

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE  
BACHELOR OF LAW (LL. B) COURSE. (GPR 400)**

**THE EFFECT OF SECTION 59 OF THE CIVIL PROCEDURE ACT ON DEVELOPMENT OF  
MEDIATION IN KENYA**

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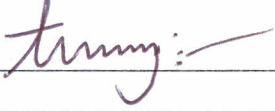
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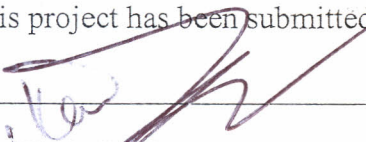


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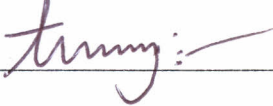
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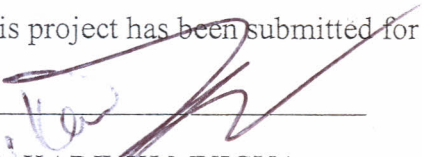


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## **DEDICATION**

To my mother Ms. Triza Atieno, Sister Gloria and brother Amah for encouraging me to be the best I can be.

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## LIST OF ABBREVIATIONS AND CASES

ADR

Halsey v Milton Keynes General NHS Trust

Demers v Gerety

United Scientific Holdings Ltd v Burnley Borough Council



**LIST OF ABBREVIATIONS AND CASES**

ADR

Halsey v Milton Keynes General NHS Trust

Demers v Gerety

United Scientific Holdings Ltd v Burnley Borough Council

## 1.0 Background

Over the past years, there has been a significant increase in the subjection of disputes to alternative means of dispute resolution methods such as arbitration, negotiation, conciliation and mediation.<sup>1</sup> ADR typically refers to any mode of dispute resolution that does not utilize the court system<sup>2</sup>. This was necessitated by the fact that the court process has overly earned the reputation of being too rigid, expensive, slow and technical.<sup>3</sup> ADR was therefore introduced to help resolve this defect of the court by providing an alternative means of resolving disputes away from the court system. This has been so not only in Kenya, but various jurisdictions such as the United Kingdom, United States, India,<sup>4</sup> Australia<sup>5</sup> and Philippines<sup>6</sup> among others. In Kenya, ADR was introduced in 1968 by way of Arbitration by the Arbitration Act 1968.<sup>7</sup> It was then repealed and replaced in 1995 due to its failure to limit the extent to which courts could intervene in arbitration proceedings. ADR however, got its major recognition by recognized by the 2010 Constitution in which Article 159 encouraged its use in resolving disputes.<sup>8</sup> This is after the success of Kofi Annan's, former secretary general to the U.N, mediation effort in solving the stalemate that arose after the 2007/2008 post-election violence. Among the alternative methods mentioned by the constitution is mediation. Mediation as defined by the United States Employment Opportunities Commission is an informal and confidential way for people to resolve disputes with the help of a neutral mediator who is trained to help people discuss their differences.<sup>9</sup> Among the advantages of mediation are that it is a voluntary process, confidential and that it is a private forum; it is also seen to be flexible; relaxed as it is informal and cost

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<sup>1</sup> Roberts S and Palmer M, *Dispute Process: ADR and the primary of decision making* (Cambridge: CUP, 2<sup>nd</sup> Ed, 2005)

<sup>2</sup> Dorcas Quek "Mandatory Mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation program."

<sup>3</sup> Muigua K, *Resolving Conflicts Through Mediation in Kenya* (Glenwood publishers ltd, 2012)

<sup>4</sup> Anand P, Anand A Use of ADR in India, APPA Workshop, Hong Kong

<sup>5</sup> Gutman J, "The Reality of Non-Adversarial Justice: principles and practice" (2009) Deakin Law Review VOL 14 NO. 1

<sup>6</sup> Angeles E, "court annexed mediation: the Philippines experience

<sup>7</sup> Arbitration Act 1968, Government Printers,

<sup>8</sup> Constitution of Kenya 2010, Government printers.

<sup>9</sup> Mediation, [www.eeoc.gov/employees/mediation.cfm](http://www.eeoc.gov/employees/mediation.cfm) accessed on 1st Nov 2013-11-14

effective as compared to litigation.<sup>10</sup> It aims at reducing the number of cases that reach the courts in general and in skilfully dealing with intra family and other often intractable disputes in particular. However in the recent years there have been increased efforts in various jurisdictions to subject ADR in general and mediation in particular to court systems. Court-annexed mediation is the provision of mediation services within the court system. Kenya has not been an exception, introducing court-annexed mediation by statute amendment law, miscellaneous amendment Act 17 of 2012 into the Civil Procedure Act s.59.<sup>11</sup> It provides for references of cases to mediation and indicates that the courts may do this at the request of the parties or where “the courts deem it appropriate”. In section 2 of the Civil Procedure Act, mediation is defined as an informal, non-adversarial process where the impartial mediator encourages and facilitates the negotiation between two or more parties, but does not include attempts by a judge to settle disputes within the proceedings thereto. Section 59 of the Civil Procedure Act provides for a mediation accreditation committee which would be in charge of matters of ethics and accreditation of mediators. With the concept of the court annexed mediation a debate has been stirred, not only in Kenya but other jurisdictions in which it is practiced. A ruling in England in 2004, where court annexed mediation is practiced, stirred such a debate. The case *Halsey v Milton Keynes General NHS Trust*<sup>12</sup> which is a landmark case, upheld a general rule that a losing party in a case should pay the costs of the winning party and the only exception to this rule is where the losing party can prove that the successful party acted unreasonably in refusing to mediate. The court in obiter stated that freedom of access to justice would be curtailed if parties were to be forced to mediate. However, some of the judges in the case state that mediation is not a barrier to justice. The debate continues. A study done in Florida, an American state which practices court-annexed mediation revealed that it had more downsides which included the assimilation of the court's strenuous formality and imposing authority on the process.<sup>13</sup> Other countries also majorly have critics of the court annexed mediation, including London and our very own Kenya.

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<sup>10</sup> Marian Roberts, “Family Mediation: the development of the regulatory framework in the U.K” (2005) 22 Conflict Resolution Quarterly 509

<sup>11</sup> (Muigua, 2012)

<sup>12</sup> [2004] EWCA 3006 Civ 576

<sup>13</sup> James Boskuy, “Court-Annexed Mediation: A Critical Perspective on Selected State and Federal Programs (book review)” [www.mediate.com/articles/Bergman.cfm](http://www.mediate.com/articles/Bergman.cfm) accessed on 11th November 2013-11-



## 1.1 Problem Statement

The introduction of the court annexed mediation appears to be leading us back to litigation, a process which they were avoiding to begin with. It leads the process back to being formal, rigid and the consequence of this is that mediation fails to be a viable option anymore. In the end, we are back to the tiresome litigation process and bulky cases in the courts. However it has also been argued that the informal nature of mediation may be open to abuse or manipulation by either one of the parties or even the mediator.<sup>14</sup> The sole purpose of mediation was to facilitate resolution of cases by alternative means to the court process, but when mediation is imposed rather than voluntarily engaged in, its virtues are lost<sup>15</sup>. Mediation loses its voluntary nature and becomes coerced.

The cornerstone of mediation is its voluntary nature. By introducing court annexed mediation, does this not produce a paradoxical effect?

## 1.2 Purpose of the Study

The purpose of this research is to identify the merits and demerits of the court annexed mediation and weigh them and be able to see how court annexed mediation is accepted by parties to a dispute and how its inclusion will impact on its acceptability by parties and development of mediation as a whole. This is important the parties in a dispute, and even judicial stakeholders. This is particularly so since the whole idea of alternative means of dispute resolution was to aid

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<sup>14</sup> Roberts S and Palmer M, "The Late 20<sup>th</sup> Century Re-Institutionalisation of Mediation" *Dispute Process: ADR and the primary of decision making* (Cambridge: CUP, 2<sup>nd</sup> Ed, 2005)

<sup>15</sup> T. Grillo: "The Mediation Alternative- Process dangers for women" (1999) 100 Yale Law Journal 1545 pp 1605-1610

the court process and it would therefore be of importance to find out if any subsequent move by the stakeholders would affect the attaining of this goal. Also, the parties to a dispute may find this useful as they may have a misguided idea on the concept of court-annexed mediation or may reaffirm their fears. All in all, with this research, the interested parties may be able to decide whether court-annexed mediation is really an asset or a liability to the legal fraternity. It will also help find if there is a way of incorporating regulation of mediating using the court system without eroding the very essence of mediation

### **1.3 Research Question**

1. Does section 59 of the Civil Procedure Act undermine the voluntary nature of mediation?
2. How does section 59 of the Civil Procedure Act then affect the development of mediation in Kenya?

### **1.4 Objectives**

This research seeks to determine the effect of section 59 of the Civil Procedure Act on the development of mediation in the country. Does it undercut the traditional ideals nature of mediation more specifically its voluntary nature? It also seeks to establish if there is a way of incorporating regulation of mediating using the court system without eroding the very essence of mediation

### **1.5 Hypothesis**

This research proceeds on the assumption that article 59 of the civil procedure Act hinders the development and acceptability of mediation in Kenya.

## 1.6 Conceptual Framework

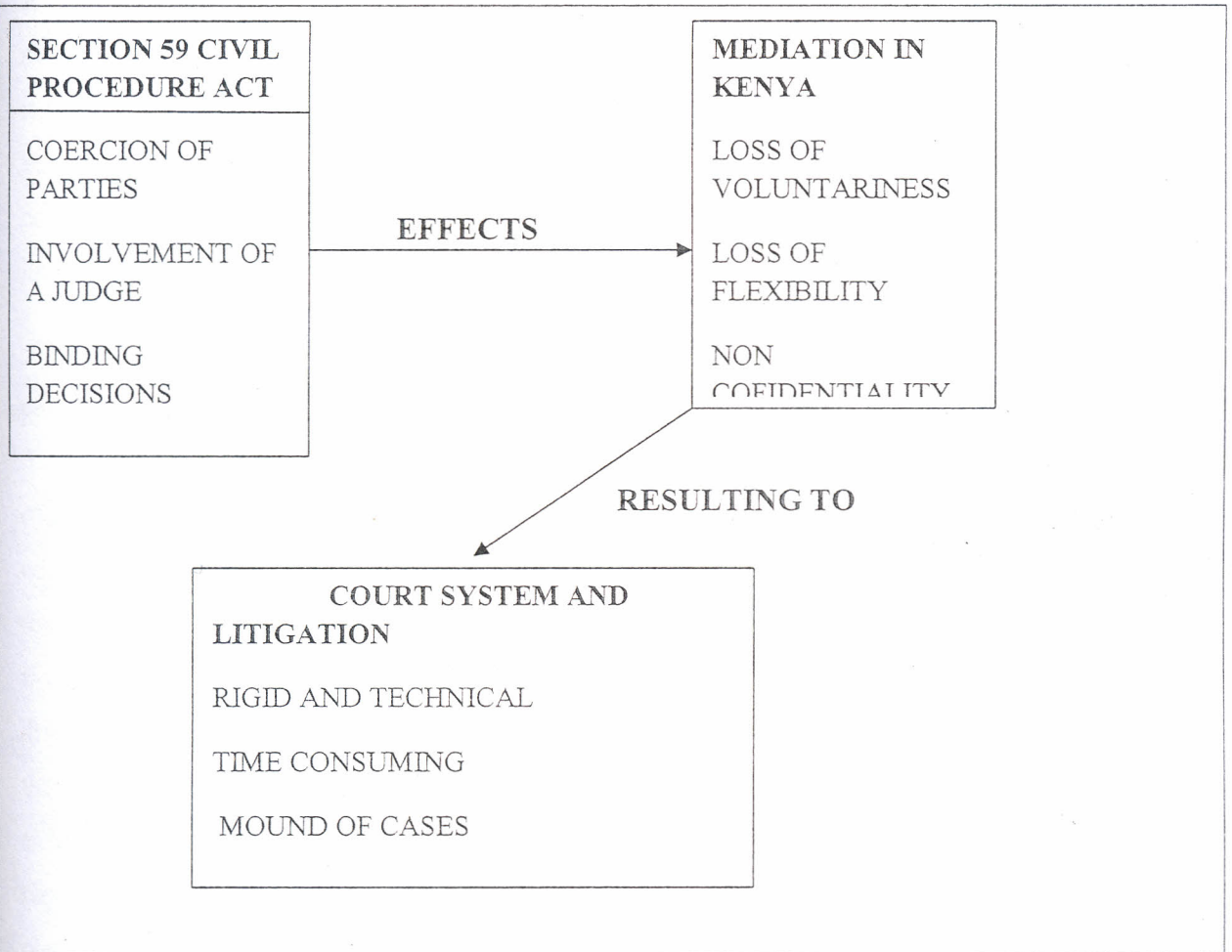


Figure 1

\*source: author



## 1.7 Theoretical Framework

There have been many different schools of thought on alternative dispute resolution methods. This research will however, focus on the Equity Jurisprudence theory. This theory revolves around that unique form of justice that was historically practiced by the court of chancery and which gave rise to equitable remedies by courts in commonwealth countries.<sup>16</sup> The reason for preferring this theory against others is that the foundation behind the equity jurisprudence theory is that behind alternative means of dispute resolution. Both are of the premise that the court system as it is, is inadequate on its own thus a need to have a system outside it but working with it to achieve justice. A great proponent of this theory is Roscoe Pound. Pound, almost a hundred years ago voiced his concern about the decline of equity jurisprudence. Institutionalization in the court system he voiced was the main cause of this. "*The very thing that made equity a system must, in the end, prove fatal to it...*" he stated.<sup>17</sup>

