EFFECTIVENESS OF ALTERNATIVE DISPUTE RESOLUTION MECHANISM (ADR) IN CASE BACKLOG MANAGEMENT IN KENYAN JUDICIAL SYSTEM: FOCUS ON MILIMANI HIGH COURT COMMERCIAL DIVISION.

BY

RACHEL CHEPKOECH BIOMNDO NGETICH

REG: G62/7057/2017

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF THE DEGREE OF MASTERS OF LAW (LLM)

UNIVERSITY OF NAIROBI SCHOOL OF LAW COURSE (GPR 602)

SUPERVISOR: DR. SCHOLASTICA OMONDI

SEPTEMBER, 2019

DECLARATION

The researcher hereby declares that this research project is original work and has not been presented for the award of any degree in any University.

Signature…… Date.....

RACHEL CHEPKOECH BIOMNDO NGETICH

REG: G62/7057/2017

This research project has been submitted for examination with the approval of DR**.**

SCHOLASTICA OMONDI as a University Supervisor.

Signature…… Date……

DR. SCHOLASTICA OMONDI

Supervisor

DEDICATION

This research thesis is dedicated to my children Brian Kimutai Korir, Audrey Chepngeno Ngetich and Oscar Kibet Korir who have been the source of my encouragement and motivation. Brian and Audrey who are both Law students went out of their way despite their busy academic programs to assist me in research whenever necessary. It is my prayer and hope that their experience in the process will contribute to shaping them in their academic path and legal practice. In your contribution in the legal field, put the interest of our country first and make law the ultimate source of justice for Kenyans. May the Almighty God bless you richly.

ACKNOWLEDGEMENT

There are feelings that words may not be sufficient to explain for they dwell in the silent understanding between the giver and the receiver. The researcher cannot forget to thank all those that have offered their support while undertaking this study. First, I wish to recognize and appreciate the support of **DR. SCHOLASTIC OMONDI** who tirelessly and with humility guided me in the progress of this project. She appreciated my busy work schedule and despite her equally busy schedule, she was very accommodative. Due to her understanding, the project progressed without any hitch. I lack sufficient words to express my gratitude. Thank you so much and may God bless and expand your territories.

I am also grateful to my children who may be young but understood the need of this study. I will not forget my secretary Joyce Anne Waithera who played role in ensuring the project was in good format.

Last but not least my LLM 2017 classmates for the team spirit, which made the study manageable.

ABSTRACT

Kenyan Judiciary continues to register high number of cases. This has resulted in huge backlog, which has overstretched existing human resource and physical facilities. Despite introduction of ADR mechanisms as measure to reduce case backlog, the effects of the ADR is yet to be realized. This study has an objective of finding reason for continued rise in cases being filed in Court despite the fact that there exists ADR mechanisms anchored in the Kenyan Constitution of 2010. This study also considered theories on managing case backlog, reliability of ADR and reliability of litigation to underpin effectiveness of ADR in this study. The study collected data through desk research, interview and records from the Deputy Registrar commercial division and performance management and Measurement directorate. Among the selected respondents to interview questions were the Deputy registrar of Milimani High court of commercial Division, a member of the Chartered Institute of Arbitrators, lawyers, and a senior officer Kenya Revenue Authority. All the institutions and persons targeted for the interview had crucial and reliable information that builds on testing the hypotheses of the study. The perceptions of the selected audiences were also critical in understanding credibility of the current ADR system.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CAP	Chapter
CBK:	Central Bank of Kenya
CIArb	Chartered institute of Arbitrators
CJ	Chief Justice
CJS	Criminal Justice System
CMC	Chief Magistrate's Court
CRB:	Credit Reference Bureau
CTDR:	Corporate Tax Dispute Resolution Division
DCRT	Daily Court Return Template
DR	Deputy Registrar
GJLOS	Governance, Justice, Law and Order Sector
HC	High Court
HOS	Head of Station
ICT	Information and Communications Technology
INSP:	International Network on Strategic Philanthropy
JTF	Judicial Transformation Framework
KRA	Kenya Revenue Authority
LOK	Laws of Kenya
MDR	Mediation Deputy Registrar
O2	Oxygen Rule

SMCA Small Claims Court Act

Pepp Pepperdine

PMMD Performance Management and Measurement Directorate

PMU Performance Management Unit

PMU: Performance Management Unit

Rev Revision

SJT Sustaining Judiciary Transformation

TAT: The Tax Appeals Tribunal

U.S United States

UNCITRAL: United Nations Commission on International Trade Law

CAMP Court Annexed Mediation Program

MDCM Multi Door Courthouse Model

DEFINITIONS

Judge A Public Officer appointed by the Judicial Service Commission to decide cases in a law Court. For purpose of this study the term will be used in reference Officers presiding both High Court and Subordinate Court.

