INTEGRATING MEDIATION INTO KENYA'S CIVIL JUSTICE PROCESS
A SURVEY OF ADVOCATES IN NAIROBI

BY

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DECLARATION

I **Cosima Apeles Omondi-Wetende** do hereby declare that this thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

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ACKNOWLEDGMENT & DEDICATION

I must begin by thanking God for all that He has done for me thus far and for all that He has promised he will continue to do.

This work is dedicated to my immediate family Andrew, Samara and Adrian and also to all the members of my extended family. I must however specifically and specially mention my mother Prof. Lucia Omondi without whose encouragement and support this thesis would never have been completed. Thanks mum. It has become a reality for which I am eternally grateful.

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CHAPTER ONE

INTRODUCTION AND RESEARCH METHODOLOGY

1.0 Introduction and Overview

A proposal has been tabled before the Kenyan Rules Committee by the Alternative Dispute Resolution Task Force for the amendment of the Civil Procedure Act and Rules. The proposal seeks to integrate mediation into the Civil Procedure Act and Rules as an alternative method of dispute resolution. It is against this backdrop that this study is conducted with a view to contributing to the ongoing debate on reform in the Kenya Judiciary. In this regard, and with this in mind this study has been conducted with a view to provide data in two related components.

The first component seeks to analyse and report on mediation and its processes as well as on the proposal to amend the Civil Procedure Act and its implications on the civil justice process. This component of the study includes references to various jurisdictions in which mediation has been integrated into the civil justice process with a view to expediting the resolution of civil cases and decongesting the cases awaiting determination by the courts. The second component of data reports on the findings of a survey conducted of the views of practising advocates in Nairobi as stakeholders in the judicial process on the proposed amendments to the Civil Procedure Act and Rules.[1]

[1] See Appendix B.

1.1 Background Information

In recent times, there has been much debate on reforms in the Kenyan judiciary. It would seem that there is a growing realization by stakeholders such as the judiciary, advocates, and even the general public that the existing civil justice system could be improved to ease the congestion of civil cases filed for determination by the civil courts and expedite the resolution process with a view to achieving judicial equity in the due process of the law. The existing processes appear to be inefficient and not always appropriate.[2] To illustrate the problem, Anthony Gross has demonstrated that as at August 2004, statistical returns for the Milimani Commercial Courts in the High Court Civil Miscellaneous Division and the Chief Magistrates Courts show at worst a negative curve as regards disposal of cases and at best a waiting time of between 4 ½ and 10 years.[3]

The reasons for the challenges facing the civil justice system are not difficult to understand and have been the subject of several studies.[4] The delays in resolution of cases and dispensing of justice are often mitigated by a combination of factors. These include shortage of judges and magistrates, delays by advocates, procedural and technical requirements relating to civil procedure, inflexibility of the law, the sheer cost of accessing justice to the litigants, all amidst allegations of corruption and other malpractices such as misplacement of files, inherent inefficiency, low morale, poor training, language and communication barriers, the hand recording of proceedings and

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[2] Ben Sihanya and Philip Kichana (2004) *Judicial Reform in Kenya*, ICJ, Nairobi.

[3] Anthony Gross (2004) "The Role of Legal Ethics and Jurisprudence in Nation Building: Mediation - A Solution for the Legal Sector Crisis," A paper presented on 29th October 2004 at Strathmore University Nairobi.

[4] Government of Kenya (2000) *Report of the Committee on the Administration of Justice* (commonly referred to as the "Kwach Report") Government Printer, Nairobi; and Government of Kenya (2003) *Report*

the concomitant requirement for the presence of the person of the judge or magistrate to mention a few.

There are certain disputes which proceed for determination by the courts which could be resolved in the chambers of advocates. For instance, in a case relating to breach of contract, there could be certain undertones which result in a stalemate between the parties. These undertones do not necessarily need due process of the law for the resolution of the dispute. Some of them may actually not be amenable to legal requirements and procedures in the due process. They could, for example, relate to matters of emotion, some aspects of family relationships, perceptions, innuendos and attitudes which strictly in law, would not have a direct impact on the judgment of the court. This important aspect of mediation is discussed in this study at Chapter Two.

Indeed, in giving evidence in a hearing before a court of law, these are often considered irrelevant and of no legal consequence and yet, for the people involved, these issues are so real that until they are brought to the fore and dealt with, the dispute itself will not be resolved. This assumes of course, that the due process of law is intended to resolve disputes among the national populace.

The spirit of reform is in the air and attempts at actual reform are on going.[5] Efforts are being made to positively change civil procedure, and reorganise the courts generally.

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of the Integrity and Anti-Corruption Committee of the Judiciary (commonly referred to as the "Ringera Report") Government Printer, Nairobi.

[5] Ben Sihanya & Ann Kyalo (1993) "Legal Education and Legal Awareness" Commissioned and published by the British High Commission, Nairobi.

Currently, related to alternative dispute resolution and specifically mediation, the Kenyan Rules Committee which is created under section 81 of the Civil Procedure Act Chapter 21 of the Laws of Kenya has embarked on an exercise aimed at soliciting views from the public for proposals to bring about practical and user friendly changes to the Civil Procedure Act and Rules.

As part of the exercise of soliciting views from the public, the Chartered Institute of Arbitrators (Kenya Branch) was approached by the Rules Committee and given the mandate to come up with draft Court Alternative Dispute Resolution Rules.[6] The Alternative Dispute Resolution Task Force was then constituted made up of 17 persons from the following organisations:

The Law Society of Kenya.

The Kenyan Chapter of the International Commission of Jurists (ICJ-K)

The Dispute Resolution Centre in Nairobi.

The University of Nairobi represented by the Faculty of Law – Parklands Campus.

The International Federation of Women Lawyers – Kenya (FIDA–K)

Family Mediation Centre in Nairobi (FAMEC).

The Task Force has completed its work and submitted its proposal to the Rules Committee.[7] In drafting the Rules, they carried out a comparative analysis of the practice of ADR in various jurisdictions worldwide including the United Kingdom, Uganda, Zambia, Tanzania, United States of America and Canada. They then selectively

[6] Allen Gichuhi (2005) Court Mandated Mediation – The Final Solution to Expeditious Disposal of Cases, The Law Society of Kenya Journal Volume 1 2005 No. 2 Nairobi Kenya.

borrowed the ADR practices from the various jurisdictions adapting them to suit the Kenyan scenario as they understand it.[8]

The term Alternative Dispute Resolution "ADR" is used in this study to describe the processes which add to and enhance the range of resources and mechanisms used to settle disputes. Mediation is one process of alternative dispute resolution.[9]

Although the Law Society of Kenya was represented in the Task Force, we have no evidence that there was a survey of the views of practising advocates and/or the Kenyan public generally, or other stakeholders to the proposed amendments. The proposed rules are yet to become law.

In a democratic process where, as Rousseau says, governance and leadership is by a social contract between the governed and the governors it is important not just for this proposal, but for all laws that the views of the stakeholders be reasonably considered.[10] By this, we mean that when a law is being promulgated or amended, the lawmakers need to envision its effect on all stakeholders and at least to some extent, its desirability from the point of view of stakeholders.

The question arises as to who the stakeholders are in the juridical process. The general tendency has been to list the categories of stakeholders for instance to include Judges,

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[7] *Ibid* page 95.
[8] *Ibid* page 95.
[9] Lawrence Boulle (2001) *Mediation: Principles, Process, Practice*, Butterworths, London and Dublin Edinburgh.

advocates, litigants, paralegals rather than develop a typology of classification. For purposes of this study, the stakeholders are divided into two categories referred to as active and passive stakeholders. This classification is based on the perceived level of involvement of the stakeholders in the juridical process.[11] By active stakeholders, we mean professional officers of the court such as advocates, judges and court clerks to mention a few examples, the administrators of justice like the police, and the provincial administrators including, provincial commissioners, district commissioners, district officers and chiefs.

The passive is generally the public who ordinarily go about their work with no cares of the juridical processes until they fall into the sub-category of consumers.[12] By the consumer category, we have in mind the plaintiffs, defendants, accused persons, complainants, witnesses and assessors. The consumer can come from either the active or passive stakeholders who need the services of the judiciary or who come into contact with it. Within the consumer category, the professionals in judicial matters and the general public will be found. At the end of the day, the society is one, and the laws that are promulgated will potentially affect all persons. The stakeholder categories are therefore not fixed.[13]

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[10] George Cole (1963) *The Social Contract and Discourses*, Everyman's Library, Dutton New York, p. 24.
[11] Joel Selzmann (1992) *Society and its Members*, Butterworths, London.
[12] Larry Bay (2004) *Legal Process*, Butterworths, London and Dublin Edinburgh.
[13] *Ibid.*

It would be highly democratic if all these categories of people had an input in the process of judicial reform. It is recognised that there is an attempt to achieve this through representation.[14]

It would be significant to know the views of all the stakeholders with respect to all laws as they are being promulgated or amended. This is however an amorphous task. At a lower level, it would be significant to know how all the categories of stakeholders react to the proposals by the Alternative Dispute Resolution Task Force to amend the Civil Procedure Act and Rules to make room for mediation as mandatory for nearly all civil cases instituted. However, because of the limitations of this study, we cannot address the views of all stakeholders.

This study restricts itself to the views of the practising advocates who are usually the first point of contact between the litigants and the courts. The study further restricts itself to practising advocates in Nairobi. It should be noted as mentioned above that the proposed Rules seek to address some of the problems experienced centrally by practising advocates in their day to day practice of the law.[15]

It is therefore of academic and practical interest to ask questions and seek answers from the practising advocates in Nairobi to establish their views on the proposed amendments with a view to contributing to the debate on the proposed reform to integrate mediation

[14] Rio Sanchez (1999) *Representation*, Guilders, Spain.
[15] *Op. cit.*

into the civil justice system and informing the processes in the area of ADR. It is with this in mind that this study is carried out.

1.2 Research Questions and Statement of the Problem

1.2.1 Research Questions

The following are the research questions that are addressed in this study:

(i) What is the significance of mediation in civil dispute resolution and how can it be integrated in the Kenyan civil justice system?

(ii) What are the implications of the proposals to amend the Civil Procedure Rules to provide for mediation?

(iii) What is the extent of use of mediation in dispute resolution by practising advocates in Nairobi and what is their level of awareness about the proposed integration of mediation in the civil justice process in Kenya.

1.2.2 Statement of the Problem

The debate on judicial reforms has widely been based on the appreciation that the Kenyan civil justice system as it presently is, does not meet the needs of all persons.[16] In this regard, certain pragmatic steps have already been taken to add to the procedures by which civil disputes filed in court could be resolved.[17] This debate has provoked an increasing interest in the use of alternative dispute resolution methods.[18] Academically speaking and from a pragmatic point of view, the introduction of mediation appears to have certain advantages to all the stakeholders and to the judicial system. For example, it has been

[16] *Ibid.*
[17] Discussed in the Introduction.

argued that there are certain cases which proceed to litigation which cases could easily be handled at a round table by mediation, even in the advocates chambers without resorting to court action.[19]

Mediation is not alien to Africa.[20] It has existed for centuries as a process of restoring broken relationships, between individuals, communities, ethnic groups or nations.[21]

The question that arises here is whether advocates and others involved in dispute resolution should not logically and as a matter of course mediate such matters to reconcile the disputants before the dispute proceeds for determination by the courts.

It has been proposed that the Kenyan Civil Procedure Act and Rules should be amended to incorporate and institutionalise mediation as mandatory for every suit instituted in court. The suits to be excluded from this mandatory requirement include suits excepted by any statute, rule or court order, or if the suit involves constitutional issues, matters of public policy or is one in which there is a pending application seeking to dispose of the suit in a summary manner; or in cases where the trial court considers the case to be unsuitable for referral to mediation.[22] For the proposals to have effect and for the advantages above to be maximally realised, the cooperation and commitment of the advocates would be critical in the implementation of the law particularly as the

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[18] *op. cit.*
[19] Rory Pieters (2000) *Mediating in the Family*, Brackhurst, United Kingdom.
[20] Frank Wright (1989) *Cultural Anthropology*, Hooters, Oregon, United States of America.
[21] Bethuel Kiplagat (2003) *is Mediation Alien to Africa?* Journal of Peace and conflict Resolution 1.3 http://www.trinstitute.org/ojpcr/1_3tt1.htm Butterworth's, London.
[22] Refer to the draft proposed Amendments annexed as Appendix B.

terminology proposed through use of words like public policy could be abused by parties seeking to exclude themselves from the mandatory application of the rules.

We ask ourselves whether the Kenyan system of dispute resolution is ready for mediation to fill this gap as has been done regionally in countries such as Uganda and Tanzania and internationally in countries such as the United States of America, Canada and Australia. We also argue that knowing the views of the stakeholders towards this end would be useful and thus a survey of the views of practising advocates in Nairobi has been carried out.

As far as we know, there is no study of the views of stakeholders to the proposed amendment of the Civil Procedure Act. More specifically, the attitude of the stakeholders to the proposed amendments has not been studied. Our problem therefore is that it is not known as to whether the Kenyan legal system and the Kenyan society would make room for mediation in the formal legal system of dispute resolution as has happened in other jurisdictions such as in the United States of America, Australia, Canada, Uganda and Zambia to give a few examples.

If the Civil Procedure Rules are amended to provide for mediation, and the stakeholders such as the litigants or the advocates do not accept this mode of ADR, they may simply just avoid the legal system and satisfy their requirements outside the judicial system or they may oppose the same in bad faith. Specifically, there is no study on the potential acceptability of the proposed amendments by stakeholders including advocates on which

so much depends. There is no reason to believe that the stakeholders even the advocates are aware of the proposed changes. We seek to attempt to fill this gap in knowledge through two closely related methods as follows.