The comparison between equity and mediation is in the fact that, like equity, mediation was conceived as justice without law. This is so because just as equity moderated the rigid nature of the common law by considering moral values and fairness in the judicial process, mediation offers fair alternatives to legal values and judicial decision-making.<sup>18</sup> Equity offers a distinctive conception of justice that like mediation, the process allows for mercy. Mediation acknowledges the emotional, psychological and spiritual needs of parties. This aspect is in danger of being lost if mediation is dominated by rule-bound process of the litigation system that its rational keystone dissolves.<sup>19</sup> As stated by Lon Fuller, who followed the natural law theory but who participated in the equity jurisprudence debate, stated that there should be a differentiation of legal processes as each should have their own structures and independent moralities. This was vital, he stated, in resolving legal problems concerning fact, law, or relationship issues. Equity Jurisprudence theory clearly states that the court system had loopholes that could be amended by other systems of justice. This reflects undoubtedly on the function of mediation and its need to be separated from the court system in order to address the inequities of the court system. Equity Jurisprudence

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<sup>16</sup> Jacqueline M. Nolan-Haley, The merger of law and mediation: "Lesson from equity jurisprudence and Roscoe Pound" [www.cardozoajcr.com/vol6no1/CAC105.pdf](http://www.cardozoajcr.com/vol6no1/CAC105.pdf) accessed on 8th Nov 2013

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> Ibid

theory portrays the success of a system that aids the court system in areas it lacks to address but yet works outside that system to maintain its core values. This is the same case with mediation. Mediation is a system that works outside the court system but aids the court in its shortcomings. In order for it to continue doing so it needs to be independent of the court. Just as if merging equity and common law which may lead us back to the common law system all over, Annexing mediation to the court may end up producing a counter effect.

## 1.8 Literature Review

T.Grillo, the author of *The mediation Alternative-process dangerous for women*, looks at court-annexed mediation from a family mediation point of view.<sup>20</sup> He gives experience of couples who were at one point forced to engage in mediation and who describe it as traumatic being forced to sit across the table and mediate with the other party. This is given the psychological vulnerability of the parties during such a time as divorce. The author proceeds to state that an efficient mediation scheme should not only be of a voluntary nature but also allow for the incorporation of the parties' emotions as they are part and parcel of their values and principles, which are vital when trying to resolve a the dispute between the parties. The parties should also be allowed to choose the location of mediation and the issues to mediate upon.<sup>21</sup> There should also be education of the parties on the mediation process for them to decide whether or not to engage in it.

He further states that when mediation is forced, it more than loses its value but rather becomes a wolf in sheep's clothing. It portrays a process where people are blindfolded and told that it seeks to empower them but in reality they are being forced to accept their own oppression. It relies on force and disregards the context of the dispute, while acting as a gentler, more empowering

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<sup>20</sup> T. Grillo: "The Mediation Alternative- Process dangers for women" (1999) 100 Yale Law Journal 1545 pp 1605-1610

<sup>21</sup> *ibid*



alternative to an adversarial litigation.<sup>22</sup> When mediation is mandatory it becomes like the law it seeks to supplement.

An article by Antoine Cremona: The writer academically analyses the structure, benefits and shortcomings of court annexed mediation schemes.<sup>23</sup> In looking at the benefits, she states that court annexed mediation, as ordered by a judge may seem to be an encroachment on the parties' autonomy may in actual sense help overcome problems relating to asymmetry of information and distrust in the 'new' mechanisms of dispute resolution. She quotes professor. Simon Roberts who argues that mingling of alternative processes with litigation may inevitably blur the line between settlement and judgment.<sup>24</sup> The author further states that this process of incorporation will lead to the loss of the intrinsic nature of alternative processes. The author points out the objections to court annexed mediation stating; that direct regulation and imposition of norms of conduct are not necessary but rather that gradually shifting the mentality of people towards mediation achieves more.

In an article by Dr. Kariuki Muigua, the author states that the amendments to the civil procedure Act merely introduce a mediation process that is formal and annexed to the procedures governing the conduct of cases in the high court.<sup>25</sup> He further states that the autonomy of parties may be lost when the mediation is court-annexed. This will interfere with the very core value of mediation which is voluntariness. The author also points out that in a court-annexed mediation; the lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to them. In addition he states that mediation in the legal process provides only a temporary reprieve as it lacks to deal with the matters underlying between the disputing parties.

Some scholars however, are in support of court-annexed mediation. They are of the view that it is needed. Among them include:

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<sup>22</sup> *ibid*

<sup>23</sup> An article by Antoine Cremona: *Forced to mediate: critical perspectives on court annexed mediation schemes*

<sup>24</sup> Simon Roberts, *Alternative Dispute Resolution and Civil Justice: An Unresolved Relationship* [1993] M.L.R. Vol. 56 No. 3 p. 452 *et seq.*

<sup>25</sup> Article by Dr. Kariuki Muigua on *Court Annexed ADR in the Kenyan Context*,

In an article *Mandatory Mediation: An oxymoron? Examining the feasibility of implementing a court-mandated mediation program* by **Dorcas Quek**, the author examines the court-mandated mediation debate in the United States.<sup>26</sup> She also makes reference to other jurisdictions ‘approaches and weighs on the advantages and disadvantages of having court annexed mediation. Quek states that on the face of it court mandated mediation appears to be an oxymoron. This is because the principal objection is that mandatory mediation impinges upon the parties’ self-determination and voluntariness, thus undermining the very essence of mediation. Mediation, according to the U.S. Model Standards of Conduct for Mediators, is a process that emphasizes *voluntary* decision-making and focuses on self-determination as a controlling principle.<sup>27</sup> Coercion into the mediation process therefore seems inconsistent with and even antithetical to, the fundamental tenets of the consensual mediation process. She further adds that some writers adamantly contend that coercion into the mediation process invariably leads to coercion to settle within the mediation process, which leads to unfair outcomes. Critics of mandatory mediation are of the opinion that there cannot possibly be a neat differentiation or even a semantic difference between coercion *into* and *within* mediation.<sup>28</sup> On the other hand, however, she states that some observers are of the opinion that mandatory mediation is not an oxymoron because there can be a clear distinction between coercion within the mediation process and coercion into mediation. An individual may be told to attempt the process of mediation, but that is not tantamount to forcing him to settle in the mediation. Coercion in mandatory mediation only “relates to requiring that parties try to reach an agreement to resolve their dispute. Moreover, the individual is not being denied access to court because mandatory mediation is not being ordered in lieu of going to court. Instead, the parties’ access to court is only delayed; the parties have the liberty to pursue litigation once again if mediation fails, she states. The writer in general is of the opinion that mediation is not an oxymoron and can actually work especially in areas where mediation may well be under-utilized in certain jurisdictions. In such jurisdictions, parties and their attorneys are still accustomed to treating litigation as the default mode of dispute resolution; commencing mediation may also be perceived as a sign of

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<sup>26</sup>Quek, D. (n.d.). Examining the feasibility of implementing a court-mandated mediation program. *mandatory mediation: an oxymoron?*

<sup>27</sup> Id.

<sup>28</sup> Id.



weakness. In many jurisdictions, the rates of *voluntary* usage of mediation have been low. She uses the example of England where, in England's Central London County Court system in which mediation occurred only with the parties' consent, only 160 mediations took place out of the 4,500 cases in which mediation was offered. However, unless it is carried out in the right manner, is likely to lose its voluntary nature and become a cause for concern. She lists three main reasons which may lead to misuse and failure of court-mandated mediation if not checked.

<sup>29</sup>First, in a discretionary referral regime, a judge can easily fail to actively exercise his/her discretion and accordingly refer all cases for mediation as a blanket rule. The parties to the disputes will then feel that they are being coerced because their cases are arbitrarily being sent for mediation regardless of the cases' specific circumstances. In such a case, court-mandated mediation may not work unless parties are allowed to request an exemption from mediation. Secondly, Excessive Scrutiny of Parties' Participation in Mediation may also cause a problem. If the courts, in determining whether the parties have complied with the order to mediate, examine their conduct within the mediation session, the parties may feel that their communications in mediation are under thorough scrutiny by the courts, and that there is no genuine voluntariness in the entire process. Finally, are the excessive sanctions given for non-compliance. Disproportionate sanctions for failure to participate in mediation may also result in coercion and undermine the nature of mediation as a voluntary process. It is indeed paradoxical if punitive sanctions have to be imposed in order to compel a party to participate in a voluntary process. A harsh administration of sanctions may cause the parties to enter the mediation process with an acute consciousness and fear of court sanctions, resulting in less than sincere and autonomous participation in the mediation process. In conclusion the writer is of the opinion that court-mandated mediation does not necessarily contradict or undermine the nature of mediation as a voluntary and consensual process, provided certain conditions are present. Mandatory mediation, as a merely temporary expedient, should remain as an informal process that parties feel comfortable with.

In the article *Overview for of Alternative Dispute Resolution: A Primer Judges and Administrators* by Markus Zimmer, Justice Systems Advisors, USA, the writers provide on some guidance on how to design and implement an expanded ADR program in an existing court

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<sup>29</sup> Id.

system.<sup>30</sup> They portray court annexed mediation as a success in the USA. The Congress of the United States, for example, as part of a broad review of the civil case processing efficiency of the federal trial courts in the 1990s, imposed a requirement that all of the trial-level or first instance federal courts of general jurisdiction experiment with ADR programs and processes in an effort to reduce the costs and otherwise expedite the resolution of civil disputes subject to federal judicial authority.<sup>31</sup> Virtually all 94 of the federal trial courts responded by establishing such programs. The one of the greatest advantage of court annexed mediation is that it ensures quality work. The judges exercise program oversight to ensure quality control. ADR services in these court annexed programs may be offered by the active judges themselves under certain conditions and, in addition, by other qualified neutrals such as highly experienced attorneys, retired judges, or even non-legal technical specialists that are retained by the court on an as-needed basis.<sup>32</sup> A key element in the success and credibility of these court-annexed systems is ensuring that all of those who serve in an ADR capacity have undergone, (i) a minimum of forty hours of intensive certification training, including ethics, and (ii) that they complete a minimum number of hours of continuing ADR education on an annual basis as a condition of retaining their court certification. This is also ensured by another important element for litigants when contemplating whether to utilize a court-annexed program is that the performance of the neutrals in their court-deputized role typically is governed by a code of conduct or ethics with disciplinary sanctions. This includes loss of certification for certain violations, prescribed and enforced by the judges of the court to which the program is attached. According to the writers, research has shown that where there is no requirement to engage in ADR and where judges do not actively promote it, the parties are less likely to consider ADR at the beginning of the case, focusing more on assembling their evidence and arguments. This thus makes the requirement that the court should inform the parties of the ADR option beforehand. Another reason in support of court annexed ADR is that although private arbitration originally provided a much less-expensive alternative to taking a dispute to court, the expense of professional private-sector arbitration services has increased dramatically in the past 20 years. Some governments willingly provide financial support for court-annexed arbitration programs because they recognize that doing so diminishes the number

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<sup>30</sup> Markus Zimmer, J. s. (2011). a primer judges and administrators . *overview of alternative dispute resolution* .