Judiciary An organ of the government mandated to adjudicate disputes.

Court Station A place where disputes are registered and trials conducted.

Model System or procedure.

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background of the Problem

Alternative Dispute Resolution (ADR) is a spectrum of negotiation-based resolution processes for solving conflicts where parties or their representatives to a current or potential dispute meet to build consensus collaboratively and find the solution to their cause of dispute[1]. The parties meet with an objective of getting to mutually acceptable resolution of the imminent dispute[2]. ADR processes require the participants to enter negotiations voluntarily. The voluntary nature of these methods includes the provision of any participant to withdraw from the process any moment they want to withdraw. ADR procedures are expected to be less costly and more expeditious. Kenyan constitution[3] provides ADR as including reconciliation, mediation, Arbitration and traditional dispute resolution mechanisms.

On the other hand, Litigation is a formal process that determines issues through a court and presided over by judges. Civil litigation disputes are between two or more parties whereas in criminal litigation, cases constitute of the state and the law-breaker[4].Despite entrenchment of ADR in the Constitution and efforts being made to promote its use to settle disputes, Kenyan Judiciary

---

[1] Jeanne Brett, *'Attitudinal Structuring, ADR, and Negotiation Strategy'* (2015) 31 Journals of Negotiation.
[2]Sandra Hale, '*Approaching The Bench*: Teach the Magistrate And the Judge How To Work ly With Interpreters (2015): 163-180', *Monti. Monografías De Traducción E Interpretación*, no. 7,
[3] Article 159 (c) of the Kenyan Constitution of 2010
[4]Ana Isabel Blanco García, *'The ADR methods to settle Smes Disputes in Spain'* (2017) 11 Culture, Meida, and Entertainment Laws.

continues to register high number of cases[5]. This has resulted in huge backlog, which has overstretched existing human resource and physical facilities. Workload piling up daily has frustrated the Judiciary's effort to achieve its undertaking in administering justice in a reasonable and timely manner[6]. The rush to the Courts remains a puzzle.

Despite efforts made by each judicial Officer to dispose cases as per the newly introduced performance contract, attempts to reduce time for trial of cases have proved an uphill task. Delayed trials have caused ripple effect in the economy; huge sums of money are held in litigation as parties wait for their cases to be processed in Court.

Long pendency of commercial disputes create a lot of hardship to many investors who may not be able to go back to their original position after determination of their disputes; this serves as a contributing factor to business entities going insolvent. Parties to transactions are however at liberty to include arbitration clause as they execute contracts. However, despite including arbitration clause in their contracts, parties still find themselves in court[7]. The question that arises is; why are matters still filed in court in the presence of such a clause in the agreements? What make them resort to courts even in issues that fall squarely within the Arbitration Act?

The Arbitration Act was intended to provide a less formal process and minimize court's interference with arbitral processes. What then can be read from the high rise in litigation? This

---

[5] John Gichuhi, *"Revisiting Article 159 (2)(C) Of the Kenyan Constitution: How The Judge Sees It"*, (2018) SSRN Electronic Journal,

[6] Judicial Transformation Framework 2012-2016

[7]Collins Odote. "*Public Interest Litigation and Climate Change – An Example from Kenya"* Climate Change: (2013), 805–30. International Law and Global Governance.

study intend to find an explanation for preference to court by parties other than mechanism which were presumed would be faster, less complex and cheaper.

The state has an obligation to guarantee access to justice for everyone. The Constitution enjoins the Judiciary to dispense justice without delay and gives a litigant a right to have a case proceed without delay[8]. Delay in disposal of commercial disputes has negatively affected investment in Kenya as every investor would want to ascertain case rate disposal before making a decision to invest[9]. The disputes not only affect two conflicting parties, it extends to stakeholders who also depend on businesses. Every pending commercial dispute represents a figure in amount of money that is meant to be ploughed back to the market for circulation.

This study will examine the effect of case disposal rate on foreign investment and local businesses. Trial process has stretched to over 10 years making litigants mislay assurance in the court system. This study is intended to assist policy makers introduce measures that will reduce the long wait for disposal of disputes. This research paper will inquire into role the state has played in ensuring all Kenyans access justice without delay. From data collated, recommendations will be made on measures the state is required to take to enhance access to justice.