The study has two components of data. In the first component, the study seeks to identity and analyse the proposed amendment to the Civil Procedure Rules which provide for mandatory mediation except in certain situations.[23] The study then attempts a regional comparison of the incorporation of mediation into the civil justice process with specific reference to the Ugandan Arbitration and Conciliation Act, 2000. The second component of data relates to and reports on the findings of a survey of the views of practising advocates in Nairobi on the proposed amendments.

1.3 General Objective

The general objective of this study is to ascertain the awareness and attitudes of the stakeholders to the proposals for the amendment of the Kenyan Civil Procedure Rules to include mediation as an alternative to civil litigation. The study has specifically focused on the stakeholder category of practising advocates in Nairobi.

1.4 Specific Objectives

This study has the following specific four objectives:

First, to test the foregoing hypotheses of this study.

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[23] *Op. cit.*

Second, to contribute to the debate on judicial reforms in the civil justice system and make informed recommendations to the proposed amendments.

Third, to fill in the gap in knowledge and literature on alternative dispute resolution in Kenya.

Fourth, to establish the level of awareness of stakeholders, their knowledge and attitudes to the proposed amendments.

1.5 Hypotheses

For this study, we have the following hypotheses:

(a) Mediation is crucial in civil dispute resolution and it should be integrated in the civil justice system in Kenya as proposed in the draft Rules to amend the Civil Procedure Act and Rules.

(b) The integration of mediation in our civil justice system will expedite the resolution of civil disputes in the interests of justice.

(c) Practising advocates do not know about mediation as an alternative form of dispute resolution and they do not use it in their practice.

1.6 Rationale of the Study and Scholarly Contribution

It has already been established that the Kenyan judicial system is experiencing problems in dispensing justice.[24] Specifically, the numerous delays experienced by litigants in resolving their disputes and the resulting huge backlog of cases pending for determination have been a matter of great concern bearing in mind that justice delayed is justice denied.

[24] See Chapter One.

In the circumstances, there is a need for the reform of the justice system with a view to resolving these problems.[25]

Following the theory of the Social Contract and the knowledge of the law that is the basis of the philosophy of Jean Jacque Rousseau[26], if advocates as stakeholders do not know about or support the proposed amendments then even if the proposals become law, implementation will prove difficult. The proposed amendments may not therefore solve any problem as intended. We recognise that advocates would be most informed even as potential consumers. If they do not support it, the intention of the proposals however noble may not be achieved. If they do not know about them, then the problem is deeper. This is because in most cases, the first step of entry into the judicial system in civil cases is done through an advocate.

Mediation is already available as an informal process of dispute resolution. It is possible that advocates are already using it. The findings of this study could be of some practical relevance to the ongoing process of reform. This study has the academic interest of analysing the process of mediation and its integration into the civil justice process in other regions including the United States, the United Kingdom and regionally in Uganda. The study then analyses the proposal to amend the Civil Procedure Rules and seeks to find out how well informed Kenyans are about the proposed law with specific reference to advocates practising in Nairobi.

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[25] *Op. cit.*
[26] George Cole (1963) *The Social Contract and Discourses*, Everyman's Library, New York, pg. 10.

In addition, the findings of the study will be of some practical benefit to the planners of reform as it seeks to establish by library and empirical research the role of mediation and the views of practising advocates in Nairobi to the proposed amendments with a view to contributing to the debate on judicial reform and making informed recommendations to the processes concerned. The analysis will also obviate the width and breadth of the proposed reforms, and the potential problems ahead of it if any. The study is also intended to fill in the gap in knowledge and material on mediation in Kenya and in other jurisdictions including regionally for future reference.

1.7 Limitations of the Study

This study has been carried out with limited finances. This has to a large extent had an impact on the scope of the study limiting the survey to the stakeholder category of advocates practising in Nairobi and to a sample size of 120.

It is hoped that the scope of this study could be expanded at the doctoral level to include advocates practising country wide as well as other stakeholders such as members of the judiciary and the general public representing a larger sample size with greater variables. There has also been considerable difficulty experienced in obtaining material relating to this subject. Indeed as a scholarly contribution, it is hoped that the study will fill in the gap in resources on this topic for future reference.

1.8 Theoretical Framework

The study is primarily concerned with the introduction of mediation as a proposed solution to resolve the problems facing the Kenyan civil justice system with a view to ensure that ultimately justice is achieved by expediting the resolution of cases.[27]

Indeed, there are several theories and schools of Jurisprudence in the study of legal theory. These include the natural law school, the analytical positivists, the sociological school, the historical school and the realists, the Marxists, critical legal theory and feminist jurisprudence.[28] Each of these schools attempts to define law which definitions fundamentally distinguish the various schools of thought. The analytical positivists for instance argue that an accurate definition of what is legal requires that law should be delineated from other social phenomenon such as morals and ethics.

Dicey for instance taught that law consisted only of the rules affecting the structure and powers of government which are enforceable in courts of law.[29] This was a major failing in that law was an instrument through which society could control itself by establishing rules of conduct and consequences for failing to adhere to these rules.

Rousseau argued that by a Social Contract between the society and the state the society gave the state existence and life for the benefit of all persons and that therefore

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[27] *op. cit.*

[28] Lord Lloyd of Hampstead and MDA Freeman (1986) *Lloyd's Introduction to Jurisprudence* Stevens & Sons Ltd, London.

[29] Albert V. Dicey (1890) *Introduction to the Study of the Law of the Constitution* Macmillan London p 1 - 38

ultimately, the state was to ensure that for all legislation, justice was the primary objective.[30]

Sociologists have generally approached law from the perspective of its role in Society. Roscoe Pound, a leading sociological jurist, in his "Programme of the Sociological School," lays down similarities among sociological jurists which include a study of the actual social effects of legal institutions, legal precepts and legal doctrines, a study of the means of making legal precepts effective in action and a sociological legal history.[31] By this he means the study of the social background and social effects of legal institutions, legal precepts and legal doctrines, and of how these effects have been brought about.

Proponents of this school of thought are concerned with social justice. Pound was concerned with the effects of law upon society and he saw the task of a lawyer as a social engineer. In his work "The end or purpose of Law" he talks about a paradigm shift in the thinking of jurists on the end of law.[32] He postulates that jurists no longer consider the end of law as a maximum of self assertion, but as a maximum satisfaction of wants. One of the key factors to this shift, according to Pound, is an attempt at economic interpretation of legal history, by showing the extent to which law had been shaped by the pressure of economic wants.

Similarly, Selznick, another sociological jurist posites that *"It is well to remember that although the law is abstract, its decision-making institution deals with a concrete and*

[30] George Cole (1963) *The Social Contract and Discourses*, Everyman's Library, Dutton, New York, p 10.
[31] Roscoe Pound (1943) *Outlines of Jurisprudence*, Butterworths, London (5th ed.).

practical world. Recognition of basic truths about that world cannot be long denied. Moreover, the legal order is becoming increasingly broad in scope, touching more and more elements of society. This means that sociological studies research addressed to the important characteristics of society, and to the basic chances in it, will automatically have legal relevance. This relevance, of course, goes beyond bare description. It includes making the law sensitive to the values that are at stake as new circumstances alter out institutions. [33]

R. Von Jhering, placed great emphasis on the function of law as an instrument for serving the needs of society. According to Jhering, everybody exists for the world and the world exists for everybody. For him the task of bringing the legal order into closer touch with actual human needs was a matter for the legislature rather than part of the judicial function. [34]

This study proceeds on the basis that there is a need to look beyond the mere existence of laws to how effectively the laws will serve the needs of society with the ultimate goal of achieving justice.

This study recognises that Alternative Dispute Resolution or "ADR" of which mediation is one alternative, is increasingly in popularity.[35] A group called the Centre for the Analysis of Conflict has for example undertaken extensive academic research and

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[32] *ibid.*
[33] David Selznick (1959) *The Sociology of Law*, Butterworths, New York, p. 52.
[34] *Ibid.* p. 90.
[35] Defined and its principles and philosophy discussed at Chapter Two.

practical intervention into dispute resolution.[36] This group has observed common patterns within and between different types of disputes. It has developed an analytical problem-solving approach to disputes, identifying the most effective stage for dealing with a dispute as early in its development, rather than after the commencement of hostilities.[37]

The Centre for Analysis of Conflict has generally divided dispute resolution methods into five categories.[38] These are "forcing" where the facilitator asserts his or her authority; "avoiding" where the facilitator side-steps dealing with the issues; "compromising" where the facilitator seeks an expedient solution irrespective of effectiveness; "accommodating" where the facilitator treats harmonious relations as top priority; and "collaborating" which is a joint problem-solving method. The collaborative approach, while not appropriate for all situations, is described as the one that, when used appropriately, has the most beneficial effect on the parties involved.[39] Mediation follows a collaborative approach.

Where in a dispute specific issues need to be addressed, a number of further approaches have been proposed.[40] Some disputes may have to be resolved by adjudication. In such an event, the main questions may be whether litigation, arbitration or some other form of adjudication is the appropriate procedure to be used and whether the issues for

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[36] *Ibid.*
[37] Christopher Mitchell and Michael Banks (1996) *The Handbook of Conflict Resolution: The Analytical Problem Solving Approach,* Fine Books, New York
[38] *ibid.*
[39] *Effective Conflict Management* by David A. Whetton, Kim Cameron and Mike Woods (1986), at p. 24.
[40] *Op. cit.*

adjudication can be clarified or narrowed. Other disputes may be resolved by negotiation, without any need for the assistance of a third party. In certain other cases, the assistance of an impartial third party may facilitate and expedite resolution. The third party in such cases can introduce procedures for examining and, where appropriate, after the evaluation of the issues, for exploring interests, concerns and options, for dealing effectively with emotional and hidden factors, and for generally assisting the parties towards resolution of the issues.

Dispute resolution is described as "an outcome, in which the issues in an existing conflict are satisfactorily dealt with through a solution that is mutually acceptable to the parties, self sustaining in the long run and productive of a new, positive relationship between parties that were previously hostile adversaries...."[41]

As a method of dispute resolution, mediation does not provide a single analytical model by which it can be described or distinguished from other decision-making processes. This difficulty in definition has been found to be based on various reasons including first, the flexibility and open interpretation of its core terms such as 'voluntary' and neutrality'.[42] In addition, mediation is yet to develop a theoretical base and an accepted set of core features to differentiate it from other processes of dispute resolution.[43] A third reason is that the term mediation has been used in different senses by different users. Finally, the practice of mediation is very wide.

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[41] Mitchell Banks (1996) *Handbook of Conflict Resolution: the Analytical Problem-solving Approach*, Fine Books, New York.
[42] Discussed at Chapter Three.
[43] *Op. cit.*

This position notwithstanding, this study seeks to determine whether ultimately mediation will expedite the resolution of cases in the interests of justice as envisaged in section 77(9) of the Constitution. This will be done through two components of data. The first component includes a review of literature on mediation in judicial process with a comparative analysis of the integration of mediation into civil justice process regionally with specific reference to Uganda. The second component of the study reports on the result of a survey of the views of practising advocates in Nairobi to the proposed amendments.

1.10 Research Design and Methodology

The research design and methodology deals with the data collection procedures and methods of analysis of data. This study has two components of data including a review of literature on alternative dispute resolution with reference to Mediation, its process and how it has been incorporated into the judicial process in various jurisdictions including regionally. The second component of the data refers to the results of a survey of the views of practising advocates in Nairobi. In this regard, reference is made to the description of the research site, the scope of the study, the target population, the sampling method, the data collection method(s), data analysis and presentation which have been used in this Study.

In the nature of the subject under inquiry, the study primarily relies on tow components of data obtained through library research and the collection of data by questionnaire as sources of information.

Library research has been used to obtain material on the state of the Kenyan judiciary, alternative dispute resolution and mediation, and the integration of mediation into various judicial systems. Reference has been made to numerous books as well as published and unpublished articles.

The data relating to the survey was collected through a survey of the views of 120 practising advocates in Nairobi to determine the extent of use of mediation in dispute resolution and to test the level of awareness about the proposal to integrate mediation in the Kenyan civil justice system. To elicit responses from the respondents the data collection was done through the use of a structured questionnaire[44] given to one respondent either in their chambers or in the court corridors. The research instrument used both open ended and closed ended questions about the respondents views on mediation generally and specifically on its use in their practice. In addition, follow up face to face interviews were conducted with willing respondents from the sample size to elaborate on answers provided in the questionnaire particularly as concerns the extent of use of mediation in their practice, their level of knowledge of alternative dispute resolution generally.

This component of the research was conducted in Nairobi due to logistical access to the respondents. In view of the fact that the researcher practices law in Nairobi, to save on time and costs, the location was selected as the research site in this regard. The target

[44] Questionnaire annexed as Appendix A.

population was 120 practising advocates in Nairobi who were randomly selected from a population of approximately 800 practising advocates in Nairobi.[45]

1.10.1 Data Collection Method

Data was collected by the use of the following methods:

(i) Library research – this entailed the use of various books and reports written on the subject of mediation and alternative dispute resolution including the review of the draft proposal for reform in the civil justice system by introducing mandatory mediation and the integration of mediation into the civil justice process in various jurisdictions including regionally.

(ii) Participant observation of the problems facing the judiciary and some of the solutions that work in legal practice to expedite the resolution of civil disputes.

Data was also collected by questionnaires distributed to 120 respondents who were practising advocates in Nairobi.[46] In addition, face to face interviews of willing respondents was conducted. This study sought to maintain the anonymity of the respondents and as such, their names were not obtained in the course of data collection.

1.10.2 Data Quality Control

This study sought to control the quality of data collected through reporting objectively on the findings from various texts and articles already written by various authors with regard

[45] Law Society of Kenya Secretariat.
[46] See Annexed Appendix A.

to the first component of the research. With regard to the second component, in the conduct of the survey the quality of the data has been controlled by going through the individual questionnaires answered by the respondents to ensure that all questions therein were answered by the respondents.