<sup>31</sup> Ibid.

<sup>32</sup> Id.



of disputes that will be subject to the costly not only to the litigants but, in addition, to the government, and often lengthy court adjudication process.<sup>33</sup>

**This study intends to fill the gap left out by writers.** Most of the writers have pointed out the merits and demerits of court-annexed mediation but have not pointed out what effect this really has on the stakeholders: lawyers, magistrates, litigants and the general public. Are they against it or are they for it? Do they lose interest in mediation as a whole or do they still consider mediation as a better alternative?

## 1.9 Methodology

This research will apply both qualitative and quantitative analysis. Qualitative will include reading materials such as books and newspaper articles. This will be by means of library research of both published and unpublished materials. There will also be the use of internet in getting online articles and materials from writers the world over.

Quantitative will include organizing a discussion forum for groups of people and getting their views on the subject matter, getting expert opinion from lawyers and other stake holders in the field of mediation. The quantitative research will be by asking specific questions and will take place in Nairobi area, and will include two universities of law where both lecturers and students will be interviewed. It will also include two law firms within the area and non-governmental organizations that deal in resolving disputes of any nature. These interviews will be face-to-face interviews.

The questionnaires will be drafted in a simple manner and will be concise as they will be given to the general public through random sampling methods. The research will look for an area that is fairly easy to manage as it will make the distribution and collection of the questionnaires easier. The target population will be a large heterogeneous group as this will be able to represent

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<sup>33</sup> Id.

all characteristics of people. They will be open ended in order to get any additional information or unique point of view. The same question may be asked twice in different wordings to test reliability of the information.

After the collection of all the data, they will be analyzed and laid down in terms percentages to make it easier to summarize the information in graphs using the statistical packages excel for social sciences applications.

### **1.10 Limitations**

This research is limited to Nairobi in carrying out personal interviews as those are the areas that it is able to access.

On giving the questionnaires, it is not a guarantee that the answers given will be all in truth as people are likely to overstate matters when they realize it is of an important nature.

### **1.11 Chapter Breakdown**

This research has five chapters:

#### Chapter 1 INTRODUCTION

This chapter consists of the introduction to, in general, alternatives means of dispute resolution and in particular mediation: Its definition, how it came about, failure of the court system as it is and the advantages that mediation offers over the court system and its shortcomings if any. It analyzes its development over the years through different jurisdictions. Which have embraced, which have not and their reasons for not doing so. Further, it focuses on the topic of institutionalization of ADR either court annexed and court mandated and specifically on mediation. It defines exactly what is meant by institutionalisation and what it entails. Also, here other jurisdictions are considered on their take on institutionalisation of ADR and mediation in particular. How they have incorporated it into their systems and implemented it.

This research then focuses solely on Kenya: The development of ADR in general and mediation in particular, its institutionalisation and the effects and reactions that has brought about.

## Chapter 2 THEORETICAL FRAMEWORK

This chapter focuses on theoretical framework. The research hopes to reveal the theoretical basis behind the research. It explains which theory the research proposes to use. It also describes the theory, how and on what basis it developed. The research then explains why it chose to use that theory, what led the research to that choice and why it preferred it over other theories. It chooses to show in what way the theory used interlinks with the research topic and bring out the reasoning behind the research. It also looks at the proponents of the theory. Why they chose to follow and support the theory. The research considers the contributions of the proponents of the theory and connect this with the research topic.

## Chapter 3 CASE STUDIES and DATA ANALYSIS

This chapter is on case studies and data analysis. This will be an investigation of an area on which the research hopes to elucidate and that provides an analytical frame to the topic being discussed. As the research question is based on Kenya, this research focuses on the Nairobi area. The research analyses reactions of the stake holders in dispute resolution; judges, advocate, parties to litigation and the general public. It also studies the court institution as a whole. The case study done here is based on information oriented sampling of legal institutions like law universities as these are intense, deviant and reveal more information. This information then helps reveal the real situation as it is in regards to the research being conducted.



## Chapter 4 RECOMMENDATIONS AND CONCLUSION

Chapter four is on the recommendations this research makes based on the case study and other information collected. The recommendations focus on the institutions affected by mediation and ADR methods in the hope that they can use the information gathered to improve the institutions. The recommendations cover all aspects of the research and explain why the recommendations are being made and finally a summary of the whole research, the findings as per duly carried out research and the stand the research takes based on what the researched is on will be done.

## 2.0 Chapter Two

### Introduction

#### 2.1 Conceptual understanding: Meaning of equity jurisprudence

To understand the theory of equity jurisprudence, one first needs to understand the term equity. Definitions from both dictionaries and authors will be considered. Equity is the body of principles which provide and govern exceptions to the law. But that is not all that Equity is.<sup>34</sup> It is generally acknowledged that it is almost impossible to completely define the term “equity”. The term has varying shades of meaning, the major being its use in ordinary language and in law.

Black’s law dictionary defines equity as a system of jurisprudence collateral to, and in some respects independent of, law.<sup>35</sup> In the case of *Demers v Gerety*, equity was defined as equal and impartial justice as between two persons whose rights or claims are in conflict.<sup>36</sup> According to the oxford English dictionaries, it has been defined as a state or quality of being equal or fair; fairness in dealing.<sup>37</sup>

Authors have expanded this meaning. According to Michael Haley and Lara McMurtry.<sup>38</sup> Equity in the general sense is associated with the notions of fairness, morality, and justice. On a

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<sup>34</sup> Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 Fordham L. Rev. 23 (1951). Available at: <http://ir.lawnet.fordham.edu/flr/vol20/iss1/2>

<sup>35</sup> Black’s law dictionary

<sup>36</sup> *Demers v Gerety*, 595 P.2d 387, 395-96 (N.M Ct. App 1978)

<sup>37</sup> Oxford dictionary [www.oxforddictionaries.com/definition/english/equity](http://www.oxforddictionaries.com/definition/english/equity) accessed on 23 Feb. 14

<sup>38</sup> M. Haley, McMurtry, *Equity and Trusts*, Sweet Maxwell 2<sup>nd</sup> Ed, 2009 pg. 1



more legal level, however, it was the branch of law that was administered by the court of chancery prior to the Judicature Acts of 1873 and 1875. It was a jurisdiction that evolved to overcome the deficiencies of the law and achieve justice. The latter function is, also performed, by the legislative authority, but that has proven too slow and rigid a method ever to be likely to displace equity courts entirely. The description of equity as that law which was administered by the old English courts of Chancery, is hardly a definition according to Howard L. Oleck.<sup>39</sup> Yet, according to him that is the customary introductory description of equity. However, according to him, equity long predates the court of Chancery in England." He goes on to state that equity, like mediation, is a difficult concept to define with specificity. In its popular sense, equity is a notion of natural justice, or a determination of what is right and just between individuals. Equity is frequently associated with ideas of fairness, discretion, natural justice, and good conscience – concepts that scholars refer to as anti-legal elements. Unsurprisingly, equity has been conceived of as justice without law.<sup>40</sup> Equity also offers "individualized" justice, moderating the rigidity of law by integrating ideas of fairness and morality into the legal system.<sup>41</sup>

There are at least three definitions of equity and, to some extent; all three are relevant in a comparison to ADR. One popular meaning of equity summons a collection of eternal and universal principles that captures all that which is moral, right, just, and good. A second, technical definition of Equity (a meaning typically signified by use of the capital letter "E") refers to that system of jurisprudence that was originally administered by the High Court of Chancery in England.<sup>42</sup> And a third, similar to the first meaning, sometimes given to equity makes equity synonymous with "natural justice. In this sense equity-the "real law" -has "a place in every rational system of jurisprudence, if not in name, at least in substance. However, Aristotle saw equity in a different light. He regarded equity as a corrective to the general laws and a form of justice that was superior to and in tension with strict legal justice.<sup>43</sup> The net effect

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<sup>39</sup> Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 *Fordham L. Rev.* 23 (1951).

Available at: <http://ir.lawnet.fordham.edu/flr/vol20/iss1/2>

<sup>40</sup> *Ibid.*

<sup>41</sup> Jacqueline Nolan-Haley, *Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 *Cardozo J. Conflict Resol.* 57 (2004-2005)

Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/285](http://ir.lawnet.fordham.edu/faculty_scholarship/285)

<sup>42</sup> *Ibid.*

<sup>43</sup> Allan Beever (2004). Aristotle on Equity, Law, And Justice. *Legal Theory*, 10, pp. 33-50 doi: 10.1017/S1352325204000163

of such an introduction is to suggest that it is necessary to know what the law administered by English Chancery, courts was, in order to understand what equity is

Equity jurisprudence is thus the theory that revolves around that unique form of justice that was historically practiced by the court of chancery and one which is based on moral principles designed to remove injustices incapable of being dealt with in the common law system.<sup>44</sup>

## 2.2 Historical Background and reasons for the emergence of Equity jurisprudence

The legal system of equity and theory of equity jurisprudence originated and developed outside the common law courts of England. The origins of equity jurisprudence lie in the development of the Chancery Courts of England, where parties would seek relief from the Chancellor to prevent wrongs or injuries, or to specifically enforce rights as the Chancery was considered a court of conscience.<sup>45</sup> It evolved from the royal prerogative of kings, as the fountainhead of justice, to ensure that justice was carried out in each case.<sup>46</sup> The chancellor, who functioned as a keeper of the king's seal and "conscience," administered the king's justice by issuing, *brevia* or writs to either order performance or cessation of certain acts at his discretion.<sup>47</sup>

Due to the repetitive process of the chancellor of issuing writs based upon similar circumstances, a standardization of that process was undertaken, such that the chancellor's court could issue the appropriate writ whenever a complainant presented a certain pattern of facts. These writs became the foundation of the "Common Law."<sup>48</sup> To the King's Court were added, in turn, the Court of the Exchequer, the Court of Common Pleas, and the Court of the King's

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<sup>44</sup> Philip H Petit: equity and the law of trusts, Butterworth's 9<sup>th</sup> Ed 2001 Uk

<sup>45</sup> J. H. Baker, An Introduction To English Legal History 105 (4th Ed. 2002).

<sup>46</sup> William F. Walsh Outlines of The History Of English And American Law 69-70 (1923).

<sup>47</sup> J. H. Baker, An Introduction To English Legal History 105 (4th Ed. 2002) .

<sup>15</sup> Joseph H. Koffler & Alison Reppy, Handbook Of Common Law Pleading

<sup>16</sup> Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 Fordham L. Rev. 23 (1951).

Available at: <http://ir.lawnet.fordham.edu/flr/vol20/iss1/2>



Bench-all Common Law courts, and all approachable only upon the authority of a writ issued by the Chancery.<sup>49</sup> But the Common Law system became a hard and fast system with it evidently drawing a line as to what it could do and what it could not. The universe of writs was fixed and their construction by Law judges narrowly circumscribed,<sup>50</sup> precise and technical rules of pleading, procedure, and proof enslaved judicial discretion within the form of action. Even for those who managed to go through the procedural intricacies successfully, the remedies available in the Law courts were often wholly inadequate. This hardening of the Common Law made it impossible for many petitioners to obtain writs appropriate to their peculiar problems. Without the appropriate writs, they could not obtain adequate redress from the Common Law courts.

But, there remained the royal prerogative; this authority was exercised by the issuance of a writ of subpoena-a summons to appear in Chancery. Chancery, made of chancellors who had some acquaintance with the Roman law and also knowledge of canon law, shepherded in the next stage of development in English law. By the late fourteenth century, a separate Court of Chancery administered this jurisprudence. The chancery acted in *personam*. This was to minimize its conflict with the Common Law courts, which were already ordained and established and whose judges and practitioners were defensive of their jurisdiction. Chancery could administer complete relief according to conscience and the principles of natural justice, without reference to the Common Law or its courts.<sup>51</sup> The chancellor unrolled a vast body of legal principle to which we now refer to as Equity to offer relief in those cases where, because of the technicality of procedure, defective methods of proof, and other shortcomings in the Common Law, there was no adequate and complete remedy otherwise available. A remedy was considered not adequate if it "fell short of what the party was entitled to," and a remedy that did not "attain the full end and justice of the case" was not complete.<sup>52</sup> Intervention was founded on the notion that justice incorporated the moral sense of the community, existing as a function not only of a community's technical rules, but also of "magisterial good sense, unhampered by rule ...."<sup>53</sup> The

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<sup>50</sup> William Searle Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 YALE L.J. 1, 1 (1916)

<sup>51</sup> Dennis R. Klinck, *Conscience, Equity And The Court Of Chancery In Early Modern England*.

