliament.**

The approach towards mediation in Kenya is currently a fragmented one with no clear and definite rules governing the process unlike arbitration which is governed by the Arbitration Act, No. 4 of 1995. Mediation in Kenya can be classified as institutional mediation (conducted by institutions such as the NCIA and CIArb (K)), informal mediation and court annexed mediation. Each category is governed by its own rules and procedures. While this might not in any pose a risk on the success of mediation conducted under any of these categories, there is need to create certainty as to the overall principles, rules and procedure governing the mediation process regardless of the institutional rules governing the process, that is, minimal or general guidelines on the same. This creates the need for enactment of a Mediation Act to address the challenges posed by the fragmented approach. Mediation conducted under any of the categories will thus be governed by the Act and parties will have a definite recourse where such mediation deviates from the objectives, rules and procedures as stipulated under the Act.

#### **5. Conclusion**

Despite the challenges highlighted above, mediation still remains an effective mechanism for conflict management due to its inherent benefits. It is confidential, cost-effective, flexible and easily accessible to parties in the conflict. Sustainability of settlements reached under mediation is high and almost guaranteed because settlements are owned by the parties.

Mediation and other alternative dispute resolution mechanisms are meant to reduce backlog of cases in court. This will in turn improve the efficiency in courts and the case clearing rate. It is therefore important to deal with the challenges that affect the just resolution of disputes using mediation so as to make the process more effective and efficient. Concerted efforts from different stakeholders in implementing the suggested recommendations can go a long way in enhancing the practice of mediation in Kenya, as a tool for access to justice for all.

## References

### Books

J. Haley, “*Mediation and Access to Justice in Africa: Perspectives from Ghana*”, Harvard Negotiation Law Review, Vol. 21, 59, Fall 2015, page 59.

J.K. Gakeri, “*Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR*,” International Journal of Humanities and Social Science, Vol. 1 No. 6; June 2011, 219-241 at page 219.

K. Muigua, “*Alternative Dispute Resolution and Access to Justice in Kenya*” (Glenwood Publishers Limited, 2015).

K. Muigua, “*Resolving Conflicts Through Mediation in Kenya*”, (2<sup>nd</sup> ed., Glenwood Publishers Ltd, 2017).

K. Shantam, “*Promoting Alternative Dispute Resolution to Reduce Backlog Cases and Enhance Access to Justice of the Poor and Disadvantaged People Through Organizing Settlement Fairs in Nepal*”, (Asia-Pacific Rights And Justice Initiative, July 2003).

Pauline Muhanda, “*The Advocate: Access to Justice*”, The LSK Magazine | Volume 1, Issue 6 | March - June, 2016, page 24.

Moore, Christopher W. *The mediation process: Practical strategies for resolving conflict*. John Wiley & Sons, 2014

### Constitution and Conventions

The Constitution of Kenya 2010, Article 159 (2) (3).

United Nations, Charter of the United Nations, 24<sup>th</sup> October 1945, Article 33.

### Articles

Jomo Nyaribo and Edel Ouma, “*Keeping disputes out of Court...Mediation gaining ground in Kenya*” Available at <http://mman.co.ke/content/keeping-disputes-out->

[court%E2%80%A6mediation-gaining-ground-kenya](#)  
(Accessed on 22/05/2018)

Joy Kubai Namachi, “*Court Annexed Mediation: Dawn of a New Era in the Kenya Judicial System*” LawQuery Blog, Available at <https://www.lawquery.co.ke/our-blog/court-annexed-mediation-dawn-of-a-new-era-in-the-kenyan-judicial-system> (Accessed on 22/05/2018).

K. Aina, “*Court Annexed Mediation: Successes, Challenges and Possibilities*”, *Lessons from Africa Session* (Nigeria) Available at <http://www.conflictdynamics.co.za/files/217/mediation--lessons-from-Nigeria--Mandela-Institute-Presentation.pdf> (Accessed on 20/05/2018).

K. Bettina & E. Zach, “*Taking the Best from Mediation Regulations: The EC Mediation Directive and the Austrian Mediation Act*” (Arbitration International, 2007) page 686. Available at [https://hl=en&as\\_sdt=0%2C5&q=Knotlz+B.+%26+Zach+E.%2C+%E2%80%9CTaking+the+Best+From+Mediation+Regulation%22&btnG](https://hl=en&as_sdt=0%2C5&q=Knotlz+B.+%26+Zach+E.%2C+%E2%80%9CTaking+the+Best+From+Mediation+Regulation%22&btnG) (Accessed on 21/05/2018).

P. Fenn,” *Introduction to Civil and Commercial Mediation*” (Chartered Institute of Arbitrators, London, 2002), Available at <http://www.adrgroup.co.uk/DisputeResolution/civil-and-commercial-mediation> Accessed on 23/05/2018).

P. Ngotho, “*Challenges Facing Arbitrators in Africa*,” Paper presented at the Chartered Institute of Arbitrators (Kenya Branch) & Centre For Alternative Dispute Resolution (CADR), An East Africa International Arbitration Conference held at The Norfolk Hotel, Nairobi on 28<sup>th</sup> and 29<sup>th</sup> July 2014. Available at <http://www.ngotho.co.ke/assets/challenges.norfolk.july2014.pdf> (Accessed on 22/05/2018).

R. Dawson, “*5 Basic Principles for Better Negotiation Skills*”, Available at <http://www.creonline.com/principles-for-better-negotiation-skills.html> (Accessed on 23/05/2018).



United Nations, “*Access to Justice for Persons with Disabilities: Toolkit on Disability for Africa*” Module 8.

The World Bank, ‘Court Annexed Mediation Offers Alternative To Delayed Justice for Kenyans.’ Available at, <http://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>, Accessed on 28/05/2018

### **Reports**

The Judiciary, ‘*State of the Judiciary and the Administration of Justice*’ Annual Report 2016-2017, Available at <https://www.judiciary.go.ke/.../state-of-the-judiciary-and-the-administration-of-justice-> Accessed on 31/05/2018