1.10.3 Data Analysis and Findings

The data collected from the literature available on this topic and from the survey has been presented systematically to facilitate analysis. The results of the survey have been analyzed using statistical packages Excel and Statistical Package for Social Sciences (SPSS) where appropriate. The results obtained are presented and analyzed through reporting, tabulation, frequencies, and simple graphs.

In summary, this Chapter sets out the primary issues that this thesis seeks to determine and how these issues will be presented in this study with reference to theories on the role of alternative dispute resolution including reference to the significance of mediation in civil dispute resolution and how it can be integrated in the Kenyan civil justice system. The chapter also sets out the methodology that has been selected towards obtaining answers to the questions under enquiry.

The following chapter sets out the problems facing the Kenyan civil justice system with reference to the delays experienced in determination of disputes before the courts vis-à-vis the enshrined Constitutional right to a fair hearing. It then sets out the findings of

literature on Alternative Dispute Resolution generally including the philosophy of ADR, the methods of dispute resolution generally and those institutionalised in Kenya.

CHAPTER TWO

ALTERNATIVE DISPUTE RESOLUTION IN KENYA'S CIVIL JUSTICE PROCESS

This chapter sets out the problems facing the Kenyan civil justice system. It recognises that there have been delays in determination of disputes by the courts. The study looks into the impact of these delays on the constitutional right of Kenyans to a fair hearing. It then sets out the principles and practice of Alternative Dispute Resolution generally and its related theories. The chapter also makes specific reference to the methods of dispute resolution recognised and applied in Kenya.

2.1 The Constitutional Right to a Fair Hearing

The Constitution of Kenya at section 77(9) enshrines the right of an individual to a fair hearing which *inter alia* includes the right to be heard and the right to the expeditious resolution of cases.[47] The delays experienced in resolution of civil cases could be argued to be an ongoing fundamental infringement of this right. Although on going and generally accepted, this infringement is yet to be challenged under the provisions of Section 84 of the Constitution by application to the High Court for redress.

The Universal Declaration of Human Rights at Article 10 enshrines principles of equality before the law.[48] The components of this Principle include presumption of innocence, and the right to an expeditious, fair and public hearing before an independent and

[47] Ben Sihanya and Philip Kichana (2004) "Judicial Reform in Kenya," ICJ, Nairobi.
[48] http://www.unhchr.ch/udhr/lang/eng.htm.

impartial tribunal established by law.[49] The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights echo the above provision.[50] Kenya is a party to both conventions.

As M'Inoti points out, the Constitution is a fundamental law providing for a country's governance, it is a statute of a special kind in which as far as the interpretation of the Bill of Rights is concerned, the rights should be enjoyed to a maximum.[51] The right to a fair hearing is a fundamental right which should not be taken for granted and which due to the lengthy delays experienced in resolving cases continues to be infringed.

The Kenyan Courts have a duty to ensure that litigants have access to justice. Access to justice has been defined by the United Nations Development Programme as "the ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through the justice system, for grievances in accordance with human rights principles and standards."[52]

Smokin Wanjala defines access to justice as the ability of citizens to obtain remedies from the justice system at minimal cost and inconvenience. He summarises the key components of access to justice as fair accessible laws both physically and in terms of

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[49] Ben Sihanya (2006) "Constitutional, legal and human rights perspectives on economic inequality, inequity and injustice in Kenya: history, challenges, prospects," Society for International Development (SID), Nairobi.

[50] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.and G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

[51] Kathurima M'Inoti (2004) *"The reluctant guard: The High Court and the decline of constitutional Remedies in Kenya"* reported in the *Nairobi Law Monthly*, at pages 18-25. (on file at Dr. Ben Sihanya's office at Innovative Lawyering.)

language, affordable, accessible, fast, convenient and fair dispute resolution mechanisms, legally knowledgeable citizens and accessibility to courts.[53]

In any country, the judicial system is central to the protection of human rights and freedoms and the administration of justice is essential to the realisation of human rights.[54] The United Nations General Assembly realised that the rule of law and the proper administration of justice all play a central role in the protection and the promotion of human rights.[55] Wanjala[56] sees judicial reform in Kenya as requiring urgent strengthening as the current structures fall short of the minimum required to enable access to justice.[57]

Mediation has been proposed as a solution towards decongesting the civil courts thereby leading to expeditious resolution of cases in the larger interests of justice. This is expected to improve access to justice as enshrined in the Kenyan Constitution.

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[52] *Ibid.*
[53] Smokin Wanjala (not dated) *The Access to Justice Question in Kenya: Points to Ponder,* unpublished article. (on file at Ben Sihanya's office at the University of Nairobi Law School and Innovative Lawyering).
[54] *Ibid.*
[55] See resolutions 51/181 of 22 December 1995 and 48/137 of 20 December 1993, entitled, Human Rights in the administration of justice.
[56] *Op. cit.*
[57] *Op. cit.*

2.2 Alternative Dispute Resolution

Alternative Dispute Resolution or "ADR" may be defined as a range of procedures that serve as alternatives to litigation through the courts for the resolution of disputes, generally involving the intercession and assistance of a third party.[58]

The term "alternative" in ADR has greatly been understood to refer to the alternatives to litigation.[59] In everyday usage, the term "alternative may suggest a non-conforming approach to dispute resolution,[60] but that is not the usage employed in this Thesis. In this thesis, the term "alternative dispute resolution" is used to describe a range of processes which add to and enhance the range of resources and mechanisms to settle disputes.

2.2.1 The Philosophy of ADR

As ADR has developed, it has become increasingly clear that there is no single philosophy underpinning it as it takes a number of different forms.

Practitioners and scholars of ADR generally accept the proposition that it is more beneficial for parties to resolve their differences by negotiated agreement rather than through contentious proceedings. Some academics such as Prof. Owen Fiss have expressed reservations about parties being encouraged to settle their disputes rather than having them adjudicated.[61] The consensus view among practitioners and writers, however is that agreed settlements are preferable to litigation.[62]

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[58] Lawrence Boulle (2001) *Mediation: Principles, Process, Practice*, Butterworths, London, Dublin, Edinburgh.
[59] *Ibid.*
[60] Paul Witt (1980) *ADR: Does it Work?,* Blundell, United States of America.
[61] *Op. cit.*
[62] *Ibid.*

This proposition is not new. Under Roman law, it was a fundamental precept that it was in the interest of the State to see an end to litigation. The common experience of ADR practitioners is that ADR processes preserve or enhance personal and business relationships that might otherwise be damaged by the adversarial process. ADR is however not limited to disputes involving relationships. It has been successfully used where no relationship exists between the parties.[63]

Most ADR practitioners share the experience that parties using ADR processes tend to arrive at settlements that are more creative, satisfactory and lasting than those imposed by the court. ADR can be used simply to establish a negotiated deal which option is available to parties in bilateral negotiations, either personally of through their lawyers.

There exist differences of philosophy and approach to ADR. The models of practice, individual belief and approaches to ADR are also very diverse as discussed below. This makes categorization into generally accepted ideologies or schools of thought which will be generally accepted by practitioners a difficult task.[64] It is however possible to distinguish certain broad approaches to ADR. These include a settlement-geared and cost-savings approach which may go hand in hand with a bargaining style of negotiation, where the parties in their search for a deal agree to trade issues.[65]

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[63] See Chapter Three.
[64] Henry Brown (1999) *ADR Principles and Practice,* 2nd Edition Sweet & Maxwell, London, pg. 12 (2nd Edition).
[65] *Ibid.*

There is another view of ADR in which parties are helped to adopt a problem-solving approach in order to find a "win –win" outcome, with a "neutral" third party. The neutral third party will explore the underlying issues in order to understand the issues that have been presented for resolution. Most ADR practitioners support this view. For other ADR practitioners, this view is an ideal that is aspired to but which cannot always be implemented in practice.[66]

There is yet another view that considers the problem-solving approach to be inadequate for neglecting a very critical element of the process. That critical element is seen as the transformative potential by which people in dispute can change their views by the mediator adopting policies that help to empower them and give them a greater sense of their own efficacy.[67]

Another school of thought views mediation and other ADR processes as requiring greater attention to be given to communication. Conflict is seen as a "socially created and communicatively managed reality occurring within a socio-historical contest that both affects meaning and behaviour."[68]

From the above, it is evident that there are different working models related to ADR. The model followed by an ADR practitioner will usually affect the intervention strategy. In addition, the models and philosophical approaches to ADR do not follow predictable

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[66] *Ibid.*
[67] *Ibid.*
[68] Joseph Folger (1994) *New Directions in Mediation: Communication Research and Perspectives* Sweet & Maxwell, New York, at p. ix.

patterns. With the development of practice in the United Kingdom and elsewhere, such distinctions have become blurred, as models have learned and borrowed from one another bridging the differences and developing ways of working that draw the best from the different models and approaches.[69]

The primary motivation of ADR is that it is said to reduce the costs and delays of litigation.[70] The cost saving element of ADR is based on the assumption that it will be effective. The costs of running a mediation or even a mini-trial will invariably be much lower than a full scale trial.[71] If, however, the ADR process does not resolve the issues and the parties have to proceed to adjudication, then the costs of the ADR will have to be aggregated with the costs of trial. Nevertheless, there is often some value added by virtue of the ADR process, such as helping to gather information and clarify or narrow the issues for determination. ADR methods which do not produce an immediate resolution have in certain cases been found to provide the basis for a later settlement.[72]

The issue of appropriateness of dispute resolution methods is central to any philosophy of ADR. There exist diverse kinds of disputes which involve varying circumstances and parties with a range of different concerns and interests which may well require different kinds of procedures and approaches. Being able to offer adjudication, which frequently

[69] *Op cit.*
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*

includes some elements of contest and threat, is increasingly felt by many ADR practitioners to be inadequate.[73] ADR is said to assist parties to arrive at a consensus.

While acknowledging the difficulty in achieving any one agreed ADR philosophy, the following embodies much of the essence of ADR. It complements litigation and other adjudication forms of dispute resolution such as arbitration and private judging. It provides processes which can be used on their own or as an adjunct to adjudication which enables practitioners to select procedures (adjudicatory or consensual) appropriate to individual disputes.[74]

ADR gives parties more power and greater control over resolving the issues between them, it encourages problem-solving approaches, and provides for more effective settlements covering substance and nuance. In addition, it tends to enhance co-operation and is conducive to the preservation of relationships.[75] Effective impartial third party intercession can help to overcome blocks to settlement, and by expediting and facilitating resolution it can save costs and avoid the delays and risks of litigation. Sometimes, but not necessarily, it can help to heal or provide the conditions for healing underlying conflicts between parties. ADR processes, like adjudicatory procedures, have advantages and disadvantages which make them suitable for some cases but not for others.[76]

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[73] Louis Street (1984) "Representation in commercial mediation" *Australian Dispute Resolution Journal,* 256.
[74] *Ibid.*
[75] *Ibid.*

2.2.2 Methods of dispute resolution

There are many recognized and unrecognized methods of dispute resolution. The main dispute resolution processes (both traditional and ADR) include litigation, arbitration, negotiation and mediation.[77]

The existing processes of dispute resolution can generally be divided into two main categories.[78] The one comprises *adjudicatory* processes where a third party makes a binding determination of the issues for example in litigation where a Judge will hear the evidence of disputants and thereafter make a determination.[79] The other comprises *consensual processes* where the parties retain the power to control the outcome and any terms of the resolution of the dispute. Mediation falls in this category as the parties are assisted to arrive at an agreed resolution. These are the major known methods of dispute resolution.[80]

The following chapter critically analyses the proposal to integrate mediation into the Civil Procedure Rules to provide for mediation and the regional.[81]

2.3 Methods of dispute resolution institutionalised in Kenya

Currently in Kenya, the following are the institutionalised methods of dispute resolution: litigation, arbitration and negotiation.

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[76] This is discussed further at Chapter Three.
[77] Henry Brown (1999) *ADR Principles and Practice*, Sweet & Maxwell, London, 15–20 (2nd edn).
[78] *Op. cit.*
[79] The Civil Procedure Act Cap 21 Laws of Kenya.
[80] Samuel Goldberg (2001) *Alternative Dispute Resolution,* Sweet and Maxwell, New York, p. 7.
[81] Annexed as Appendix B.

2.3.1 Litigation

This refers to an institutionalised system of dispute resolution with its own procedures as set out in the Civil Procedure Act.[82] It involves the appointment of an adjudicator, usually a judge or magistrate. The proceedings are generally conducted in formal established courts of law. In summary, when a civil dispute arises an aggrieved party is required to institute proceedings against his aggressor by filing a Plaint setting out the nature of his claim for which he seeks intervention of the courts.[83] This is filed at the relevant court registry after court fees has been paid. It is noteworthy that the court fees to be paid is assessed by the court based on the nature of the claim and the amount in dispute. The Plaint and Summons to Enter Appearance are then served upon the adverse party who then enters an appearance and files a Defence.[84] There after, the parties have to set out a list of agreed issues for the determination of the court and are required to produce and exchange the documents to be relied upon at the hearing afterwhich the suit can then be fixed for hearing on a mutually convenient date depending on the court diary. The procedural requirements as summarised above are numerous and can indeed take sometime to complete in preparation for trial.

In the circumstances, litigation can be viewed as costly, time consuming. In addition, it significantly leaves out feelings and emotions of the litigants as it attempts to fully comply with the law.[85]

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[82] The Civil Procedure Act and Rules Cap 21 Laws of Kenya.
[83] *Ibid.* Order VII.
[84] *Ibid.*
[85] *Op.cit.*

2.3.2 Arbitration

This was institutionalised in the Arbitration Act to address some of the shortcomings of litigation as a method of dispute resolution. Arbitration was viewed as the solution to some of the problems facing the judicial system especially congestion and unavailability of adjudicators. It was expected to lead to faster resolution of cases.