<sup>52</sup> E M Morgan, *Justice According To Law, By Roscoe Pound*. Yale University Press, New Haven, 1951. Pp. Iii, 98. § 2.50., 12 la. L. Rev (1952)

Available at: <[http:// digitalcommons.law.lsu.edu/lalrev/vol12/iss3/10](http://digitalcommons.law.lsu.edu/lalrev/vol12/iss3/10)>

<sup>53</sup> *Ibid.*

chancery did not just usurp this role for the sake of acquiring power; rather, to address circumstances that the static and rigid common law could not. There was a strong tendency within the Law courts to sacrifice the particular to the general, and to equate justice with certainty and uniformity. The function of Equity, then, was the correction of the Law where it was deficient by reason of its universality.<sup>54</sup> "The regimes of law and equity consequently approached a given set of facts from opposite angles-invoking distinctive traditions, applying different reasoning, and pursuing separate aims."

### Equity Today

Despite the merger of law and equity in most judicial systems, the distinction between legal and equitable remedies retains some significance. The distinction between legal and equitable remedies is that equitable relief is discretionary, while legal remedies enforce rights.<sup>55</sup> Finally, as a general rule, unlike legal remedies, equitable remedies may be enforced by contempt.<sup>56</sup> The Supreme Court of Judicature Act, in 1873, abolished the system of two distinct sets of courts in England. Instead of the old separate Chancery, King's (or Queen's) Bench, Common Pleas, Exchequer, Court of Probate, Court of Divorce, and Court of Admiralty, a new High Court of Justice was established, having five divisions, and with a Court of Appeals above it. Later, another higher court of last resort was added,-the House of Lords. The divisions were similar to the old separate courts, but became parts of a single, unified system. In these courts, in addition to their other functions, each court is required to grant the same relief, in case of an equitable claim or defense, as would have been granted by the old Court of Chancery. Thus, the principles of equity now thoroughly permeate all English courts and law.<sup>57</sup>

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<sup>21</sup> Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 Fordham L. Rev. 23 (1951). Available at: < <http://ir.lawnet.fordham.edu/flr/vol20/iss1/2> >

<sup>55</sup> M. Haley, McMurry, *Equity and Trusts*, Sweet Maxwell 2<sup>nd</sup> Ed, 2009

<sup>56</sup> Jacqueline Nolan-Haley, *Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 Cardozo J. Conflict Resol. 57 (2004-2005)  
Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/285](http://ir.lawnet.fordham.edu/faculty_scholarship/285)

<sup>57</sup> Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 Fordham L. Rev. 23 (1951). Available at: < <http://ir.lawnet.fordham.edu/flr/vol20/iss1/2> >



## Development of ADR and Its Similarities to Equity Jurisprudence

### 2.3 Development

Certain delineations of the dispute resolution landscape changed in the 1970s, due to the fact that formal adjudication faced special criticism and pressures. Courts experienced an "explosion" of new and complex cases.<sup>58</sup> An unprecedented lack of civility among lawyers delayed cases from being resolved and this jeopardized the reputation of the legal profession." Critics complained that ordinary citizens no longer had meaningful access to the courts; business clients, too, were demanding more efficient dispute resolution alternatives.<sup>59</sup> In April 1976, acknowledging a certain amount of "deferred maintenance" in the courts, Chief Justice Burger convened the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice.<sup>60</sup> This extraordinary event brought together three hundred conferees from the bench, bar, and academia.<sup>61</sup>

The varied agendas of this crowd arose from dozens of problems ranging from the excesses of diversity jurisdiction and the prosecution of victimless crimes to the dearth of empirical research.<sup>62</sup> The conference "provoked a new zealous spirit for fundamental procedural reform. This encouraged innovation. The papers presented at the conference were published in a bound volume entitled *The Pound Conference: Perspectives on Justice in the Future*.<sup>63</sup> Professor Frank Sander's<sup>64</sup> speech at the Pound Conference, entitled *Varieties of Dispute Processing*, envisioned by the year 2000 not simply a court house but a Dispute Resolution Centre, where the those with grievances would first be guided through a screening clerk who would then direct them to the

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<sup>58</sup> Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978); available at: <<http://scholarship.law.berkeley.edu/facpubs/760>>

<sup>59</sup> Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1001 n.16 (1979).

<sup>60</sup> Main, Thomas O., "ADR: The New Equity" (2005). *Scholarly Works*. Paper 739.

<<http://scholars.law.unlv.edu/facpub/739>>

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> The Pound Conference: Perspectives On Justice And The Future

<sup>64</sup> Frank E.A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE.

process (or sequence of processes) most appropriate to his type of case.<sup>65</sup> Sander suggested that dispute resolution required flexible and diverse array of processes to meet the systematic needs of entire categories of certain types of cases. Also, they would deal with the unique circumstances presented in particular cases. His remarks are often credited as marking the birth of the modern ADR movement.<sup>66</sup> The ADR movement found grip because it interwove threads both threads that responded to a genuine problem within the legal profession, and resonated with a changing socio-political culture.<sup>67</sup> Litigants of all types got a new forum for dispute resolution; the litigation academy had a new discipline, and rhetoric of peaceful problem-solving mechanisms. Sander elevated these various methods of dispute resolution from their shadowy "aide-de-camp" and supplementary status to a legitimate alternative *primary* process for the resolution of certain disputes. Projecting a range of available processes from formal adjudication at one end through mediation and negotiation at the other, Sander emphasized that the critical issue was determining, for a particular conflict, the "appropriate dispute resolution process."<sup>68</sup> Notwithstanding a vocal and persistent chorus of disquietude, ADR has expanded to become somewhat of a court of general civil jurisdiction.<sup>69</sup>

## 2.4 Similarities to equity

The system of ADR stands in a breach created by the merger of Law and Equity. ADR offers an alternative system for relief from the hardship created by the substantive and procedural law of formal adjudication. Moreover, the freedom, elasticity, and luminance of ADR bear a striking resemblance to traditional Equity, offering relaxed rules of evidence and procedure,

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<sup>65</sup> The Pound Conference: Perspectives On Justice N The Future 5, 5 (A. Leo Levin & Russell R. Wheeler Eds., 1979).

<sup>66</sup> Main, Thomas O., "ADR: The New Equity" (2005). *Scholarly Works*. Paper 739.  
<<http://scholars.law.unlv.edu/facpub/739>>

<sup>67</sup> *Ibid.*

<sup>68</sup> Frank E.A. Sander, *Varieties of Dispute Processing*, in THE POUND CONFERENCE: Perspectives on Justice In The Future.

<sup>69</sup> F. sander see supra note 25



tailored remedies, a simpler and less legalistic structure, improved access to justice, and a causal relationship with the substantive law.

Mediation, like equity, was conceived of as justice without law.<sup>70</sup> Mediation also offers the possibility of individualized justice, which may be in tension with strict legal justice. Equity offers a distinctive conception of justice that like mediation, the process allows for mercy. Mediation acknowledges the emotional, psychological and spiritual needs of parties. This aspect is in danger of being lost if mediation is dominated by rule-bound process of the litigation system that its rational keystone dissolves. Just as equity moderated the rigidity of the common law by integrating fairness and moral values into the judicial process, mediation offers fair alternatives to legal values and judicial decision-making.<sup>71</sup> Though scholars may disagree on the meaning of fairness in mediation, substantive and procedural fairness remain its primary and enduring values.<sup>72</sup> Numerous professional codes require mediators to insure that agreements are fair according to prevailing social standards.<sup>73</sup> Scholars have suggested ways of promoting fairness in mediation, and parties participating in mediation express satisfaction with such fairness in the process.<sup>74</sup> Equity Jurisprudence theory portrays the success of a system that aids the court system in areas it lacks to address but yet works outside that system to maintain its core values. This is the same case with mediation.<sup>75</sup> Mediation is a system that works outside the court system but aids the court in its shortcomings.

Finally, just as equity offered relief from harsh pleading and procedural rules that operated to deny disputants justice in the common law courts, mediation offers relief from the rigidity of a rules-bound justice system. It provides opportunities for individualized justice through the exercise of party self-determination and the expression of dignitary values.<sup>76</sup> While we may

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<sup>70</sup> Jerold S. Auerbach, *Justice without Law?* <[www.jstor.org/stable/40239150](http://www.jstor.org/stable/40239150)>

<sup>71</sup> Jonathan M. Hyman and Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 177 (2002).

<sup>72</sup> Jacqueline Nolan-Haley, *Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 Cardozo J. Conflict Resol. 57 (2004-2005)  
Available at: [http://ir.lawnet.fordham.edu/faculty\\_scholarship/285](http://ir.lawnet.fordham.edu/faculty_scholarship/285)

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Jacqueline M. Nolan-Haley, *The merger of law and mediation: "Lesson from equity jurisprudence and Roscoe Pound"* [www.cardozojcr.com/vol6no1/CAC105.pdf](http://www.cardozojcr.com/vol6no1/CAC105.pdf) accessed on 8th Nov 2013

<sup>76</sup> James Boyle, *Legal Realism and the Social Contract: Fuller's Public Jurisprudence of Form, Private Jurisprudence of Substance*,

differ on the extent to which self-determination is over-valued and the extent to which procedural justice is undervalued in current versions of court mediation practice, these principles nonetheless support a framework for the realization of individualized justice in mediation.

Regrettably, the dark side of ADR is also resonant of Equity: unaccountability, secrecy, an inability to extend its jurisdictional reach beyond the parties immediately before it, and certain vulnerability to capture by special interests.<sup>77</sup>

## 2.5 Justification for the use of equity jurisprudence as opposed to other theories

One of the main proponents of the theory of equity jurisprudence was Roscoe Pound. Pound, almost a hundred years ago voiced his concern about the decline of equity jurisprudence. Institutionalization in the court system he voiced was the main cause of this. "*The very thing that made equity a system must, in the end, prove fatal to it...*" he stated.<sup>78</sup>

Lessons from equity's merger with law are out there for the taking. If court-connected mediation is to offer alternatives to traditional rule-bound justice, it must return to its complementary role to litigation and adjudication. However, according to Main,<sup>79</sup> Mediation is so deeply entangled in the justice system that it is difficult to categorize it as a distinct entity. But that is exactly what needs to be done to refill mediation's potential for individualized justice as a real alternative to rules-bound justice. The theory that best examines and explains this situation is equity jurisprudence. Hopefully, equity jurisprudence's suggestion that justice remains the essential purpose of law is not naive.

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78 CORNELL L. REV. 371 (1993).

77 Main, Thomas O., "ADR: The New Equity" (2005). *Scholarly Works*. Paper 739.

Available at: <<http://scholars.law.unlv.edu/facpub/739>>

78 Ibid

79 Main, Thomas O., "ADR: The New Equity" (2005). *Scholarly Works*. Paper 739.

<http://scholars.law.unlv.edu/facpub/739>



Equity jurisprudence, certainly in its historical moral sense, and perhaps in the manner of its administration, is the principal technique thus far developed to make certain that law will be readily adaptable for, and directed toward, the achievement of justice.<sup>80</sup> Fortunately, then, equity jurisprudence enjoys a certain inevitability.<sup>81</sup> When the rigidity of the Law courts failed to keep pace with the growing wants of society, the discretionary and flexible system brought about by equity jurisprudence provided the sensible remedies. ADR too performs too similar tasks, when the forms and modes of formal adjudication became intolerable, ADR emerged to provide a sensible method of dispute resolution that was discretionary and flexible.<sup>82</sup> ADR offered fresh perspectives on procedural and social justice to counter the strict role of the law in dispute resolution.<sup>83</sup> Just as equity moderated the rigid nature of the common law by considering moral values and fairness in the judicial process, mediation offers fair alternatives to legal values and judicial decision-making.<sup>84</sup> This ability to deal with each case uniquely is patent in most situations.