The rush to court raises doubt on effectiveness of ADR. This study will inquire into the short falls in the existing ADR mechanisms. From analysis of information and data collated from respondents mentioned above, the author will be able to understand the reasons for preference to litigation, what need to be done to enhance reliance of ADR mechanisms. The findings will assist the author arrive at proposed recommendations to policy makers for purposes of promoting use of ADR

---

[8] John Gichuhi, *"Revisiting Article 159 (2)(C) Of the Kenyan Constitution: How The Judge Sees It"*, (2018) SSRN Electronic Journal

[9] Collins Odote. "*Public Interest Litigation and Climate Change – An Example from Kenya"* Climate Change: (2013), 805–30. International Law and Global Governance.

mechanisms. The desired solution will be to have an efficient, effective and quick disposal of disputes.

1.2 Statement of the Problem

Speedy determination of disputes is part of fair hearing as per maxim statement, which postulates that delay of justice is denial of justice. However, delay in Kenyan judiciary system has been a problem for a long time now. In Milimani law courts, cases pile up between filling point and the point of case determination. Despite introduction of ADR mechanisms in our Constitution,[10] as measure to reduce case backlog the effects of the ADR is yet to be realized; cases filed in Courts have continued to rise slowing the wheels of justice. Delay in resolution of commercial disputes has scared away foreign investors and stalled or crippled local businesses.

The long pendency of commercial disputes amount to holding monies that is meant to go back to the market for circulation. The resulting effect is slow economic growth, leading to high rate of unemployment, and rise in crime rate among other negative effects. This study seeks to find the place ADR in addressing the perennial issue of case backlog in Kenya.

1.3 Justification of the Study

Fair and efficient resolution of disputes has far-reaching benefits to both the state and the Kenyan citizen. For Kenyans to have faith in Courts, it should be able to discharge its mandate as prescribed by the Constitution of Kenya 2010[11]. Judicial authority is donated to the judiciary by Kenyans. Performance by the Judiciary is therefore required to meet the expectations of Kenyans. However, complaints of delays and inefficiency have been made continually[12]. To address the problem,

---

[10] Rebecca Gill, *"A Framework for Comparative Judicial Selection Research*", (2007). SSRN Journal

[11] Article 159 of the constitution of Kenya 2010.

[12]Kenya News Agency, *"Judiciary To Recruit More Judges To Ease Backlog Cases"* (2019). Kenya news.go.Ke,

Kenyans proposed ADR mechanisms, which were promulgated in the Constitution; but for some reasons, which this paper sought, Kenyans seem to prefer to have their disputes resolved by Judges or Magistrates. In the process, they clog the Court system making it ineffective due to inability to deal with huge caseload.

The study sought to find why Kenyans place much faith in Judges and not in facilitators outside the formal legal system.

1.4 Statement of Objective

This study sought to find the reasons for continued rise in cases being filed in Court notwithstanding the existence of ADR mechanisms anchored in Constitution of Kenya. These study specifically:

- Studied the nature of ADR mechanism available for commercial disputes in Kenya
- Established the legal, policy and institutional framework of ADR mechanisms
- Determined the effectiveness of ADR mechanisms in managing case backlog

1.5 Research Questions

Throughout the study, the researcher will seek reasons for continued rise in cases being filed in Courts despite existences of available alternative dispute resolution mechanism. The study answered the following inquiries:-

1. What is the nature of ADR Mechanism available for commercial disputes
2. What legal, policy and institutional framework are in place for implementation of ADR in case backlog management in Kenya
3. How effective are available ADR mechanism in managing case backlog

1.6 Theoretical Framework

This section visited theories on managing case backlog, reliability of ADR and reliability of litigation to underpin effectiveness of ADR in this study.

1.6.1 Rawlsian Theory of Justice

Rawls Theory was founded by John Rawls in 1971[13]. The theory was developed to address the issue relating to distributive justice in the society through reliance on alternative device of the social contract. The theory posits that justice ought to be a basic functional principle in independent societies and social institutions. Rawls' Theory of Justice recognizes social justice in an ideal society scenario where citizens interact on egalitarian basis of cooperative reciprocity and mutual respect. Ideally, the theory speculates that elements of ADR such as mediation would work well to solve conflicts between parties when a neutral person reminds of the two parties the possible outcomes (worst case and best case). From the theory, conflicting parties are able to reflect on the alternatives and the results of their actions then conform to a just solution without necessarily involving the punitive actions of the law.