In arbitration, as set out in the Arbitration Act, the parties can privately choose an adjudicator who is paid by the disputants. The procedural rules may be statutory or imposed by the organization governing the conducts of Arbitration for example the Chartered Institute of Arbitrators. It has been observed that arbitration has tended to amalgamate with litigation in terms of its adjudicatory nature and its procedure as a result of which it is often costly and the problems of litigation remain unmitigated in dispute resolution. [86]

2.3.3 Administrative or statutory tribunals

These are created by statute to provide adjudication based on statutory requirements such as the Business Premises Rent Tribunal[87], the Industrial Property Tribunal[88] and the Value Added Tax Tribunal[89] to mention a few. The tribunal is constituted to hear disputes relating to the respective statutes to arrive at a decision on the rights of the

[86] Murray, Rau & Sherman (1989) T*he Processes of Dispute Resolution: The Role of Lawyers,* Foundation Press, London, p.69.
[87] Established under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya.
[88] Established under the Industrial Property Act. Act, No. 3 of 2001.
[89] Established under the Value Added Tax Act, Cap 476 Laws of Kenya.

affected parties as set out in the law. This is an adjudicatory process in which although the process is more informal than for litigation. In this regard, the strict rules of procedure such as are elaborately laid out in the Civil Procedure Act are excluded. The tribunal will usually have its general rules of procedure providing a framework within which it will carry out its work as opposed to that found in litigation. The tribunal will then make a decision in accordance with the relevant law.

2.3.4 Negotiation

This is not institutionalized and is not compulsory. It has however been in existence in its informal form usually occurring at the pre-litigation stage as a procedure by the parties in their attempts to resolve the dispute before resorting to litigation. Litigation will usually take over once negotiation has failed.

Negotiation remains informal and is carried out in accordance with the needs of the parties usually depending on the nature of the dispute. There are no laid down rules on how negotiation should be conducted.[90] Ultimately, the parties seek to resolve the dispute through discussions. This flexibility is necessary as negotiation is a necessary tool for dispute resolution in society.

The inadequacies of the existing methods of dispute resolution referred to above have been much debated.[91] The judicial system faces critical challenges in providing the delivery of services and the dispensation of justice in addition to moving with the times in view of the inevitable changes and developments in society generally. It is against this

[90] *Op. cit.*
[91] Discussed in Chapter One.

background that this study focuses on mediation as an alternative form of dispute resolution.[92]

There are obviously comparative advantages of mediation over litigation and all other adjudicatory methods of dispute resolution in terms of dealing with the dispute and its effect on human relationships. The second advantage is that mediation unlike negotiation for example can be incorporated into the national formal legal adjudicatory framework as has been done in other jurisdictions.[93]

We observe in this study that there is a gap in the formal system of dispute resolution and we study the significance of mediation in civil dispute resolution with a view to establishing how it can be integrated in the civil justice system. In addition we study the implications of the proposals to amend the Civil Procedure Rules to provide for mediation.

[92] Mediation is discussed in Chapter Two.
[93] *Op. cit.*

CHAPTER THREE

IMPLICATIONS OF THE PROPOSED INTEGRATION OF MEDIATION INTO THE KENYAN CIVIL JUSTICE SYSTEM

It is noted from the proposed amendments to the Civil Procedure Rules to integrate mediation into the civil justice system[94] that certain themes run through the principle and practice of mediation. These are summarized to include its informality, the use of a third party to assist the parties resolve their dispute, the requirement for neutrality and impartiality of the third party with the ultimate goal of assisting the parties to reach an outcome to which each one of the can assent. In this study, these are referred to as the core features of mediation and are discussed below.

3.1 Defining mediation

The definitions in Part One of the draft proposed amendments to the Civil Procedure Rules[95] reflect that the goal of mediation is to resolve disputes. We note that the definitions do not set out restrictive rules to be followed and that they are set out as broad guidelines for the conduct of mediation with the ultimate goal of assisting the parties to a dispute arrive at a mutually acceptable agreement. These definitions, compared to those currently contained in the Civil Procedure Act and Rules[96] can generally be seen to be flexible and open in terms of interpretation. The definitions allow for a wide diversity in the practice of mediation.

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[94] Annexed as Appendix B.
[95] Appendix B.
[96] Cap 21 Laws of Kenya.

The principles behind the conduct of mediation include the ultimate goal of empowering the parties to the dispute in the resolution thereof, striving to maintain and/or improve the relationship of the parties all as an alternative to mainstream litigation. In defining the role of a mediator, it could be argued from the idealistic description of the expectations of mediation that the mediator's role may not be achievable in all civil disputes.

3.2 The concepts of neutrality and impartiality

It is noted that the definitions of mediation and mediator in the proposed legislation assert that the intervener is neutral and impartial in the parties' dispute. The concepts of neutrality and impartiality seem to have an important legitimizing function for mediation.

It has been argued that reference to neutrality or impartiality is misleading and a myth as this cannot be achieved.[97] The use of the term "neutrality "in its broadest sense covers the following factors including the fact that the mediator should not have a direct interest in the outcome of the dispute, the mediator should have no prior knowledge of the dispute, he/she should not know the parties to the dispute. He/she should not try and influence the decision to be arrived at in resolving the dispute and should merely act as a guide. He/She should act evenhandedly, fairly and without bias towards the parties.[98]

In practice, bearing in mind the above factors, it is questionable whether one is able to achieve neutrality in dispute resolution to the standard as described above.

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[97] George Tillet (1991) *Resolving conflict –A Practical Approach*, Sydney University Press, Sydney.
[98] *Ibid.*

3.3 Distinguishing between Neutrality and impartiality

In distinguishing between neutrality in the sense of disinterestedness and neutrality in the sense of fairness, the former is referred to as neutrality and the latter impartiality. Neutrality relates to the mediator's background and his or her relationship with the parties and the dispute. It involves matters such as the extent of prior contact between the mediator and the parties, prior knowledge about the specific dispute and the extent of the mediator's interest in the dispute. Impartiality by contrast refers to an even-handedness, objectivity and fairness towards the parties during the mediation process. It relates to such matters as time allocation, facilitation of the communication process, and avoidance of display of favouritism or bias. [99]

In reality, achieving the above standards of impartiality and neutrality may not be possible. Therefore, it may not be correct to assert in legislation that the mediator will be impartial and neutral.

3.4 The process of mediation as an alternative form of dispute resolution

Mediation has been used as a form of dispute resolution for many centuries.[100] In modern times, it has been viewed as an alternative form of dispute resolution. In the legal context, it is viewed as an alternative to litigation.

There are certain contrasting principles on which litigation and mediation are based. These are summarised in the table below:

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[99] *Ibid.*

Contrasting principles	
Litigation	Mediation
Enforcement of rights	Accommodation of interests
Coercive and binding	Voluntary and consensual
Follows strict procedure	Procedural flexibility
Formality	Informality
Consistency and precedential	Situational and individualised
Fact oriented	Relationship oriented
Focus on past	Future focused
Public and accountable	Private and confidential
Adversarial	Collaborative

Source: Mediation Principles, Process and Practice by Laurence Boulle and Miryana Nesic 2001 Butterworth's page 34

3.5 Procedural flexibility

The principle of procedural flexibility in mediation is captured in the proposed amendments to the extent that the Rules only provide guidelines on the conduct of mediation. Indeed, mediation is a flexible process of dispute resolution.[101] The procedure can be negotiated and adapted. Flexibility has the advantage of allowing the parties some say over what processes will suit them, of allowing for adaptability where the nature of the dispute and disputants require it and of avoiding the possibility that

[100] John Wall and Anne Lynn (1983) "Mediation: a current review" 37 *Journal of Conflict Resolution* 160, at 169.
[101] *ibid.*

technical procedures will dominate the process.[102] Litigation by contrast has a more rigid structure with established rules and procedures which demand compliance of the parties before and during the trial process. [103]

Another important distinction between mediation and litigation which emerges from the proposed amendments relates to the information and evidence which can be used and how it can be presented and tested. In litigation, this is regulated by evidential and procedural rules on relevance and reliability. In mediation, there are no strict rules of evidence and there is no scope for cross-examination and procedural point taking. There are only loose guidelines. The disputing parties are therefore able to tell their story freely and could include emotion for example allowing ventilation of all aspects of the dispute. In litigation, the process is governed by the Evidence Act Cap 80 Laws of Kenya and the provisions of the relevant statute.

Even though flexibility is provided for, there are limits to this potential of mediation. This is reflected in the proposed time limit of three months within which the mediation settlement should have taken place.[104] Further, a first scheduling and settlement conference must be held within thirty days after pleadings have closed.[105] It is also noted that the mediator is to be appointed from a court maintained panel of approved mediators with specific qualifications (which have not been described) who adhere to court approved mediator ethics and shall be of not less than seven years standing in their

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[102] *Ibid.*
[103] The Rules of Procedure in litigation are set out in the Civil Procedure Act and Rules Cap 21 Laws of Kenya and in the Court of Appeal Rules.
[104] See paragraph 4 Appendix B.

respective fields.[106] The above notwithstanding, we argue that the flexibility potential, with all its benefits remains an important feature of the proposed amendments.

3.6 Informality

The informality in the conduct of mediation is closely linked to its flexibility.[107] In this study, the use of the term informality refers to the setting, the style and the tone of the mediation as well as how the parties to the mediation conduct themselves. In sharp contract with court process, mediation is informal in terms of dress code, the venue where the mediation can be conducted, how the parties should sit, the language in which it should be conducted as well as the hours of attendance. Mediation can allow for round table meetings with no potential for contempt of court principles.

Court process on the other hand tends to enforce formality and hierarchy. For instance, the Civil Procedure Act provides that the language of the High Court and of the Court of Appeal shall be English, and the language of the subordinate courts shall be English or Swahili.[108] If any other language is to be used, a court interpreter will have to be appointed to interpret the proceedings into either of these two languages. In addition, unless otherwise ordered by the Court, proceedings are conducted in a court where the seating arrangement is very clearly defined.

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[105] See paragraph 1 Appendix B.
[106] See paragraph 2 of Appendix B.
[107] *Op cit.*
[108] Cap 21, section 86(1).

The informality in mediation is said to make the mediation process more user-friendly in an attempt at having the parties arrive at an agreed settlement. The mediator can manipulate his environment generally depending on the needs of the parties ultimately to achieve a settlement of the dispute.

3.7 Participation of the parties

The informality and flexibility of mediation allows for extensive and direct participation of the parties in the process. Thus mediation is sometimes referred to as a purely "consumer oriented" dispute settlement process.[109] The parties can talk, negotiate and discuss options throughout the process. Mediation therefore provides a unique opportunity for the parties to provide explanations and proffer apologies as and when required of them.[110]

Mediation assumes that the parties themselves can make better decisions about their interest than outsiders such as judges or arbitrators. In this regard, for this aspect of mediation to be achieved, the professional involved in the process will need to be trained to allow the disputants sufficient space in the process. This may be difficult particularly for a lawyer who may be concerned that if his client participates in the process, the client could damage its own case or even put the lawyer out of work. Extensive education and training must be conducted for the full potential of mediation to be achieved. This will

[109] Mary Robertson, "Is ADR part of a movement towards consumer-oriented legal services?" ADR Bulletin, Vol, no. 1, May 1998, at p. 1.
[110] Louis Mulcahy (2000) *Mediating medical negligence claims; An option for the future*, NHS Executive, at p. xvii.

require vast resources which must be provided in terms of training, literature on mediation, awareness campaigns among requirements before the proposals are made law.

3.8 Focus on the person and the relationship between the parties

Litigation attempts to ascertain what occurred historically through disclosure, testing and confrontation. The adjudicator will listen to the historical facts and on the basis of these findings, will attribute blame or culpability. Mediation by contrast can be said to concern itself with the current needs of the parties. For instance, in a personal injury case, damages can be decided upon without the issue of liability being determined.

With regard to the relationship element of mediation, it is argued that in allowing the parties to vent their feelings, relationships can be preserved or improved. There is a reconciliation element to mediation. Although litigation will ultimately settle the dispute through adjudication, it may result in irreparable damage to relationships.

3.9 Rules, principles and policies

In making decisions, courts rely on legal rules and principles which are provided by statutes and in case law precedents. In mediation, the parties may not necessarily articulate the rules that will guide the outcome or settlement. The settlement will usually be arrived at in terms of the mutual interests of the parties. In this regard, it is possible for the parties to a mediation to arrive at an agreement which could not be available as a remedy in court.

The limitations that we envisage in this regard is that the agreement cannot be illegal or against public policy as provided under statute[111] and common law. Such, an out come will not be enforceable even if breached by a party to the agreement.[112]

Further, it is noted that mediation will take place "in the shadow of the law". The court has maintained an administrative role in the conduct of the mediation with the result that there is a mandatory requirement for an agreement resolving the dispute to be signed by the parties and filed in court within ten days after conclusion of the mediation[113]. If the agreement settles the action, the mediator is required to file the agreement in court after which the court shall enter judgment.[114] It is further provided that no appeal shall lie against a registered mediated settlement.[115]

3.10 Focus on the future of the parties interests

While mediation focuses predominantly on the present interests of the parties, and not on past facts, it can also take into account the future needs of the parties. We note that there is no limitation on the future matters which parties can refer to and agree on. For instance if there is an alleged breach of contract, mediation allows the parties to re-negotiate the whole agreement, irrespective of how the dispute over the breach is resolved, or even whether it is resolved. Litigation by contrast cannot prescribe and enforce future cooperative action between the parties. As already discussed earlier, mediation has a large potential for creativity in decision–making. The mediator is

[111] The Law of Contract Act.
[112] *Ibid.*
[113] See paragraph 12 of Appendix B.
[114] See paragraph 12 of Appendix B.

empowered to use whatever means he deems appropriate to lead the parties towards a settlement of their dispute which then leads to the privacy and confidentiality of mediation.