An ironic consequence of Equity's success was the ensuing effort to crystallize the jurisprudence of that court. Yet the law's demand for certainty is equity's foil. The gradual introduction of procedural rules and structural custom ultimately caused Equity to collapse under the weight of its own precedents and processes.<sup>85</sup> This view was also held by Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council*,<sup>86</sup> where he expressed the view that the common law and equity have been fused to such an extent since 1875 that equity jurisprudence had effectively disappeared from English law;

The legacy of Equity jurisprudence was preserved in those doctrines that had been adopted by the Law courts, but equity is less dynamic and generative in a merged system.<sup>87</sup> ADR

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<sup>80</sup>Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 Fordham L. Rev. 23 (1951).

Available at: <http://ir.lawnet.fordham.edu/flr/vol20/iss1/2>

<sup>81</sup>Main, Thomas O., "ADR: The New Equity" (2005). *Scholarly Works*. Paper 739.

<http://scholars.law.unlv.edu/facpub/739>

<sup>82</sup>id.

<sup>83</sup>Id.

<sup>84</sup>Ibid

<sup>85</sup>Id.

<sup>86</sup>United scientific holdings v burnely borough council [1978] A.C 904, HL  
<[www.ubclss.org/CANs/Law-453-Equitable-Remedies-Sheppard-Kate-Phipps-Fall-2009.doc](http://www.ubclss.org/CANs/Law-453-Equitable-Remedies-Sheppard-Kate-Phipps-Fall-2009.doc)>

<sup>87</sup>Main, Thomas O., "ADR: The New Equity" (2005). *Scholarly Works*. Paper 739.

<http://scholars.law.unlv.edu/facpub/739>

resuscitated the spirit of equity jurisprudence. This however caused ADR to earn quite an amount of popularity and this has led to calls for ADR to undergo reforms that would transform its flexible and discretionary modes of resolution into a more systematic framework. Looking at the evolution of equity it may be stated that this transformation of ADR is inevitable. Moreover, some suggest that the inevitability of equity jurisprudence, too, will ultimately resurface thereafter in some form or another (as ADR succeeded Equity).<sup>88</sup> This however does not justify inaction. Rather than allowing ADR to ossify, why not maximize the benefits of the administration of justice through dual systems? In broad design, the emerging system of ADR should be enabled to perform much of equity jurisprudence's function in the administration of justice.<sup>89</sup> But in the same way that the sweeping jurisdiction of (traditional) Equity was unrestricted by any definite rule, ADR must enjoy genuine discretion and flexibility.<sup>90</sup>

The moral growth of the law is the record of the slow emergence of equity jurisprudence into the mainstream of the law. It is through the interplay of law and equity jurisprudence that *both* are enriched. Law and equity should be in continual progress, with the former constantly gaining ground upon the latter. A great part of what is now strict law was formerly considered as equity, and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.<sup>91</sup> ADR thus plays an important role in the growth of the law. Without this engine of equity jurisprudence, "our law will be moribund, or worse."<sup>92</sup> It has been suggested that the best use for ADR may be to resolve the types of cases that are extremely difficult or exceedingly costly to resolve in court. This suggestion resonates with the law-equity model because the jurisdiction of Equity jurisprudence consisted entirely of cases where the legal remedies were inadequate.<sup>93</sup> But the premise that ADR should hear those cases that the formal system cannot adequately resolve leads to an uncomfortable conclusion, because the most profound examples of such cases are some of society's most important. Chayes' public law cases, Fiss' structural

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<sup>88</sup> *ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> Equity, ADR, Arbitration And The Law: Different Dimensions Of Justice The Fourth Keating Lecture Lincoln's Inn, 19 May 2010

<sup>91</sup> Jean R. Stemlight, ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice, 3 NEV. L.J. 289, 289 n.3 (2003);

<sup>92</sup> *Ibid.*

<sup>93</sup> Main, Thomas O., "ADR: The New Equity" (2005). Scholarly Works. Paper 739. <http://scholars.law.unlv.edu/facpub/739>



suits, Rifkind's problems, and Fuller's polycentric cases all strain the competencies of traditional formal adjudication.<sup>94</sup>

This, too, resonates with a law-equity model, although the functions of formal adjudication and ADR are reversed. This approach, which could be characterized as the opposite of the first proposal, allocates the difficult and important cases to formal adjudication, however, there are those who are of the view that suggesting that simple or repetitive cases can be resolved outside of courts may understate the important role of courts in the tasks of applying the law and vindicating rights.<sup>95</sup> The application of law to fact is the source of the court's legitimacy, if not also its primary responsibility. Can such an important task be outsourced?

Whichever the case, one must agree that equity jurisprudence brought a unique and effective way of dealing with inadequacies of the law. This as has been, was born in equity and found its way ADR, particularly in mediation and in the event that this too is curtailed, it will emerge in yet another system. This goes to show the principles behind equity jurisprudence will never perish.

## 2.6 Conclusion

Other major theories of law for example natural law, positivism and any other that has tried to define the law offer their view on how the law is, or the law is to be but none truly offers an alternative means of adjudication to the litigation system that has been so widely condemned. Each agrees that the legal system cannot be perfect. Equity jurisprudence provided a solution by suggesting an alternative system that would work alongside the litigation system to achieve justice. Equity Jurisprudence theory portrays the success of a system that aids the court system in areas it lacks to address but yet works outside that system to maintain its core values. This is the same case with mediation. The idea was to have a separate system which does not replace the law but aids it where there is a shortfall. It is the theory that best explains ADR and mediation in particular and through which both the advantages and disadvantages of mediation can be weighed. Through the equity jurisprudence theory, one can gauge the success or failure of mediation and come up with answers on whether or not it should court-annexed.

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<sup>94</sup> Ibid

<sup>95</sup> Ibid

## 3.0 CHAPTER THREE

### **Introduction**

This chapter is divided into two. The first part is on case studies. The case study is an investigation of an area on which the research hopes to illuminate and that provides an analytical frame to the topic being discussed. It considers a jurisdiction which has also instituted mediation, and how successful it has been. The jurisdiction considered is the United States of America. This is because it has one of the most successful forms of ADR processes. The research then analyses Kenya; how mediation is to be institutionalized and the various reactions from the stakeholders in dispute resolution; judges, lawyers and parties to litigation. The chapter discourses on two constituents of the data collected and relied on in this study. The first is reports on the data from various texts and academic writing on mediation. The study acknowledges that mediation has been in existence for centuries even in the African context.

The second part is on reports on the data collected and the findings of the survey conducted of the views of 50 students of University of Nairobi and Jomo Kenyatta University of Agriculture and Technology, 5 Advocates from law firms in Nairobi and 2 magistrates based in Nairobi.

### **3.1 Court-annexed Mediation in the United States**

By the late 1980s, mediation had become an increasingly popular procedure in all types of civil cases in the United States and is now seen as the most popular form of alternative dispute resolution used by litigants in civil cases.<sup>96</sup> Mediation as ADR method in the United States first arose in the area of family law; this was majorly due to the nature of interests involved. It was quickly recognized as a valuable tool, and courts soon realized that using mediation was not

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<sup>96</sup> Mediation and the courts; Electronic Journals of the U.S Department of state. December 1999 vol. 4 no.3



limited to family disputes but could be extended to other civil disputes as well.<sup>97</sup> The Congress of the United States, for example, as part of a broad review of the civil case processing efficiency of the federal trial courts in the 1990s, imposed a requirement that all of the trial-level or first instance federal courts of general jurisdiction experiment with ADR programs and processes in an effort to reduce the costs and otherwise expedite the resolution of civil disputes subject to federal judicial authority.<sup>98</sup> Virtually all 94 of the federal trial courts responded by establishing such programs. The judges exercise program oversight to ensure quality control. ADR services in these court annexed programs may be offered by the active judges themselves under certain conditions and, in addition, by other qualified neutrals such as highly experienced attorneys, retired judges, or even non-legal technical specialists that are retained by the court on an as-needed basis.<sup>99</sup> In 1990 a Civil Justice Reform Act required federal courts to design and implement alternative dispute resolution programs.<sup>100</sup> Mediation in the United States normally arises in one of two contexts in U.S. litigation.<sup>101</sup> The first is through court-ordered or court-annexed mediation. Here courts maintain a panel of approved mediators who offer their services to litigants. This is either through the court's direction or the litigants' request. The second is where it is private mediation. Here, the parties to a dispute decide that mediation would be appropriate and chose to select a mediator from among private providers offering these services.<sup>102</sup> Most mediators report 80- to 90-per cent success rates. Presently, there are no licensing or certification requirements for mediators in the United States and no formal training is required to offer those services. However, most of those who offer mediation services have received some training. Most courts that have court-annexed mediation programs require training of the people who wish to be members of the mediation panel and also offer the training to others who wish to receive it. Mandatory mediation in the U.S is required to ensue as is outlined in the

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<sup>97</sup> Ibid.

<sup>98</sup> Markus Zimmer, J. s. (2011). a primer judges and administrators . *overview of alternative dispute resolution* .

<sup>99</sup> Ibid .

<sup>100</sup> Supra note 1

<sup>101</sup> R. A Gooding, Mediation: An Overview of Alternative Dispute Resolution Electronic Journals of the U.S Department of state. December 1999 vol. 4 no.3

<sup>102</sup> Dr. D peters, Court annexed mediation An Overview of Alternative Dispute Resolution Electronic Journals of the U.S Department of state. December 1999 vol. 4 no.3

rules and statutes provided by the particular state, on the other hand, voluntary mediation can be adapted by agreement to create whatever process the parties wish.<sup>103</sup> Most successful mediation programs in the United States are through mandatory mediation as most state courts in the U.S have mandated mediation.

The parties are to compensate the mediator thereafter at a court-established hourly rate. The biggest expenses typically are the court-provided mediation services. Using private mediation-providers who are paid by the litigants is the least expensive route. There is some use of volunteer *pro bono* mediators in the various court-annexed programs around the country. Most federal courts now use private mediation services and require litigants to pay the fee.

The key players in court-annexed mediation are the judges, the lawyers, the litigants or participants and the mediators. The judicial role is limited to referring the case to mediation and occasionally designating the mediator from a rotating list or a program maintained by the court.<sup>104</sup> The idea behind this is that the judge is in the best position to determine if a case is appropriate for referral. Mostly, these mediators are used in lower-income family cases and in volunteer small-claims cases. Should the parties opt to choose their own mediator, they are allowed to do so within a time limit. The state of Florida, for example has a "10-day rule" allowing parties to agree on a mediator within 10 days of an order referring the case to mediation.<sup>105</sup> The role of the lawyer is not done away with as they have the important task of preparing litigants for mediation. They are also given the right to attend and participate fully in mediation. In some states it is mandatory that participants attend court ordered mediation. Otherwise, they can be sanctioned for failing to attend without good cause and made to pay mediator and attorney fees or other costs.<sup>106</sup> An agreement reached during mediation is deemed to be a contract. The parties are negotiating their way out of a dispute by reaching an agreement that has the force of a contract, and so the court generally does not review agreement terms.<sup>107</sup>

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<sup>103</sup> Ibid

<sup>104</sup> Ibid

<sup>105</sup> "The Role of the Judges in Public Law Litigation," *Harvard Law Review*, vol. 89, 1996, pp. 1281

<sup>106</sup> Supra note 5

<sup>107</sup> Bethesda, MD: *Court-Annexed Mediation: Critical Perspectives on Selected State and Federal Programs*, (Pike and Fisher, 1999)



### 3.2 Opinions

According to most stakeholders in dispute resolution, court-ordered mediation has proven to be a very good way to involve and commit lawyers and participants to the mediation process because, in essence, they have no other choice.<sup>108</sup> The notion perceived here is that if you sit people down with authority they will make good use of the time and at least talk. Mediation is seen as a means to produce closure that encourages parties to reassess the risks and consequences of not agreeing. Furthermore, litigants can vent to emotional issues than possible at trial as such issues are normally not as relevant in court. Studies suggest about a 60-percent compliance rate with mediated agreements in collection cases.<sup>109</sup> This shows some measure of how well mediation works. Further it is claimed that in cases of private mediation, the fees for the mediators is agreed between the mediators and the parties. This amount is normally rather substantial than that of court annexed mediation. Another advantage stated in favour of court annexed mediation is that it also provides a process that permits the confidential sharing of information that could generate solutions but that is too risky to share with the other side directly. This is because it takes place in the context of the court. Mediators can use this information to explore potential solutions without disclosing it directly.