3.11 Privacy and confidentiality

We note that it is proposed that mediation proceedings are inadmissible in any proceedings before any court of law.[116] This is in compliance with the principle of privacy of mediation that is considered to be one of the key principles upon which parties favour this process.[117] Mediation proceedings are conducted on a "without prejudice" basis which precludes the parties at a subsequent court hearing from leading any evidence on what was said.[118] The mediator is also bound by this requirement of confidentiality.

The principle of confidentiality is intended to make the negotiations conducive to the parties being frank and open to encourage the parties to openly discuss the issues.

The above notwithstanding, it is noted that the proposals do not provide for an exception in the event of the agreement of the parties to the contrary. This could be viewed as an omission in the drafting of the provisions which we argue could be amended to allow the parties to agree to waive the confidentiality element if they so wish. By allowing the parties to consent to remove the confidentiality requirements, this would not compromise the mediation. In the event that the parties do not agree to waive the confidentiality then

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[115] See paragraph 14 of Appendix B.
[116] see paragraph 15 of Appendix B.
[117] John Mulay (2000) *Mediation*, BPP review, at p. xvi.
[118] *Op. cit.*

the confidentiality element is maintained. This would not prejudice the principles of mediation but would in our view allow the parties to decide whether or not to waive the confidentiality. The benefit of this proposed flexibility could be useful as with the parties consent, settlement agreements could be used as precedents or guidelines to parties in similar situations.

As has already been discussed in this chapter, the proposal to amend the Kenyan Civil Procedure Act and Rules to provide for mediation seeks to formally introduce a set of legal practices and institutions which are targeted at the already existing legal framework. The intention is to improve the already existing legal framework. This chapter has discussed the attempt in the proposals to incorporate the fundamental principles of mediation and the significance and implications of these principles in the Kenyan civil justice system.

CHAPTER FOUR

DATA AND FINDINGS ON MEDIATION IN KENYA PERSPECTIVES FROM A SURVEY OF ADVOCATES IN NAIROBI

This chapter reports on the two components of the data collected and relied on in this study. The first component reports on the data from various texts and academic writing on the mediation. The study acknowledges that mediation has been in existence for centuries even in the African context. Its methods have been adopted in the resolution of disputes for centuries. It is thus not a new concept in dispute resolution. The chapter further reports on the findings as regards the integration of mediation in various jurisdictions worldwide including regionally.

The second component reports on the data collected and the findings of the survey conducted of the views of 120 practising advocates in Nairobi to the proposed amendments to the Civil Procedure Act and Rules to provide for mediation.

4.1 Mediation in the traditional African set up

Conflicts are generally accepted as part of human interaction and which often erupt when relationships break down.[119] Mediation has been viewed as but one of the processes of restoring broken relationships, between individuals, communities, ethnic groups or nations.[120] This has been the practice even in the African traditional set up with the ultimate goal of managing the conflict in the interests of the society.[121] This conflict management would usually adopt various methods of dispute resolution including

[119] Rob Hermans (1963) *Conflict in Ages*, Valet Printers, London.
[120] *Ibid.*
[121] Ray Kraft (1978) *Social Dynamics*, Roysfield Publishers, London, United Kingdom.

negotiation, conciliation and mediation sometimes interchangeably to suit the dispute and ultimately to retain social relations.[122]

There have been various examples recorded in recent times depicting both indigenous and traditional approaches to mediation.[123] The Akobo Peace conference in the Upper Nile Province of Southern Sudan is one example.[124] In this case, conflict erupted in 1990 between the Lou and Jikany clans of the Nuer ethnic group. The elders in the community recognising that the conflict was escalating to alarming heights called for a traditional peace conference, which took place from July through November 1994 at Akobo.[125] The conference was attended by elders, religious leaders (Christian and traditional), young men, women and Nuer intellectuals from abroad. The communities gathered with the common objective of restoring the broken relationships to bring abut healing among the people.

In Wajir in the North Eastern part of Kenya close to the Somalia border cattle raiding, robbery and general lawlessness became widespread in the district. Resentment grew between the Ogaden and Ajuran clans in the area.[126] This prompted the women in the area to come together to form an advocacy group for peace. They convinced the leaders to call for a peace conference. The conference came up with a peace declaration - a set of principles to guide the community in its search for peace.[127] In the process, the tension

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[122] *ibid.*
[123] *ibid.*
[124] Gray Peters (1992) *Social Disputes: the African Perspective*, Foundation, Bayreuth, Germany.
[125] *ibid.*
[126] *Ibid.*
[127] *Ibid.*

was diffused and the community members continued to work towards achieving their goal of peace.

4.2 Mediation in other jurisdictions

The debate on how the existing formal methods of conflict and dispute resolution has continued to gain pace world wide. In Canada for example the courts faced a crisis on account of the backlog of cases. This is exemplified in the following text by Master Robert N. Beaudoin.[128]

> "In Ontario, the need for our Civil Justice Reform arose from the twin evils of cost and delay. On average, it took a civil proceeding three to five years to proceed to trial from the date of filing with the Registrar. Complex cases took even longer. We estimated that it took the average litigant $ 38,000 to take a case to a three-day trial. The high costs and delays were undermining public confidence in our civil justice system and resulted in a denial of meaningful access. Our Chief Justice described the situation as being in crisis."

Robert Coulson, as President of the American Arbitration Association wrote thus:

> "Lawyers are in a bind when it comes to managing their clients' disputes if they are locked into the courts. Litigation has not kept up with modern fast-moving society.... there have been revolutionary changes in business practices since the basic court structure was adopted from English common law....Compared to modern business, civil courts have changed very little... Alternative dispute resolution gives lawyers an opportunity to use processes, encourages a problem-solving attitude and an openness to compromise...."[129]

Modern mediation has its roots in America, when in 1913 a small claims mediation scheme was introduced in the Municipal Court in Cleveland Ohio.[130] In the 1930s US judges urged lawyers to consider conciliatory methods of dispute resolution.[131] By the

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[128] Excerpts are from paper, "Case Management in Ontario" which was presented at a Seminar in Ontario in 2001 by his lordship, who is a judge in the Superior Court of Justice, Ottawa, Ontario.
[129] In an article entitled "The Lawyer's role in Dispute Management in Dispute Resolution" published by the American Bar Association Standing Committee on Dispute Resolution, Issue 25 Spring/Summer 1989.
[130] J. S. Auerbach (1983) *Justice without Law?* Oxford University Press, New York, at p. 97.
[131] J Resnik (1986) "Failing Faith: Adjudicatory Procedure in Decline" 53 *University of Chicago Law Review* 494, at 535.

late 1960s, mediation was considered a means of increasing access to justice in the US.[132] By the mid to late 1970s mediation's potential for reducing court caseloads led to "quantitative – efficiency" arguments in favour of mediation.[133] Mediation became part of a larger reform movement directed towards resolving the internal problems of the courts.[134] The impetus for mediation in the US came from a conception of crisis in the US judicial system. By the 1990s, mediation in America was considered part of a trend towards private justice.[135]

In the United Kingdom, in the early 1970s, the Finer Report[136] recommended mediation for the resolution of family disputes. The Report was not implemented although it is believed to have provided the impetus for the development of independent family mediation services.[137] The mediation movement in the UK was motivated by a number of factors, including calls to preserve family, to reduce the costs of conflict and to make more responsible use of public resources for dispute resolution.[138] By the mid 1990s the mediation movement in the UK began to be influenced by countries like the US and Australia, and Canada.

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[132] *Ibid.*
[133] *Ibid.*
[134] C. Harrington (1984) *The Politics of Participation and Non-participation in Dispute Processes'* 6(2) *Law & Policy* 203, at 204.
[135] *Ibid.*
[136] Office of Public Sector Information *Report of the Committee on One Parent Families,* CMND 5629, HMSO, London, 1974 (Finer Report).
[137] *Ibid.*
[138] *Ibid.*

In Australia, the debate on court reform gained pace in the early 1990s. They were concerned about the cost and delay in dispensing of justice.[139] The reforms in Australia did not expand court facilities by introduced case flow management, specialist lists and the appointment of judges to monitor interim application. In addition, they made the resolution of cases expeditiously their ultimate goal.[140]

In Uganda, the Arbitration and Conciliation Act, 2000 was enacted with the intention of expediting the resolution of disputes through providing for alternative methods of dispute resolution.[141] This Act amended the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards.[142] In addition, it defined the law relating to conciliation of disputes.

The model of alternative dispute resolution in Uganda incorporated the fundamental principles of conciliation.[143] This model is distinguished from that which has been proposed for integration in the Kenyan civil justice system.[144] The Kenyan model has adopted the principles of mediation.[145]

From a definitional perspective, the distinction between the two processes of conciliation and mediation as dispute resolution methods is not well defined. There is sometimes an

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[139] Richard Posner (1986) *Economic Analysis of Law,* Little Brown, Boston.
[140] *Ibid.*
[141] R. Robin (2003) "The course of Justice" 53 *Journal of Law, University of Southern Cape* 494, at 535.
[142] See the Preamble to the Act.
[143] See Part V of the Act.
[144] Allen Gichuhi, (2005) "Court mandated mediation – The final solution to expeditious disposal of cases," *Law Society of Kenya Journal,* Vol 1 2005 No. 2 page 121.
[145] *Ibid.*

overlap in the processes. In fact, as methods of dispute resolution, both method allow the parties procedural flexibility in the process of resolution of the dispute.[146]

The Ugandan model adopted proposes mandatory conciliation of parties to a dispute unless excepted by any law in force or unless the parties otherwise agree. Conciliation proceedings are to be commenced by the written invitation of one party to the other and the proceedings commence when the other party accepts in writing the invitation to conciliate. If the other party rejects the invitation, there will be no conciliation proceedings. The Act provides for the appointment of one conciliator unless the parties agree otherwise.[147] The conciliation process is set out in the Act with various procedural requirements and conditions for compliance.

The Ugandan model is again distinguished from the proposed Kenyan model in which the strict procedural requirements have been limited to allow the parties to decide the procedure to be adopted in resolving the dispute. It is arguable that the Ugandan model has not eliminated to a large extent some of the problems that have been identified with the civil justice process and its strict procedural rules.[148]

The concepts of independence and impartiality of the process have been incorporated in the Ugandan Act. In addition, the principles of objectivity, fairness and justice have been provided for in the statute. The parties are also required to keep confidential all matters relating to the conciliation proceedings. The above principles as incorporated in the

[146] Lawrence Boulle (2001) *Mediation: Principles, Process, Practice,* Butterworths, London and Dublin.
[147] Section 51

Ugandan Act are similar to those as proposed in the Kenyan model.[149] There is however a distinction between the Ugandan and the Kenyan model on the requirement of confidentiality. The Uganda Act allows for disclosure of the terms of a settlement agreement where such disclosure is necessary for purposes of implementation and enforcement while the Kenyan model strictly provides for confidentiality without exception.[150]

The Ugandan Act provides that any settlement reached by the parties in the conciliation proceedings can be recorded in a settlement agreement. This settlement agreement has the same status and effect as an arbitral award which is recognised as binding and which can be enforced upon application in writing to the court. The proposed amendments to the Kenyan Act recognise that by agreement of the parties, a settlement agreement will be final upon registration by the court. This registration would give effect to the parties intentions and ensure finality of such agreement. The more cases that will be resolved through mediation or conciliation will translate to fewer cases pending for determination by the courts. This would fulfil the primary basis upon which the amendments have been sought.[151]

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[148] Rory Pieters (2000) *Mediating in the Family*, Brackhurst Press, United Kingdom.
[149] Allen Gichuhi, (2005) "Court mandated mediation – The final solution to expeditious disposal of cases," *Law Society of Kenya Journal,* Vol. 1 2005 No. 2, page 121.
[150] Discussed at paragraph 3.1 in Chapter Three.
[151] Anthony Gross (2004) "The Role of Legal Ethics and Jurisprudence in Nation Building: Mediation - A Solution for the Legal Sector Crisis," A paper presented on 29th October 2004 at Strathmore University Nairobi.

The Act has been functional in Uganda since 19th May 2000 and has been observed to have decongested the courts as the number of disputes proceeding for determination by the courts has reduced.[152]

The proposal to integrate mediation in the Kenyan civil justice system is therefore not unique to the Kenyan system. It has been adopted in various jurisdictions as discussed above with certain difference in procedure and description. This notwithstanding, ultimately, the intention is to provide options to dispute resolution to decongest the courts.[153]

4.3 Report on the Survey of Advocates practising in Nairobi

With reference to the second component of data, this study reports on the findings of the survey conducted of the views of 120 practising advocates in Nairobi on the extent of use of mediation in dispute resolution and to establish their level of awareness about the proposed integration of mediation in civil dispute resolution. There are currently over 3,000 advocates in Kenya with practising certificates out of which approximately 800 practice in Nairobi.[154]

The data collected in this regard has been set out under the sub themes of background information, the use of mediation in civil practice and the views of practising advocates on the proposed integration of mediation in the civil justice system.

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[152] Allen Gichuhi, (2005) *op. cit.*
[153] Office of Public Sector Information *Report of the Committee on One Parent Families,* CMND 5629, HMSO, London, 1974 (Finer Report).