However, there have been some resistance and concerns raised by stakeholders, lawyers in particular. Some lawyers and litigants are of the view that through mandatory mediation the control of negotiating and strategizing is taken away from them and also prevents them from trying cases they and their clients want to try.<sup>110</sup> Some also view it as merely a way for other lawyers to simply "save face." Another concern is that most of them would have to take mediation training primarily to learn more about how to advocate effectively and avoid being displaced. Despite the concerns raised by those against court-annexed mediation, it has generally proved successful in the U.S and efforts are being made to alleviate these concerns. Circumstantial evidence suggests that more clients are asking for it, and more attorneys are requesting it before the court gets involved.<sup>111</sup>

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<sup>108</sup> Dr. D Peters, Court annexed mediation: An Overview of Alternative Dispute Resolution Electronic Journals of the U.S Department of state. (December 1999) vol. 4 no.3

<sup>109</sup> Issues of Democracy, IIP Electronic Journals, ( December 1999)Vol. 4, No. 3,

<sup>110</sup> Supra note 5

<sup>111</sup> Supra note 13

### 3.3 ADR in Africa

At the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa attended by a stakeholders; a grouping of legal professionals, state representatives from 22 African countries, international and national NGO's and African Union representatives, it was stated that there were are not enough lawyers in African countries to provide the legal aid services required by the hundreds of thousands of persons who are affected by criminal justice systems.<sup>112</sup> All those in attendance were of the view that diversification of services and service providers would have to take place. Reference was made to ADR and mediation in Africa more generally. African governments were encouraged to promote the use of alternative dispute resolution as a first step in all legal disputes.

This was easily agreed to as the nature and origins of mediation make it particularly relevant for African countries, being that the historical roots and development of mediation can be traced back to both classical and traditional societies.<sup>113</sup> Modern ADR models mirror many of the traits of traditional African societal dispute resolution mechanisms. It has been argued that the shift toward ADR in Africa is simply a return to methods used prior to colonial interference and that "colonialism imposed European dispute resolution on Africa, but while Africa suffers, Europe awoke and adopted African methodology".<sup>114</sup> Many countries have been forced to look at greater exploration of alternative dispute resolution options.<sup>115</sup>

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<sup>112</sup> Lilongwe Legal Aid Declaration, (agreed 24 November 2004), Lilongwe, Malawi. A PDF version is available at <http://www.penalreform.org/lilongwe-declaration.html>.

<sup>113</sup> Jerome Barrett, Jossey-Bass, *A History of Alternative Dispute Resolution*, San Francisco, (2004); and Law Reform Commission Consultation Paper 50 (2008), p.21.

<sup>114</sup> Quoted by Felix Adewumi, *Alternative Dispute Resolution: An antidote to court congestion*, [www.nigerianvillagesquare.com](http://www.nigerianvillagesquare.com).

<sup>115</sup> Supra note 14



### 3.4 Court-annexed mediation in Kenya

The question of court mediation in Kenya has been addressed by major stakeholders in dispute resolution. Among the stake holders include: the Law Society of Kenya, the International Commission of Jurists, and the judiciary as a whole.

Current Chief Justice stated in an address<sup>116</sup> that though by going to court the parties think that there is a total breakdown in relationships that can only be righted by an authoritarian decision favouring one side over another, once in court, many people realize belatedly that their contests become irrevocably adversarial, and the zero-sum outcome – where one person emerges the winner and the other a loser – often damages relationships within families, neighbourhoods and communities.<sup>117</sup> Other disadvantages he added are the cost, length of time and the injury that can be caused by trying to prove a case in court often place justice out of the reach of many people. Furthermore, taking every dispute to court burdens the justice system and dilutes the quality of justice - through time and work pressure - for those who need the system the most. According to the chief justice, it is estimated that only one in 10 people in Kenya bother to take their disputes to court.

The Constitution of Kenya, 2010, recognizes alternative dispute resolution and raises its status to a judicial principle. Specifically, the Constitution requires the Judiciary to promote alternative forms of dispute resolution, among them reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, as long as they are not repugnant to justice and morality, or are inconsistent with the Constitution.<sup>118</sup>

Judicial officers are required to embrace the principle of alternative dispute resolution in their daily work, but they do not have a monopoly on its use. He encouraged Kenyans to use family forums, places of worship and traditional settings to resolve their issues away from adversarial and costly court processes. Various other approaches to resolving disputes in a non-

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<sup>116</sup> Remarks By The Chief Justice, Dr. Willy Mutunga, At The Induction Retreat For Cohesion And Integration Goodwill Ambassadors, Crowne Plaza Hotel, Nairobi (August 29, 2010)

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

confrontational way have evolved, ranging from negotiation, mediation to consensus building. With the Constitution provision, there is expanded space, he explained, that creates for alternative dispute resolution; there are numerous opportunities for private citizens and groups to contribute to the pursuit of justice in Kenya. Although conflicts pose risks of violence, in the hands of the trusted negotiators, mediators and facilitators, they hold the promise for cooperation in creating a win-win solution.

He emphasized that resource-based conflicts such as land, forests, water and others play a central role in the lives of the Kenyan people. Embracing public participation in negotiating and resolving intractable and emerging disputes through negotiation, conciliation and mediation can play a big role in preventing their escalation into conflict. Kenyans still have the capacity to negotiate their conflicts. They need trusted mediators who can assist them to frame their issues in order to negotiate how to resolve them.<sup>119</sup> From the remarks of the Chief Justice, it is clear that the type of dispute resolution mechanisms envisaged is that away from courts. Mediation having been borrowed from traditional African nature did not have court intervention. If at all people are familiar with mediation, like the jurisdictions given by the chief justice, it is the informal type of mediation and are more inclined to trust the informal mediation as opposed to court-annexed mediation.

The civil society too was in the fore front of rooting for mediation. The ICJ in its report lauded efforts that have been made in promoting mediation and ADR as a whole.<sup>120</sup> Among the advantages of ADR it states, is that the informal nature of mediation is free from procedures and thus the mediator can adopt any acceptable method of mediation. Also included is that it is confidential, has mutual agreement and freedom to choose mediators. Despite this, the ICJ applauds the legislation of ADR especially mediation as there is need to do so. Among the recommendations provided by the civil society organization, was the need to mainstream and streamline ADR to ensure that it complements the formal justice system.<sup>121</sup> The report stated that there is need to establish a single licensing and regulatory body for ADR especially mediation

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<sup>119</sup> Id

<sup>120</sup> Report on the interface between formal and informal justice systems in Kenya, Kenya section of ICJ, (June 2011).

<sup>121</sup> Ibid



and conciliation and also set up a code of conduct for ADR providers.<sup>122</sup> This report however proves an oxymoron as stated earlier, one of the major advantages of mediation is its informal nature and thus going further to recommend that it be supervised by the courts seems to suggest that its autonomy is curtailed.

The process of mediation in Kenya is similar to that of the United States and most of other commonwealth countries. Section 59B of the Civil Procedure Act the court may on the request of the parties, where it deems appropriate or where the law so requires that a dispute before it be referred to mediation. Where a dispute is referred to mediation under the court, the parties are to select a mediator from a register maintained by the Mediation Accreditation Committee and the mediation conducted in accordance to the mediation rules. Such accreditation committee is to have the responsibility of supervising the regulation, training, certification, accreditation and disciplining of mediators listed with mediation registrar. In accrediting mediators the committee is to have regard to the diversity of matters that may be referred for mediation and the vulnerabilities of some special groups. The courts hold a scheduling conference within 21 days of close of pleadings to give parties directions on referral to mediation. Here, the court has discretion to order that it will conduct the mediation itself or refer the suit to the mediation Registrar for allocation of a mediator.

Any agreement arrived at between the parties is to be published by the mediator within ten days. If the agreement settles the suit, the mediator is obliged to file a notice to that effect. It will be enforceable and no appeal can be made against the agreement. 59A outlines the mediation accreditation committee, to be set up by the Chief justice. The courts according to section 59D allow for private mediation agreements. This is similar to both the U.S and most common law systems.

In his address, former Chief Justice Evans Gicheru at the Southern African Chief Justices' Forum also addressed the issue of court-annexed mediation.<sup>123</sup> Acknowledging the need for ADR in the Kenyan judiciary he stated that ADR is required especially at the High Court and the Subordinate level. This is because the judiciary has been the target of persistent criticism for

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<sup>122</sup> Ibid

<sup>123</sup> Remarks by the Chief Justice Evans Gicheru at the Southern African Chief Justices' Forum (June, 2011)



mounting arrears as well as inefficiency in disposing of litigation involving business interests.<sup>124</sup> He emphasised that in an attempt to streamline the judicial process towards ensuring timely justice, the role of the judge and the judicial system are continuously evolving as we move towards more rigorous planning and management in our judiciary. The role of the judge is therefore no longer confined to merely deciding the case, but also requires him/her to play an active part in the manner of its resolution.

While private businesses have been increasingly relying on domestic as well as international commercial arbitration in the course of their dealings, the use of methods such as conciliation and mediation for resolving other categories of civil disputes still needs governmental support.

A crucial legislative intervention in this regard is the Statute Law (Miscellaneous Amendment) Act No. 6 of 2009 which recognized Court-annexed ADR methods in Kenya. Section 59 of the Civil Procedure Act (CPA) mandates that Judges can direct parties in civil proceedings to resort to methods such as mediation under circumstances where it is perceived that the dispute can be resolved in a co-operative and non-adversarial manner. In his opinion, this provision is important since a significant portion of pending litigation at the trial level such as rent disputes, property disputes and those pertaining to family matters are best resolved through these methods. This is because civil litigation has an inherently adversarial character and is widely perceived in society as a tool of confrontation and unnecessary harassment. Especially in instances where parties are otherwise well-known to each other, their involvement in lengthy and acrimonious civil suits can do irreparable damage to their mutual relationships. Under such conditions, judges can use their discretion to direct the use of ADR methods under their supervision. If this approach is internalised in our system, it can greatly reduce the case-load before the Courts of Law.<sup>125</sup>

However, he acknowledges some of the setbacks of court-annexed mediation. He stated that the continuously evolving nature of the judge and the judicial system in respect of improving 'case management' techniques raise some important issues which need due consideration. The modern approach to case management envisions the emergence of a pro-active judge, whose function is to set out the issues involved, limit the time taken for each step of the litigation in order to ensure a speedy procedure as well as to decide the outcome of the case. This would then mean that the

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<sup>124</sup> Ibid.

<sup>125</sup> Id

final responsibility for the control of litigation must move from the litigants and their legal advisers to the court.<sup>126</sup> This change in the function of the judge shifts the judicial system, away from adversarial litigation and towards a slightly more pro-active approach. This has raised the concern that the adversarial nature of litigation will be undermined given the new role of the judge. There are also questions about the extent and limits of the control that the judge should exercise over the procedural aspects in the courtroom. It may also seem that the objective is to divest the parties of their action. This is a major difference between the administration of court annexed mediation in Kenya and the United States. In the U.S, court annexed programs may be offered by the active judges themselves under certain conditions and, in addition, by other qualified neutrals such as highly experienced attorneys, retired judges, or even non-legal technical specialists that are retained by the court on an as-needed basis.<sup>127</sup> Kenya does not provide for this and yet the personnel are stretched as it is.

He however, states that there are greater advantages of court-annexed mediation. For instance, under the supervision of the court, the core issues relating to the case can be identified and addressed with greater speed, while frivolous aspects can be ignored. Proactive judicial involvement in case-management thus serves to improve the effectiveness of the process rather than to supplant it.<sup>128</sup> It is also of great importance to ensure that though expediting judicial proceedings is of great importance; there must be mechanisms in place to ensure that this does not compromise the rights of the parties involved. Ultimately, both parties benefit from an expeditious trial so long as it is ensured that no great detriment is caused to either party. However, if implemented appropriately it will go a long way in addressing the problems of arrears and delay.<sup>129</sup>

This research interviewed two magistrates: Hon. Ole Keiuwa and Hon. Okello from the Milimani commercial law courts and the Makadara law courts respectively. On their contribution to the research they both stated that settling of disputes through ADR has been long overdue and

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<sup>126</sup> Id

<sup>127</sup> Supra note 4

<sup>128</sup> Id

<sup>129</sup> Supra note 23



is a welcome process. However, as concerning the institutionalization of mediation into the court system, they raised concerns as to its effectiveness. Though it is a great way of reducing the backlog of cases to be adjudicated upon, the general lack of facilities and personnel to supervise the mediation poses a challenge. According to Hon .Okello, the courts lack both the mediators and court personnel to supervise the mediation and even the funds to facilitate the program. Yes the magistrates encourage the parties to consider ADR, but practically this is done away from the courts.