4.3.1 Background information

The questionnaire submitted to the 120 respondents in this study contained questions relating to the background of the various respondents.[155] This information relates to the personal details of the respondents ultimately to record the diversity of the respondents which could have an effect on the substantive research questions that this study seeks to answer. This background information is merely descriptive of the respondents in the survey. It was included in the questionnaire for the purpose of identifying the respondents and has not been used for the purpose of the study.

4.3.2 Distribution of the respondents by sex

Table 1 below shows the distribution of respondents by sex reflecting that majority of the interviewees were male representing 71.6% of the respondents. The female respondents represented 28.4% of the respondents.

Table 1: Distribution of the respondents by sex

No.	Item	Count	%
1	Male	86	71.6
2	Female	34	28.4
Total		120	100

4.3.3 Distribution of the respondents by level of education

The level of the respondents education is represented in table 2 below. This table shows that all the respondents had got at least a university undergraduate degree in line with the present expectations for qualification as an Advocate in Kenya as set out in the

[154] The Law Society of Kenya Secretariat. Published List of Advocates with Practising Certificates as at 12th July 2007.
[155] See Appendix A.

Advocates Act.[156] 56.6% of the male respondents had a postgraduate degree while 58.8% of the female respondents had a postgraduate degree. This finding is consistent with the current trend in Kenya and the world generally towards a growth in post graduate training.[157]

Table 2: Distribution of respondents by the level of education

Level	Male		Female		Total
	Count	%	Count	%	
Undergraduate degree only	Nil	-	-	-	-
Post –graduate degree	66	56.6	20	58.8	86
Other	20	16.6	14	11.6	34
Total	**86**		**34**		**120**

4.3.4 Distribution of Respondents by number of years in practice

The survey sought to establish the respective number of years in which the various respondents had been in legal practice. The findings are illustrated in Table 3 and Chart 3 below.

Majority of those interviewed in the different categories were male, forming the majority of the respondents in each category of years in practice.

The practice period of years 5-10 represents the largest category of the respondents; this being 25.8% and 10%, in both the male and female representation, respectively. The majority of the respondents are spread between 2-5 and 5-10 years in legal practice. The number of years in which an advocate is in legal practice could be used as an indicator of

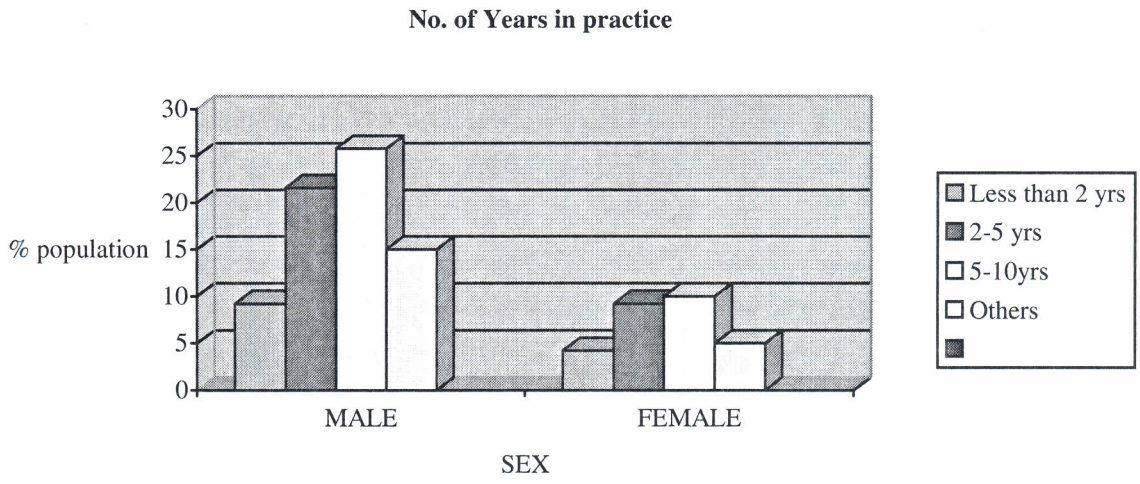
[156] Cap 16 Laws of Kenya.
[157] Richard Whitkin (2004) *Emerging Trends in Education,* Finer Press, London.

their level of experience in civil practice and knowledge of the civil practice system. This information is relevant towards this study in providing answers to the research questions relating to the use of mediation in civil practice and the views of the advocates on the proposal to integrate mediation in the civil justice system. It is likely that the more experienced an advocate is in civil practice, the more information they will have on the challenges facing the judiciary and suggestions on the way forward.

Table 3: Number of years in Practice

Years in legal practice	Male		Female		Total count
	count	%	count	%	
Less than two years	11	9.2	5	4.2	16
2-5	26	21.6	11	9.2	37
5-10	31	25.8	12	10.0	43
Other (please specify)	18	15.0	6	5.0	24
Total	**86**	**67.6**	**34**	**32.4**	**120**

Chart 3



4.3.5 Areas of practice of the respondents

This study identifies three main areas of legal practice as litigation, commercial and conveyancing.[158] Litigation is used in this study to refer to that area of legal practice in which an advocate practices law by prosecuting or defending his/her client's interests in a court of law.[159] Commercial practice is used in this study to refer to the area of legal practice covering the areas of law such as company law, intellectual property, banking, and insurance to mention a few examples and in which the advocate does not represent his/her client's interests in court. The third category referred to as conveyancing refers to those advocates involved in drawing up documents and advising client's on transactions relating to land such as purchases, mortgages, charges, transfers and leases without representing their client's interests in court.[160]

The different categories of legal practice are significant in this study with a view to obtaining views on the proposal to integrate mediation in the civil justice system not only from those advocates who experience the court system practically on a daily basis but also from those advocates who although not involved in court practice will ultimately be affected in their practice by the proposed amendments for instance in terms drawing up agreements to provide for mediation. The views of all the stakeholders are therefore necessary to arrive at answers to the research questions of this study.

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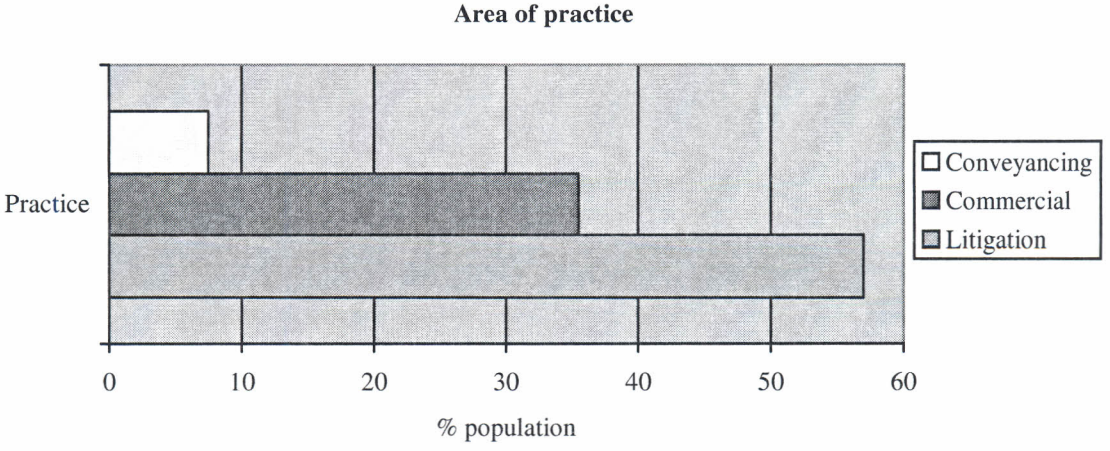
[158] Rupert Day (1998) *The Practice of Law,* Butterworths, London.
[159] *Ibid.*
[160] Keith Hurd (1965) *Defining Legal Practice,* Blundell Inc, Seattle.

Table 4 and Chart 4 below set out the findings of the study on the areas of practice of the respondents illustrating that over 57% of the respondents practice Litigation, 7.5% are conveyancers and 35.5% practice commercial law.

Table 4: Area of practice

No.	Area	Count	%
1	Litigation	69	(57%)
2	Commercial	43	(35.5%)
3	Conveyancing	8	(7.5%)

Chart 4: Area of practice



4.4 The Use of Mediation by Advocates in Civil Practice.

This study seeks to establish as one of its research questions, whether practising advocates are familiar with alternative dispute resolution methods generally and

specifically mediation.[161] It also seeks to establish whether the practising advocates have been using mediation in their legal practice.[162] In addition, it seeks to establish the views of practising advocates to the proposal to integrate mediation into the civil justice system.

It is against this background that this second theme of data collected from the survey is set out. This theme is concerned with presenting the data that has been collected on mediation as a method of dispute resolution

4.4.1 The use of various methods of dispute resolution in legal practice

The data collected in this study is set out in table 5 below which reflects that the majority of the respondents interviewed, (48% and 21.5% for male and female respondents respectively) apply negotiation and Conciliation regularly in their legal practice. 63% of the respondents in this study who use negotiation and conciliation in dispute resolution have been found to rarely use mediation.[163]

Table 5: Use of various methods of dispute resolution.

No.	Item	Regularly	Occasionally	Rarely	Never	Total
1	Negotiation	(48%)	(25.5%)	(14.5%)	(12%)	120
2	Conciliation	(21.5%)	(2%)	(21.5%)	(15%)	120
3	Arbitration	(10.5%)	(19.5%)	(20.5%)	(9.5%)	120
4	Mediation	(20%)	(53.0%)	(43.5%)	(63.5%)	120

Interestingly, the discussions with some of the willing respondents on the distinction between each one of the listed methods of dispute resolution is unclear particularly as

[161] As discussed in Chapter Three.
[162] *Ibid.*

between negotiation, conciliation and mediation. Indeed, it would seem that in their legal practice, there is sometimes an overlap of the methods of alternative dispute resolution other than arbitration. Arbitration in Kenya has been integrated into the legal system and is governed by the provisions of the Arbitration Act, 1995 which sets out the rules of procedure to be followed in arbitrations in Kenya.

Even in the absence of specific rules of procedure, it has been found that negotiation, conciliation and mediation are used by advocates in their legal practice. These processes are usually carried out at the time when the dispute is first brought to the advocate by the client. The advocate then after considering the nature of the dispute will in certain cases try and get the disputing parties to amicably resolve their dispute before proceeding to court.

The findings in this study reveal generally that practising advocates are aware of various methods of alternative dispute resolution and that these methods are used in their legal practice depending on the discretion of the advocate usually determined by the nature of the dispute.[164]

The findings on the nature of disputes in which the methods of alternative dispute resolution have been used by advocates are presented in table 6 below.

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[163] See Chapter One.
[164] Lawrence Boulle (2001) *Mediation: Principles, Process, Practice,* Butterworths, London and Dublin.

Table 6: Nature of dispute

No.	nature of dispute	Count	%	Total
1	Breach of contract	21	17.5	21
2	Family dispute	49	40.8	49
3	Land dispute	23	19.1	23
4	others	27	22.5	27
Total		120	100	120

The categories of civil disputes brought for determination by the civil courts have been classified into four main categories which are breach of contract, family disputes, land disputes and others.[165]

Civil disputes relating to breach of contract has been used to classify those disputes which relate to all claims which have been brought on the basis that one party has failed to comply with his obligations as previously agreed between the parties. This could relate to matters of employment, banking or insurance to give a few examples. The next category relates to family disputes which include matters relating to family relations such as marriage, divorce, custody and maintenance of children are a few examples.

The third category relates to land disputes in which one party is making a claim of ownership of land as against another such as through adverse possession and trespass. The fourth category which has generally been referred to as other disputes envisages civil disputes which do not fall in any of the above categories but which nonetheless are civil in nature and which do not comparatively for a large percentage of civil disputes brought for determination before the Kenyan courts such as disputes relating to intellectual

property rights, defamation, malicious prosecution to mention a few examples. The above categories are in no way conclusive and were used in this study as guidelines for collection of data.

A high percentage of the respondents were found to use alternative dispute resolution methods mostly in cases relating to family disputes such as those relating to matrimonial disputes, child custody and maintenance, inheritance and succession.

Majority of the interviewees, that is 40.8 %, have used ADR in relation to family disputes. 19.1% of the respondents have used ADR in relation to Land disputes with 17.5% having used ADR in cases of breach of contract.

4.5 Distribution of disputes resolved through ADR by the respondents

This relates to the success rate of the respondents in resolving the disputes to which they have used any of the available methods of alternative dispute resolution. In view of the fact that this study seeks to establish whether by introducing mediation into the civil justice system this will lead to the expeditious resolution of civil cases in Kenya, this finding is relevant towards showing whether or not disputes can actually be resolved by employing any of the methods of alternative dispute resolution. The findings in this regard are set out in table 7 below.

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[165] *Op. cit.*

Table 7: Distribution of the disputes resolved by respondents through ADR

No.	Item	Score	%	Total
1	Yes	87	72.5	87
2	No	33	27.5	33
Total		**120**	**100**	**120**

The findings reveal that 72.5% of the disputes were resolved through ADR and that 27.7% of disputes were unresolved. This finding is significant to the extent that it reflects that the disputes that can be resolved through ADR are higher than those that cannot. This finding supports the case for the introduction of mediation as an alternative to litigation primarily on the basis that civil cases can be resolved outside the civil courts and that therefore, if more disputes are resolved in this way, the number of civil cases proceeding for determination by the civil courts will be reduced thereby decongesting the civil courts. The civil courts could then be better placed to expeditiously resolve those cases that are before it.

4.6 Awareness of practising advocates to the proposal to integrate mediation in the civil justice system and their views on the proposed reform.

As one of its research questions, this study seeks to find out whether practising advocates are aware of the on going process to integrate mediation into the civil justice system.[166] Advocates have already been identified as primary stakeholders in the civil justice system and as such, their knowledge of any on going reform and their participation in the law making process is necessary.[167] This study therefore sought to establish whether

[166] Discussed in Chapter One.
[167] Chapter One.

practising advocates were aware of the proposal to integrate mediation in the Civil Procedure Rules.[168] The findings were as follows:

Table 8: Awareness of proposal to integrate mediation into the Civil Procedure Rules.