According to Mr. Allen Waiyaki Gichuhi mainly due to the immense backlog of cases, the past strikes in the judiciary and overworked judiciary have wreaked havoc to the expeditious conclusion of cases, give weight for the need to urgently embrace Alternative Dispute Resolution mechanisms. He is of the opinion that court institutionalized mediation can positively lead to the development of mediation in Kenya, but only if all stakeholders are willing to work towards achieving this goal. He applauds the Canadian court system for effectively managing court-mandated mediation. Further, he states that we should emulate the successes of the Canadian experience which substantially led to the substantial eradication of the perennial backlog of cases.

The Canadian experience relied on an interest-based approach. Interest based mediation attempts to resolve the dispute by focusing on the interest of the parties, i.e. what is the motivation behind the litigation; and by encouraging the parties to a mutually satisfactory resolution of their dispute. The English did not adopt court mandated mediation but instead opted for a court annexed voluntary system. In his paper, he gave recommendation on how the incorporation of mediation into the legal system can effectively be carried out. Among the recommendations was that 3 centers be set up for the evaluation of the pilot scheme. This should be based in the cities of Nairobi, Mombasa and Kisumu.<sup>130</sup>

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<sup>130</sup> Allen Gichuhi, Court-Mandated Mediation: The Final Solution To Expeditious Disposal Of Cases, Paper Presented At The Law Society Annual Conference, (Mombasa, 2005)



### **3.5 Data Analysis and Interpretation**

This part presents the data analysis. The data are presented in tables, graphs (bar graphs, histograms), and pie-charts and in percentages. The analysis of the data was done in accordance to variables under study. These variables were broken to various sub-headings so as to enhance easier interpretation and discussions.

This research reports on the findings of a survey conducted of some of the stakeholders. It is divided into two. During the study period, a total of 5 advocates of the High Court of Kenya, and 50 law students as respondents were included in the study.

#### **Sample 1 characteristics**

The interview was carried out by directly asking the advocates if the institutionalization of mediation will hinder its development in the country. The interview was face to face and generated various views together with justification for the views expressed. It is worth noting that four out of the five advocates interviewed, though well versed in ADR, are not in favour of ADR as a whole. They are used to the idea that litigation should be the main way to solve disputes. Most have indicated that their clients prefer going to court as they believe it will have more impact. Also according to them it is more prestigious to win in court than settle in mediation where it is seen as a compromise. The clients are however willing to try mediating the problem if the advocates think it is a worthwhile process.

Another observation is that the lawyers who were older in the profession were totally against the idea of ADR, as opposed to those younger who did not entirely oppose the mechanisms. Also worth noting is that no gender showed any particular inclination. Also, those in commercial law were more receptive to the idea of court annexed mediation than those in family and litigation.

As regards the institutionalization of mediation, five were interviewed, three of them being male lawyers and two being female. Two of those interviewed practice in the commercial area. Two practice in litigation. One practices family law. This is represented in figure 1 below.

**Area of practice**

(N=5)

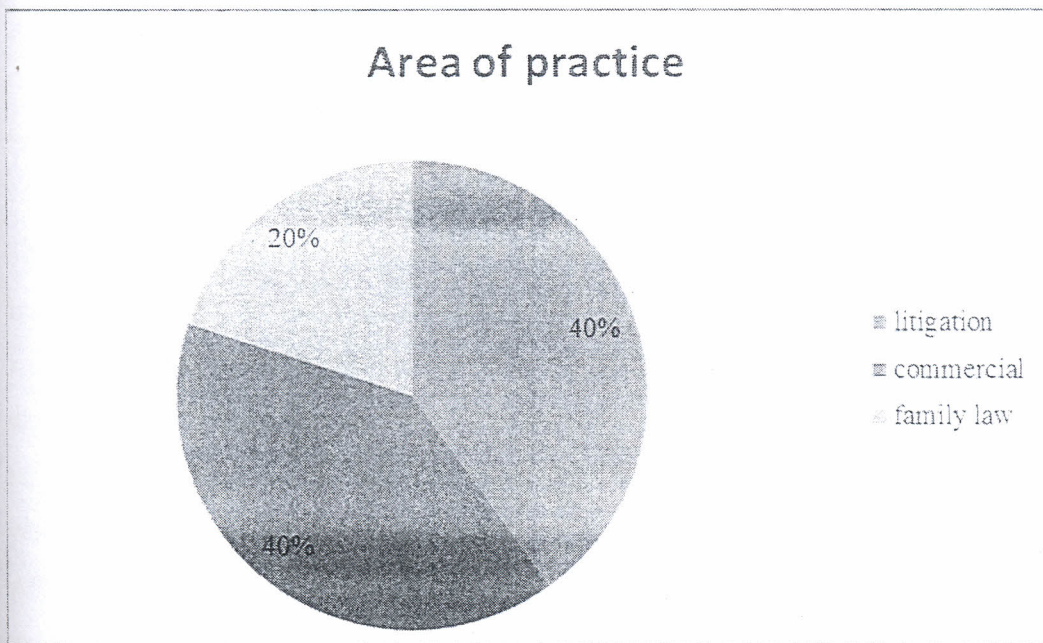


Figure 2

\*source: author

Out of the five interviewed. Three out of the five were of the opinion that it would be unproductive to institutionalize mediation. This represents 60%. This is tabulated in the table 1 below

**Will the institutionalization of mediation hinder its development in the country?**

**Table 1**

Will the institutionalization of mediation hinder its development in the country?	yes	No	Total
male	2	1	3
Female	1	1	2
Total	3	2	5
Percentage	60%	40%	100

\*source: author

They justified their views by stating that they feel that it will be an additional hurdle by the litigants. This is because mediation by itself came about as a means of avoiding going to court and settling their disputes away from the courts. Taking mediation back to the court may serve to discourage the litigants who reason that it is just as well as going to litigation straight away. The respondents were also of the opinion that making it mandatory for parties to go to mediation would defeat the logic of alternative and voluntariness. "It is hard as it is to convince clients that ADR and mediation in particular is a good method of settling disputes, how harder would it be to explain that this mediation is required to take place under the guidance of a judge?" aired one advocate. Generally they noted that the rules of the process of court-annexed and mandated ADR are quite formal and similar to the procedures governing conduct of cases in the High Court.



They also raised the concern of confidentiality. What is stated in mediation is not supposed to be used against the parties in court should the mediation fail to work. Conversely, the respondents felt that this confidentiality will be compromised. They also felt that mediation is meant to lighten the burden on the work of the judges, magistrates and courts in general. However annexing it to the court does not alleviate the functions of the judges or magistrates but simply shifts it as they still have to supervise the mediation process or appoint people who will report back to them.

An angle taken by one of the respondents was that of the corruption in the judicial system. She argued that if corruption is present, a court-annexed, public mediation arrangement may pave the way for greater opportunities for abuse by the judiciary, governmental officials and court staff. This has in the past created a bad image for the judiciary and may not settle very well with the litigants. She was of the view that court annexed mediation can only work well in countries that have efficient judicial systems.

Those, however, in favour of the court mandated and annexation of mediation believe that it is necessary. This is represented as 40% of the respondents. This is justified by the fact that without the court's supervision it is easy for the mediators to take advantage of the process misleading their clients. They were also of the view that unless mandated, some cases which can easily be resolved away from the courts will take up the valuable time that would have been used in resolving more "serious" cases. As such, the court would have to mandate parties that refuse to go to mediation and place a penalty on the party that refuses to cooperate. Though they deem this as going against the principle of voluntariness, they say it is necessary if at all mediation is going to work as not many are willing or even aware of it. They also favour it in terms of the decisions reached here are binding. They believe that some parties may agree to amount of court settlement and not respect the agreement. This will mean that the aggrieved party will still have to go to court in order to have their remedy. If the mediation takes place by the guidance of the court, the agreement then would be binding thus using less time. Naturally, there are certain risks associated with private mediation. In an unregulated market there is no guarantee of quality of service or qualification of the mediator for the task. There is also a risk that a private mediator may take on a case where there is a deeply uneven power balance between the parties. This is of particular concern in developing countries where parties may not fully understand their rights,

the voluntary nature of the process or legal alternatives available to them. As parties are not precluded from returning to the courts after an agreement is reached, there is a possibility that mediation may simply add another layer of cost and procedure to a trial.

This research reveals that though many practitioners agree that mediation should have some form of regulation and that court annexation does have advantages, few are willing to recommend it to their clients.

### Sample 2 characteristics

The research also interviewed 50 law students on their views on court-annexed mediation. The research was carried out by questionnaire and sampling was random with 29 female students and 21 male students. The questionnaires were distributed online with three of the students being from the JKUAT University and the rest from The University of Nairobi. On the question of their preferred method of dispute resolution, the research revealed that most students agreed that mediation was their preferred method of dealing with civil cases and were ready anytime to refer to mediation. This was the response of 84% (42 out of the 50) of the respondents.

**If you had a dispute would you rather go to court or go to mediation.**

Table 2

If you had a dispute would you rather go to court or go to mediation.	Mediation	Litigation	Total
Male	15	6	21
Female	27	2	29
Total	42	8	50
%	84%	16%	100

\*source: author

However, most of the respondents stated that they have heard of very few mediated cases and more so very few had an idea on where to get accredited mediators or the location of ADR centres. This was 45%.

On asked whether mediators should exclusively be licensed advocates there was a 45-55% disagreement. Some felt that there are those who might be good mediators without necessarily being licensed. The rest however were of the opinion that only advocates would be well equipped to be mediators. However, they were all in agreement that mediators should be well versed in matters law.

Table 3

Do you think mediators should exclusively be licensed advocates?	Yes	Percentage by gender	No	Percentage by gender	Total
Male	10	20%	11	22%	21
Female	9	18%	20	40%	29
Total	19	38%	31	62%	50

\*Source: author

On the question as to whether the informal nature of mediation may be open to abuse or manipulation and as such needs to be regulated by the courts, all 88% of the respondents were in agreement. The common view was that any system needs to be checked even informal mediation. The other 12% stated that regulation by the court of mediation will simply mean going back to the court process and lose the autonomy it has.

When asked if they would still consider going to court even after institutionalization, curiously, most of the respondents felt that if the mediation was going to be court-annexed, they would rather just go straight to litigation. This is as shown in figure 2 below.



Would you still consider going to mediation even after institutionalization?