No.	Item	Score	%	Total
1	Yes	120	100	120
2	No	NIL	NIL	NIL
Total		**120**	**100**	**120**

The above table reflects that all the respondents interviewed were aware of the proposal to integrate mediation into the civil justice system. The oral interviews conduced revealed that even though the respondents did not have details of what had been proposed, and/or the methodology to be used in the conduct of mediation, they had some knowledge that there have been ongoing efforts to integrate mediation in the Kenyan Civil Procedure Rules. This has largely been attributed to the compulsory continuous legal education program which is now a pre-condition for the annual renewal of advocates practising certificates.[169]

The opinions of the respondents on the proposed reform were then sought. This was with regard to their views on whether or not they thought the proposed reform would improve on the quality of the civil justice system in Kenya and lead to expeditious resolution of civil cases. 93 of the 120 respondents interviewed (forming a majority view) were of the view that mediation would effectively improve the civil justice system as it could lead to

[168] See Chapter One.

decongestion of the civil courts by reducing the number of cases proceeding for hearing and determination by the courts. As a consequence thereof, the courts would then be in a position to expeditiously resolve the cases pending for determination.

27 of the 120 respondents interviewed were of the view that the proposed integration of mediation into the civil justice system would be ineffective. They justified their position on the basis that they viewed the proposed mediation process as an additional hurdle to be crossed by litigants who would in most cases before proceeding to the courts for determination of their disputes have already attempted and failed to settle the dispute amicably. In the result, by making it mandatory for such parties to again attempt mediation, this would not bear any fruit.

The Respondents were of the view that the integration of mediation would also unnecessarily increase the costs of the parties to a suit by increasing the procedural requirements to be followed before determination by the courts. These respondents were therefore against the mandatory requirement for mediation as set out in the proposed rules.[170]

It is noted that 80% of the Respondents overwhelmingly supported the proposed introduction of mediation. This is a positive finding bearing in mind that the proposals as

[169] The Law Society of Kenya Secretariat (2005) Nairobi.
[170] Appendix B.

drafted will require the good faith and support of advocates if the process is to be successful.[171]

This study then sought to find out the respondents views on whether or not the proposed integration of mediation into the civil justice system would have any effect on the period within which a civil dispute could be resolved. To provide some comparison in this regard, the respondents were first asked the average period within which civil cases are resolved through litigation. These findings are set out in Table 10 below.

Table 9: Average length of time taken to resolve civil cases through litigation.

Item	Period	count	%
1	Less than a year	7	5.8
2	2-3 years	43	35.8
3	3-4 years	51	42.5
4	5-6 years	17	14.1
5	Others	2	1.6
Total		**120**	**100**

From the above findings, on average, it takes 3 to 4 years to resolve a civil case through litigation in the Kenyan Courts. This finding is consistent with the findings of the Law Society of Kenya, the Dispute Resolution Centre in Nairobi and the Kenyan Section of the International Commission of Jurists which provide an estimate of 3 to 4 years.[172] The findings of the study reveal that litigation in Kenya can be quite lengthy and thus,

[171] See Chapter One.

there is a need to try and reform the civil justice system to shorten the period with in which civil disputes are resolved by the Kenyan Courts.[173]

It is against this backdrop that majority of the respondents are hopeful that by integrating mediation into the civil justice system, the parties will be given a chance to look at their dispute again, with the guidance and assistance of trained mediators under the overall supervision of the courts to determine whether or not an amicable solution can be reached.

Alongside the advantage of the expeditious resolution of cases, the respondents supporting the integration of mediation into the civil justice system were of the view that there will be an additional cost benefit to litigants if their dispute is resolved through mediation. Mediation is expected to reduce on the costs of litigation if the dispute is successfully resolved through mediation. This is viewed as an additional incentive to litigants as they try to resolve their disputes amicably.

From the findings in this survey, three conclusions can be drawn as regards the research questions and hypothesis of this study. First, the majority of the respondents accept that mediation should be integrated in the civil justice system in Kenya. Mediation is viewed as one way through which the civil justice system could be improved through sifting through civil cases filed for determination by the courts. The disputes that can be

[172] www.icj-kenya.org/news.asp (2004), Dispute Resolution Centre statement in support of Alternative Dispute Resolution (2006) and the Law Society of Kenya Report on the State of the Kenyan Judiciary (2004).

resolved are then mutually resolved in the interests of all parties. This in effect leads to the second conclusion.

Second, the integration of mediation will expedite the resolution of civil disputes in the interests of justice. Following through from the first conclusion above, it is anticipated that the number of disputes that will actually proceed for determination by the courts will be reduced and further, that even if mediation fails, the issues between the parties will have been brought to the fore at the mediation and in certain cases, narrowed down. This could reduce on the amount of judicial time spent on each dispute, allowing the judicial officers more time to enable them handle more cases. As already discussed in this study, it is in the interests of justice that civil cases should be expeditiously resolved.

Third, as regards the views of practising advocates on the proposed reform to integrate mediation into the Kenyan Civil Procedure Rules, it has been found that overwhelmingly, practising advocates are aware of the proposed reform. In addition, even though mediation has not yet been integrated into the Kenyan civil procedure, the advocates have been successfully using it and other forms of alternative dispute resolution in their legal practice usually depending on the nature of the dispute.

After reviewing the proposed amendments to the Civil Procedure Rules and the findings of the survey in this chapter, this study concludes in Chapter 5 by providing a summary

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[173] Anthony Gross (2004) "The Role of Legal Ethics and Jurisprudence in Nation Building: Mediation - A Solution for the Legal Sector Crisis." A paper presented on 29th October 2004 at Strathmore University Nairobi.

of the conclusions arrived at in this study with recommendations on the way forward as regards the proposed integration of mediation into the Kenyan civil justice system.

CHAPTER FIVE

CONCLUSION AND RECCOMENDATIONS

At the beginning of this study, our general concern was the problems facing the Kenyan civil justice system with a view to contributing positively to the debate on reforms in the judiciary.[174] Specifically, this study focused on the proposal to integrate mediation into the Kenyan civil justice system aimed at providing an alternative form of dispute resolution to *inter alia* decongest the civil courts of cases pending for determination.[175]

The proposed amendments to integrate mediation into the Kenyan civil justice system have been set out in this study with a discussion on their implications to legal practice in Kenya.[176] A critical analysis of the practical application of the proposed reforms against the backdrop of the fundamental principals or concepts of the practice of mediation then follows. The proposed amendments are then discussed and analysed. In summary, it can be concluded that the proposal to integrate mediation into the Kenyan Civil Procedure Act and Rules is welcomed as a positive step towards reform of the civil justice system. Although some of the proposed provisions may present problems of interpretation, the spirit of mediation has been captured in the proposals. The stakeholders are now awaiting implementation of the proposals.

The mandatory requirement for mediation of all civil cases (save for those expressly excluded) is a starting point towards pushing parties to look again at their disputes before

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[174] See Chapter One.

proceeding for determination before the courts. The use of a third party in this process will be of assistance to disputants in identifying their disputes by allowing free discussions between the parties. From a legal practice perspective, it is usual that disputants do not interact with each other once a dispute has been forwarded to the disputants advocates. To some extent, it is the lawyers who demand that all correspondence should be made through them. The proposed mandatory mediation will give the parties one last chance to articulate their dispute before proceeding for determination by the courts.[177] Once the proposals are implemented, we look forward to carrying out a study of the rate of resolution of cases through mediation and/or whether the positive intentions of the reform will have been achieved.

Having reached the conclusion that mediation should be integrated into the civil justice system, this study went further to seek the views of practising advocates to establish whether they were aware of the proposals for amendment and if so, what their views were. It has already been argued that the advocates are primary stakeholders in this process as they are often met at the entry point of parties into civil litigation. They are critical to this process. Indeed, for the proposals to achieve their ultimate goal, the good faith of advocates and indeed all stakeholders including disputant is definitely required.

The above findings support two of the three hypothesis of this study as follows:

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[175] Anthony Gross (2004) "The Role of Legal Ethics and Jurisprudence in Nation Building: Mediation - A Solution for the Legal Sector Crisis." A paper presented on 29th October 2004 at Strathmore University Nairobi.
[176] See Chapter Three.
[177] See Chapter Two.

First, Mediation is viewed as a crucial and necessary method of alternative dispute resolution which should be integrated into the civil justice system in Kenya as has been suggested in the draft proposal to amend the Kenyan Civil Procedure Act and Rules.[178]

Second, it is expected that by integrating mediation into the Kenya civil justice system, the resolution of civil cases by the Kenya civil courts will be expedited in the interests of justice.[179]

As regards the third hypothesis, this has been disputed by the findings of the survey carried out on practising advocates in Nairobi. The findings reflect overwhelmingly that practising advocates know about mediation as a form of alternative dispute resolution.[180] Notwithstanding that it has not been institutionalised, it has been found that mediation is used by a majority of the respondents in their legal practice.[181]

The respondents determine whether or not to attempt mediation depending on the nature of the dispute. The advocates will usually weigh the merits of proceeding for litigation in terms of how long the process will take and the expense likely to be incurred as well as the interests of the parties and what they are likely to gain or lose at the end of the process. Depending on their views, they will make attempts at resolving the dispute amicably which will usually be through negotiations or through an intermediary by

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[178] See Paragraph 1.5.
[179] Anthony Gross (2004) "The Role of Legal Ethics and Jurisprudence in Nation Building: Mediation - A Solution for the Legal Sector Crisis." A paper presented on 29th October 2004 at Strathmore University Nairobi.
[180] These findings are to be considered against the backdrop of the limitations of the study discussed at paragraph 1.7.
[181] Lawrence Boulle (2001) *Mediation: Principles, Process, Practice,* Butterworths, London and Dublin.

mediation. In conclusion therefore in this regard, mediation already exists as an alternative method of dispute resolution informally.[182] The disputes commonly mediated or negotiated usually relate to family disputes, land disputes and cases of breach of contract.

In conclusion therefore, the introduction of mediation in the formal civil system is awaited with much anticipation. We look forward to fewer cases awaiting determination by the Kenyan Courts with majority having been disposed of through mediation. Mediation may be the long awaited solution to the problems of congestion that have for many years now plagued our judiciary.

It is noted that the proposals to amend the Kenyan Civil Procedure Act and Rules to integrate mediation as an alternative method of dispute resolution have already been submitted to the Rules Committee. We are now awaiting the enactment of the proposals into law. This has not yet been done and only time will tell when this is likely to be done. We however look forward to improvement in the Kenyan civil justice system in the interests of justice.

[182] See Chapter Three.

POST SCRIPT

It is necessary to mention that since this study was conducted and the thesis submitted for examination in July 2007, there have been further developments towards the proposed reform of the Kenyan judicial system.

These developments include further proposals on the integration of mediation into the civil justice process. The proposals seek to provide for alternative dispute resolution (ADR) within the Constitution at the first instance.[183] In addition, it is proposed that the Civil Procedure Act and Rules should be amended accordingly to incorporate the proposed constitutional amendments.[184]

Further, in Kenya mediation was brought to the fore after the violence that erupted post the 2007 elections. Kofi Annan the former Secretary General of the United Nations came to Kenya as a mediator between the two parties that both claimed victory in the election. Despite the fact that there was no legal persuit either in the constitution or in statute, the mediation proceeded and resulted in a settlement in the form of a power sharing agreement.[185] Mediation is now a term which many Kenyans are familiar with arising from the above.

These recent developments which have occurred after conclusion of the thesis have not therefore formed a core part of this study.

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[183] Rules Committee (2008) *Proposed Amendments to Civil Procedure and Court of Appeal Rules* Milimani Commercial Court, Nairobi.
[184] *Ibid.*
[185] Ben Sihanya (2008) *The post 2007 election crisis in Kenya: the constitutional politics of mediation and its outcomes*, Society for International Development (SID) Nairobi.

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APPENDIX A

QUESTIONNAIRRE

A. BACKGROUND INFORMATION

(1) AGE _____

(2) GENDER_____

(3) YEAR OF BIRTH _____

(4) LEVEL OF EDUCATION

a. Undergraduate

b. Post-graduate

c. Graduate

(5) YEAR OF ADMISSION_____

(6) NUMBER OF YEARS IN PRACTICE

Less than 2 years ☐

2-5 years ☐

5-10 years ☐

Other (please specify) _____

(7) MAIN AREA OF PRACTICE

Litigation ☐

Commercial law ☐

Conveyancing ☐

Other (please specify) _____

(8) WHAT IS THE NATURE OF YOUR EMPLOYMENT?

Self- employed ☐

Employed ☐

Others (please specify)_____

B **ALTERNATIVE DISPUTE RESOLUTION**

(9) ARE YOU AWARE OF ANY ALTERNATIVE METHODS OF DISPUTE RESOLUTION OTHER THAN LITIGATION?

Yes ☐

No ☐

(10) IF YES, PLEASE TICK AS NECESSARY THE METHOD(S) YOU ARE AWARE OF

Negotiation ☐

Conciliation ☐

Arbitration ☐

Mediation ☐

Others (please indicate which ones)._____

(11) HAVE YOU USED ANY OF THE ABOVE METHODS OF DISPUTE RESOLUTION IN YOUR PRACTICE

Yes ☐ No ☐

a) IF YES, PLEASE INDICATE WHICH ONE (S)

_____

b) WHAT WAS THE NATURE OF THE DISPUTE? Please tick as necessary.

Breach of contract ☐

Family dispute ☐

Land dispute ☐

Others (please specify)_____

c) WAS THE DISPUTE RESOLVED?

Yes ☐ No ☐

(12) ARE YOU AWARE OF A PROPOSAL TO AMEND THE CIVIL PROCEDURE ACT AND RULES TO INTEGRATE MEDATION INTO THE CIVIL JUSTICE SYSTEM?

Yes ☐ No ☐

(13) DO YOU THINK MEDIATION SHOULD BE MADE (Please Tick as necessary)

a) Compulsory ☐

b) Voluntary ☐

(14) DO YOU THINK THE INTEGRATION OF MEDIATION INTO THE CIVIL JUSTICE SYSTEM WILL MAKE DISPUTE RESOLUTION MORE EFFECTIVE THAN IT PRESENTLY IS?

Yes ☐ No ☐

(15) ON AVERAGE, HOW LONG DOES IT TAKE YOU TO RESOLVE A CIVIL CASE THROUGH LITIGATION?

a) Less than a year ☐

b) 2-3 Years ☐

c) 3-4 Years ☐

d) 5 Years- 6 years ☐

e) Other (please specify).....

(16) IN YOUR VIEW, WHO IS LARGELY RESPONSIBLE FOR DETERMINING HOW LONG A CIVIL CASE TAKES FROM THE BEGINNING TO THE END?

a) The court ☐

b) The parties ☐

c) The advocates ☐

d) Others (please specify)_____

(17) HOW OFTEN DO YOU RECOMMEND ADR TO YOUR CLIENTS?

a) Frequently ☐

b) Regularly ☐

c) Rarely ☐

d) Never ☐

(18) HOW OFTEN DO YOU USE ADR IN YOUR PRACTICE?

a) Very frequently ☐

b) Less frequently ☐

c) Rare ☐

d) Never ☐

(19) WHAT FACTORS DO YOU CONSIDER IN YOUR RECOMMENDATION TO YOUR CLIENT FOR ADR?

_____

(20) WHAT TYPE OF CASES HAVE YOU FOUND VIABLE FOR ADR?

_____

APPENDIX B

THE PROPOSED AMENDMENTS TO THE KENYAN CIVIL PROCEDURE RULES

The Alternative Dispute Resolution Task Force has proposed that a new Order XLV B should be included in the Civil Procedure Rules with new forms set out in compliance with the new rules.

Below are the provisions as proposed

Definitions

It is proposed to add the following definitions to the Civil Procedure Act:

"Mediation" means an informal and non-adversarial process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties with the aim of helping the disputing parties reach a mutually acceptable and voluntary agreement.

"Mediator" means an impartial person whose role in mediation is to assist and encourage parties to a dispute:

- To communicate and negotiate in good faith with each other;
- To identify and convey their interests to one another;
- To assess risks;
- To consider possible settlement options;
- To resolve voluntarily their dispute.

"Impartial" means being and being seen as unbiased towards parties to a dispute, toward their interests and toward the options they present for settlement.

"Mediation Coordinator" is a person to be designated by the Chief Justice to be responsible for the administration of mediation under this Act.

Amendments to the Civil Procedure Act

It is proposed to add a Part IV to the Civil Procedure Act covering special proceedings.

It is further proposed to add a section 59A (1) and 2) to the Civil Procedure Act to provide as follows on mediation:

S. 59 A (1) Every suit may be referred to mediation unless otherwise excepted by statute, rule or court order or the suit involves constitutional issues, matters of public policy or has pending applications that seek to dispose the suit in a summary manner or where the trial court considers the case to be unsuitable for referral to mediation.

(2) A court ordered mediation shall be conducted according to the Rules.

Amendments to the Civil Procedure Rules

It is further proposed to provide for an ORDER XLV B in the Civil Procedure Rules which sets out the process to be followed in cases of mediation under an order of the Court. This Order will read as follows:

MEDIATION UNDER ORDER OF A COURT

Referral to mediation

1. (1) In every suit instituted in court, a first scheduling and settlement conference shall within thirty days after close of pleadings for the purpose of referring the case to mediation be held and presided over by the mediation coordinator.

(2) A mediation under sub rule (1) shall be conducted by a person:

Chosen by the agreement of the parties from the list of approved mediators.

Assigned by the Mediation Coordinator from the list of mediators.

(c) Who is not named on the list if the parties consent.

List of mediators

2. The court shall maintain a panel of approved mediators that meet specific qualifications and who adhere to court approved mediator ethics. The mediator shall be of not less than seven years in their respective fields.

Mediators Fees

3. (1) The mediator's fees for the mandatory mediation session shall not exceed the amount shown in the following Table:

Number of Parties	**Maximum Fees (excluding taxes and expenses).**
2	Kshs. 15,000.00
3	Kshs. 20,000.00
4	Kshs. 25,000.00
5 or more	Kshs. 30,000.00

(2) Each party is required to pay an equal share of the mediator's fees for the mandatory session at least seven days before the first mediation session.

(3) The mediator's fees for the mandatory mediation session cover up to three hours of actual mediation.

(4) After the first three hours of actual mediation, the mediation may be continued if the parties and the mediator agree to do so and agree on the mediator's fees or hourly rate for the additional time.

(5) If the mediator cancels a session under Rule 6 (2) of this Order because a party fails to comply with Rule 6 (1) that party shall pay any cancellation fees.

(6) If the mediator cancels a session under Rule 7 (2) of this Order because a party fails to attend within the first thirty minutes of the session, the party who fails to attend shall pay any cancellation fees.

(7) Two or more parties who fail to comply or attend, as the case may be shall pay the cancellation fees in equal shares.

(8). A party's failure to pay a share referred to in Rule 3 (2) or 3 (7) does not increase the share or shares of the other party or parties.

(9) A party who has instituted a suit in *forma pauperis* with respect to the proceeding is not required to pay fees under this Order.

Time limit

4. A mediation settlement shall take place within three (3) months after being referred to mediation provided that time may be extended for a further sixty days by the mediation coordinator having regard to the number of parties or complexity of issues or with the consent of the parties which consent shall be duly filed in court.

Mediation hearing

5. (1) The assigned mediator shall immediately fix a date for the mediation settlement and shall at least twenty days before that date, serve on every party a notice stating the place, time and date of the mediation of the settlement conference and advising parties that the settlement conference is mandatory.

(2) The assigned mediator shall file a copy of the notice in court.

Procedure before mediation

6. (1) Every party shall at least seven days before the settlement conference comply with the following conditions:

(a) Prepare a statement in the prescribed form and provide a copy to every other party and to the mediator.

(b) The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement.

(c) The party making the statement shall attach to it documents that the party considers of central importance to the action.

(2) If it is not practical to conduct a mediation session because a party fails to comply with sub-rule one, the mediator shall cancel the session and immediately file with the mediation coordinator a certificate of non-compliance.

Attendance at Mediation Session

7. (1) The parties, and their lawyers if the parties are represented, are required to attend the mediation session unless the court orders otherwise. If the party is a corporation, partnership, government agency or entity other than an individual, an officer or director of sufficient rank to settle the matter shall attend.

(2). If it is not practical to conduct a scheduled mediation session because a party fails to attend within the first thirty minutes of the time appointed for commencement of the session, the mediator shall cancel the session and immediately file with the mediation coordinator a certificate of non-compliance.

Statement of Understanding on Role of Mediator

8. At the commencement of the mediation, the mediator shall read and explain to the parties the statement of understanding on the role of the mediator in the prescribed form and shall require the parties to the sign the form.

Non-compliance

9. (1) When a certificate of non-compliance is filed, the mediator shall refer the matter to the court.

(2) The court may make any of the following orders;

(a) an order that further mediation shall occur on any terms that the court considers appropriate.

(b) an order that the pleadings of the non-complying party be struck out, unless the party satisfies the court that there was reasonable excuse for the non-attendance and that striking out the party's pleadings will be inequitable.

(c) an order that the defaulting party pays costs.

Confidentiality

10. All communication at a settlement conference and the mediator's notes and records shall be deemed to be without prejudice settlement discussions.

Mediator's Report

11. Within ten days after the mediation is concluded, the mediator shall give the mediation coordinator and the parties a report on the mediation in the prescribed form.

Agreement

12. (1) If there is an agreement resolving some or all of the issues in dispute, it shall be signed by the parties and filed in court within ten days after the mediation is concluded.

(2) If the agreement settles the action, the mediator shall file in court a notice to that effect and the court shall enter judgment.

(3) If no agreement is reached the parties shall set the suit down for hearing.

Consent Order for Additional Mediation

13. At any stage in the proceedings, the mediation coordinator may with the consent of the parties make an order requiring the parties to participate in an additional settlement conference for purposes of dealing with all matters required to be dealt with in any case at such a settlement conference.

No appeals against settlement

14. No appeal shall lie against a registered mediated settlement.

Inadmissibility in Other Court Proceedings

15 (1) Anything said at a mediation session shall be inadmissible in any proceedings before any court of law.

(2) Neither the mediator nor any person present at the mediation session may be summoned, compelled or otherwise required to testify or to produce records or notes relating to the mediation in any proceedings before any court of law.

(3) A mediation session shall not be taped nor any transcript of it kept.

(4) Any record of what took place at a mediation session shall not be admissible before any court of law, unless the parties agree in writing.

(5) The provisions of this rule do not:

(a) apply to a mediated agreement, or;

(b) prevent the admission of factual evidence relating to the cause of action that would be admissible apart from sub rule (1) and/or (2) above.

Immunity

16. A mediator shall have the protection and immunity in the same manner and to the same extent as granted judicial officers and judges under Section 6 of the Judicature Act (Chapter 8 of the Laws of Kenya).

PROPOSED FORMS

No.1

(General Heading)

NOTICE OF APPOINTMENT OF MEDIATOR

(Order 45 B Rule 1)

TO: MEDIATOR

1. I certify that I have consulted with the parties and the parties have chosen you as the mediator for the mediation as required by Rule 1(1).

2. Please proceed to immediately fix a date for the mediation session.

Dated at this day of 2005

MEDIATION COORDINATOR

(Copied to the parties advocates)

(General Heading)

No.2

NOTICE BY ASSIGNED MEDIATOR

(Order 45 B Rule 5)

TO:

AND TO:

I have been assigned to conduct the mediation session under Rule 1.

The mediation session will take place on (date), from (time) to (time), at (place)

Unless the court orders otherwise, you are required to attend this mediation session. If you have a lawyer representing you in this action, he or she is also required to attend.

You are required to file a statement of issues 7 days before the mediation session. A blank form is attached.

When you attend the mediation session, you should bring with you any documents that you consider of central importance in the action. You should plan to remain throughout the scheduled time. If you need another person's approval before agreeing to a settlement, you should make arrangements before the mediation session to ensure you have ready telephone access to that person throughout the session even outside regular business hours.

YOU MAY BE PENALISED UNDER RULE 6 (2) AND 7 (2) IF YOU FAIL TO FILE A STATEMENT OF ISSUES OR FAIL TO ATTEND THE MEDIATION SESSION

(Date) (Name, address, telephone number and fax number of mediator)

Cc. Mediation Coordinator

(General Heading)

No.3

STATEMENT OF ISSUES

(Order 45 B Rule 6)

(To be provided to mediator and parties at least seven days before the mediation session)

1. *Factual and legal issues in dispute*

   The plaintiff (or defendant) states that the following factual and legal issues are in dispute and remain to be resolved.

   (Issues to be stated briefly and numbered consecutively)

2. *What the party hopes to achieve.*

   (Brief summary)

---

3. *Attached documents*

   Attached to this form are the following documents that the plaintiff (or defendant) considers of central importance in the action: (list)

   (date) (Party's signature)

   (Name, address, telephone number and fax number of advocate of party filing statement of issues, or of party)

   NOTE: When the plaintiff provides a copy of this form to the mediator, a copy of the pleadings shall also be included.

(General Heading)

No. 4

STATEMENT OF UNDERSTANDING: THE ROLE OF THE MEDIATOR

(Order 45 Rule 8)

My name is ..... I have been assigned to mediate your case. I will serve as a neutral party to help you resolve your dispute. I will not act as an advocate for any party.

This mediation is strictly confidential. No party shall be bound by anything said or done in mediation unless a settlement is reached. If a settlement is reached, the agreement shall be reduced to writing and, when signed, shall be binding upon all parties to the agreement. Each party agrees not to request that, I, the mediator testify against the other party, nor ask me or the other party to testify regarding statements made in mediation.

Please sign below to acknowledge that you have read and/or understand this statement.

.....	.....
Plaintiff(s)	*Defendant(s)*
.....	.....
Plaintiff's Advocate	*Defendant's Advocate*
.....	.....
Mediator	*Date*

(General Heading)

NO.5

CERTIFICATE OF NON-COMPLIANCE

(Order 45 Rule 9)

TO: MEDIATION COORDINATOR

I, (name), the mediator, certify that this certificate of non-compliance is filed because:

() (*Identify party (ies)* failed to provide a copy of pleadings to the mediator

() (Identify party (ies) failed to attend within the first 30 minutes of a scheduled mediation session.

() None payment of fees under Rule 3 (2).

(Date) (Name, address, telephone number and fax number of mediator)

No.6

MEDIATOR'S REPORT

(Order 45 Rule 11)

TO: THE MEDIATION COORDINATOR

I ..... having been designated as mediator in this action and having conducted mediation

between the parties do hereby report that the parties have failed to reach a settlement/ reached a settlement..

Dated the day of .....

.....

Mediator's Signature

(General Heading)

No.7

MEDIATION SETTLEMENT

(Order 45 Rule 12)

We, the undersigned parties to this action have agreed to settle our disputes/differences as follows:

Dated the day of .....

.....	.....
Plaintiff(s)	*Defendant(s)*
.....	.....
Plaintiff's Advocate	*Defendant's Advocate*
.....	.....
Mediator	*Mediator's Full Name*