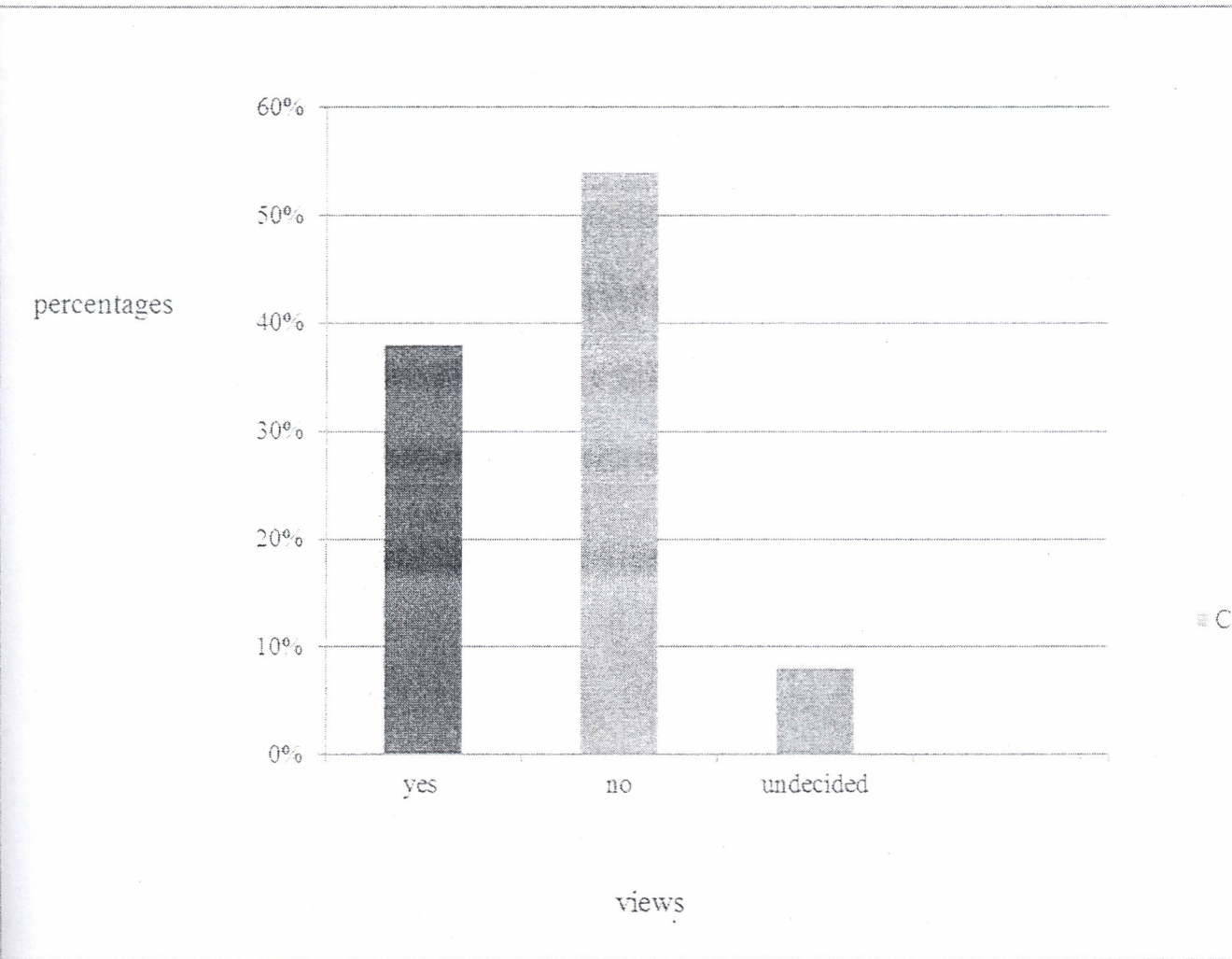


Figure 3

\*source: author

From figure 2 above, only 38% were willing to go to mediation after institutionalization. This is as opposed to 54% who stated that they would not go to mediation now that it has been institutionalized. 8% of those polled were undecided. This shows that not many are willing to participate in court institutionalized mediation.

### **Conclusion of the survey findings**

From the findings of this survey, some conclusions can be drawn. First is that many people have come to embrace mediation as a method of dispute resolution. Despite this, it is clear that not many know where to get mediators and where such ADR centres are found. It is also clear that according to the respondents, the matter of mediators being exclusively advocates or being provided for by the court is received with mixed reactions. They are in agreement that mediation should be regulated being annexed to the court is not entirely disadvantageous, but it should not be in a way that makes it stringent. Curiously, despite knowing this, they would rather not go to mediation in the first place if it will be mandated by the courts. This is majorly because they feel that they will lose their autonomy.

## 4.0 Chapter Four

### Conclusion and Recommendations

#### Have the objectives of the research been met?

This research had three main objectives, which have all been met.

The main purpose of this study was to. Through the extensive research carried out; books, online and interviews and questionnaires, the research can conclude that this objective has been met. From the study of other jurisdiction to the interviews carried out in ours, the research can conclude that section 59 of the Civil Procedure Act has affected the development of mediation in Kenya negatively. It will derail the development of mediation in the country. This is despite the fact that many are in support of the opinion of regulating ADR the focus majorly on mediation; many are sceptical about its institutionalization. It has taken many years for mediation to be accepted by the justice system as a method of dispute resolution. The recent efforts by the government, judiciary and other stakeholders have managed to give litigants confidence in mediation and away from litigation. These efforts are however, at a risk of being eroded. This research reveals that litigants do not appreciate that while trying to get away from the litigation, they will still be required to carry out their mediation under supervision of the court. The most common view being that they might as well have gone straight to litigation in the first place. It will take another number of years to restore litigants' faith in this "new mediation mechanism." From the research, the stakeholders seem sceptical about institutionalizing mediation. The lawyers are not ready to recommend the same to their clients and law students, who are going to be lawyers in a few years, do not see it as a very positive move. Unless well managed and the



idea communicated to the stakeholders and public in general, the provisions of section 59 of the civil procedure Act may end up corroding the very mechanisms it seeks to promote.

The research also sought to determine whether section 59 of the Civil Procedure Act undercuts the traditional ideals and nature of mediation more specifically its voluntary nature. The research can conclude that by section 59 granting the court powers to strike out the pleadings of the non-complying party and order the defaulting party to pay, then, the very core value of mediation is eroded. This is expressed by writers' views articulated throughout this research as producing an oxymoron; that of mediation being voluntary and at the same time mandated by the court. This was also revealed by the survey carried out where, according to the respondents in figure 2 above, only 38% would consider participating in a court annexed mediation as opposed to 54% who revealed they would not. The major reason stated for this is the feeling among the respondents of the loss of autonomy as they view that it is no longer voluntary but that they are being coerced into it. Also by being required to only select a mediator from a list provided, failure to which the court appoints one for them, the respondents feel that they no longer have autonomy over the process.

The research also sought to establish if there is a way of incorporating regulation of mediation using the court system without eroding the very essence of mediation. From the research carried out and more specifically the study of various jurisdictions, the research has determined that it is possible for mediation to be incorporated into the court system without eroding the very essence of mediation. This can only be done, however, if the choice of whether or not to mediate is left to the parties with the magistrates only advising the parties to do so. This can also be achieved if the stakeholders and the public at large are extensively educated on mediation and its incorporation into the system.

## Conclusion

Though ADR and mediation in particular has been in use as far as the pre-colonial period, it has taken a long time for it to be recognized by the justice system. Over the past years, there has been a significant increase in the subjection of disputes to alternative means of dispute resolution

methods such as arbitration, negotiation, conciliation and mediation. On passage of the constitution 2010, ADR was given a new status. This was necessitated by the fact that the court process has overly earned the reputation of being too rigid, expensive, slow and technical. ADR was therefore introduced to help resolve this defect of the court by providing an alternative means of resolving disputes away from the court system.

However in the recent years there have been increased efforts in various jurisdictions to subject ADR in general and mediation in particular to court systems. Court-annexed mediation is the provision of mediation services within the court system. This has been received with mixed reactions. A major debate being that ADR was originally to step in when the forms and modes of formal adjudication became intolerable; ADR emerged to provide a sensible method of dispute resolution that was discretionary and flexible. ADR offered fresh perspectives on procedural and social justice to counter the strict role of the law in dispute resolution. Mediation also offers the possibility of individualized justice, which may be in tension with strict legal justice. However, others are in support of the institutionalization of mediation. Their justification being that the dark side of ADR is its unaccountability, secrecy, and its inability to extend its jurisdictional reach beyond the parties immediately before it.

In order for mediation to develop further in the country, the participation of stakeholders is key. Whereas it is important that mediation be regulated to protect the parties and ensure efficiency, this should be done in a manner that does not alter the core values of mediation. As one thing is very clear, the word —alternative refers to looking outside the courtroom setting to resolve some disputes.

#### **4.1 Recommendations**

In this respect, the research supports that where it is appropriate, parties involved in civil disputes should be encouraged to explore whether their dispute can be resolved by agreement. This should be especially in disputes where emotional issues combine with legal issues, provided that this alternative process meets fundamental principles of justice.

The research thus makes recommendations on how the institutionalization of mediation can work to promote the very essence of mediation as has been known through traditional ADR mechanisms.

These include:

- i. It is more appropriate to introduce mandatory information sessions rather than a mandatory mediation requirement for parties to dispute. Information and education play an important role in the understanding and successful use of mediation in resolving their disputes.
- ii. The research also recommends that, in deciding whether it is appropriate to invite the parties to consider using mediation to attempt to settle the proceedings, the court after having considered all the circumstances of the case should deliberate in particular whether mediation has a reasonable prospect of success and whether it is likely to assist the parties in resolving the issues in the dispute before the court.
- iii. The judges should include the parties in litigation in deciding whether or not their cases should first be referred to mediation. If the parties are reluctant to do so or present a strong case against it, they should not be forced to go to mediation
- iv. That the participation of parties in mediation should be voluntary and that the mediator should play no advisory or evaluative role in the outcome of the process, but may advise on or determine the process.
- v. There should also be a register of mediators that will include both lawyers and non-lawyers, who have complied with set standards. However, parties should not be compelled to choose a mediator from the list. This way parties will feel like they still have autonomy over the mediation.



- vi. The meaning of confidentiality should be clearly defined. This will set the parameters of what can be recorded, what cannot and situations where disclosure is required by law. The parties should be able to agree when their discussions should be recorded.
- vii. Now that the courts may require the parties to mediation, the fees to be paid to the mediators should be highly subsidised by the government or have mediators who provide pro bono services. This way parties do not have to incur additional costs in being forced to go through mediation first.
- viii. Elevating the role of community leaders such as sub-chiefs and village headmen to include resolving of disputes among community members. The government should also establish more centres across the country where disputes can be resolved by mediators where disputing parties can easily access these centres.

The research recommends that an experimental Court-annexed mediation schemes be established in the county courts based on the principles of the voluntary participation of the litigants and assess its success first and engage the public in the best way to implement court annexed mediation. recommends examining a number of successful court-annexed schemes in other jurisdictions including England, United States, New South Wales, Ontario, and Philippine should to study how institutionalization works in those jurisdictions.

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## Appendix 1

### Questionnaire to students

The following questionnaire is part of a research undertaking in fulfilment of my dissertation for the Bachelor of Law Degree. The focus of the study is on court annexed mediation; how or if at all it affects the development of mediation in Kenya. Thank you for your cooperation.

Questions 1-7 require only one word answers.

1. If you had a dispute would you rather go to court or go to mediation. Give reason
2. If your answer above was positive, if you went to mediation would you rather choose your own mediator or have the court provide one for you?
3. On a scale of 1 to 10, with 1 being "totally ineffective" and 10 being "extraordinarily effective" how would you rate the effectiveness of mediation in cases in Kenya?

4. Do you think there is adequate accessibility and location of ADR centres in the country?
5. Do you think there is adequacy of ADR Training and qualifications centres for those that wish to be licensed?
6. Do you think mediators should exclusively be licensed advocates?
7. The informal nature of mediation may be open to abuse or manipulation and the law should intervene to regulate this. Do you agree with the above statement?
8. What do you think is the role of courts in relation to ADR?
9. What opportunities are there to promote/integrate ADR more effectively into the process of resolving disputes that are filled with the court?
10. What recommendations can you provide to harmonize the two systems of dispute resolution methods?
11. Would you still consider going to mediation even after institutionalization?

## Appendix 2

Question to other stakeholders.

Dear \_\_\_\_\_,

I am a fourth year student at the University of Nairobi. I am currently doing my dissertation and undertaking this research in partial fulfillment of the Bachelor of Law (LL. B) course. I would highly appreciate your contribution to my research. The focus of the study is on court annexed mediation; how or if at all it affects the development of mediation in Kenya.

Sharon Amendi

What is the Effect of section 59 of the Civil Procedure Act on the development in Kenya? Through section 59 of the Civil Procedure Act, court-mandated/annexed mediation has been introduced as an alternative dispute resolution method. Though this is a wonderful move to give



potency to Alternative Dispute Resolution Mechanisms, the idea of forcefully asking parties to mediate and including it into the court system to a process which the parties were avoiding to begin with, leads the it back to being formal, rigid and the consequence of this is that mediation fails to be a viable option anymore. It also goes against the very core of the values of mediation and ADR in general. This being that they are built on the values of confidentiality and voluntary nature. This was argued in the case of *Halsey v Milton Keynes General NHS Trust*.<sup>1</sup>

However it has also been argued that the informal nature of mediation may be open to abuse or manipulation by either one of the parties or even the mediator and should therefore be included in the court system and regulated. Should mediation and ADR in general then be left in the informal nature it has been or should it be regulated by the court? Should a judge force a party to mediate even if the party is against it? Alternatively can they be harmonized to work together without one curtailing the other?

Your view on the issue is highly appreciated.

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<sup>1</sup>. [2004] EWCA 3006 Civ 576