According to Rawls, from its basis, justice theory speculates the original position of equity, which would influence agreements based on just principles. Rawl's theory of justice relies on two principles. The first principle explains that "each person is to have an equal right that is compatible with liberty for others"[14]: It also provides that "inequalities are to be arranged to everyone's

[13] Anthony Faber, *"A Theory of Justice Reexamined"(*2012) SSRN Electronic Journal.
[14] Gaynor, Tia Sherèe, and Hindy Lauer Schachter. 2014. "Revisiting the Theory of Justice." Public Administration Quarterly 38 (4): 440–44.

advantage"[15]. Such an understanding extends the freedom of an individual against psychological intimidation and liberty from arbitrary arrest. It is important to note the similarity between the first principle by Rawls' and Mills principle of harm, which explains that power can only be exercised in the right way over any individuals in civilized community against their will, is through preventing harm to other people[16]

The theory is significant to the research because it advocates for solving conflict through peaceful means (an element of ADR) without intimidating conflicting parties. From the perspective of this theory, ADR will solve conflicts between parties without undermining the element of justice. This theory also posits that an element of ADR will be effective in terms of providing justice that works in the best interest of conflicting parties. In theory, Rawls' principle will create an avenue for solving conflict without necessarily taking the matters to court while guaranteeing the best available results for conflicting parties. Rawls theory of Justice thus guarantees that ADR is a suitable mechanism of accessing justice and would therefore be useful in settling disputes and providing an avenue that are also utilized in the courts.

1.6.1.1 Critiques of the Rawlsian theory

Hsieh is an outstanding critique of Rawls ideal theory. Most compelling argument from Hsieh regarded the idea of exit. Like ADR, Rawls theory has a provision of free exit from a scenario leading to conflict or free exit from the justice process if one of the parties finds the

---

[15]Nancy Perkins Spyke, *The Instrumental Value of Beauty in the Pursuit of Justice*, (2006) 40 U.S.F. **L.** REV. 451, 461

[16] John Stuart Mill, Cambridge Univ. Press '*On Liberty'*(1859)13

process unsatisfactory. The first part of this argument concerns leaving workplace where property is owned communally[17]. This provision may create peace but would not be just for the one exiting especially when no compensation for their contribution is guaranteed. This argument may explain the limitations of ADR in settling land disputes in Kenya through an arbitrator[18]. The second argument against Rawls theory relates to freedom of exit during justice process. Hsieh is concerned that if conflicting parties are at will to leave at any moment they deem fit then they are likely to use their freedom to frustrate the process. This weakness is also in the elements of ADR which may making it difficult to coerce parties to commit to ADR processes until the final resolution can be realized.

1.6.1.2 Strengths of Rawlsian Theory

The concepts of the original position in this theory and the veil of unknown outcome provide a useful tool in an attempt to provide reasonable justice values that are constructive to the disputing parties. This advantage is beneficial over the litigation system where the disputes would be settled based on the laws. In respect to litigation, such disputes are based on predictable outcomes based on the law. Unlike litigation, this theory provides an avenue where no one would want to emerge victorious but contented with best possible outcome where no one is the loser. Part of the hypothetical situations when using the theory to advocate for ADR other than litigations would be providing hypothetical scenarios involved in litigations including effects of prolonged waiting on the two contenders of justice[19]. The original position in the theory speculates that people can agree on the justice principles from Rawls theory without prejudice bias because of knowledge of values.

---

[17]Anthony Faber, *"A Theory of Justice by Rawls Reexamined*" (2012)SSRN Electronic Journal.
[18]Kenya News Agency, *"Judiciary To Recruit More Judges To Ease Backlog Cases"* (2019). Kenyanews. go.ke,
[19] Anthony J. Faber, *"A Theory of Justice by Rawls Reexamined*" (2012) SSRN Electronic Journal.

Even the most selfish decision would be harmless to another party because it is made in the best interest of whoever gets the worst offer of the judgment made. Despite the weakness Rawlsian theory, it provides room for settling disputes without necessarily involving the courts while ensuring that disputes are settled.

1.6.2 Theory of change

International Network on Strategic Philanthropy (INSP) (2005) established the theory of change.[20]Change concept articulates the underlying principles and suppositions that direct a service provision strategy, which are critical for producing change and improvement. Change philosophies speak to convictions about what the populace requires and what systems will empower them to address those issues. They establish an avenue for thinking about the association between a framework's central goal, methodologies and real results, while establishing connections between who is being served, the systems or exercises that are being actualized, an and the coveted results[21]. A hypothesis of progress has two expansive parts. The principal segment of the theory of change includes conceptualizing and operating the three center cases of the framework.

The frames outline:

The population (the people this theory serves),

Strategies: Approaches the researcher believed will achieve desired outcomes,

Outcomes: what the institution intended to achieve[22].

---

[20]Yolles and Frieden, *"Information Theory*:" (2005) 103-136 Journal of Organizational Transformation & Social
[21] John Stuart Mill, Cambridge Univ. Press '*On Liberty'*(1859)13
[22]Anthony Smith, *Concept Of Social Change* repr.(2010) London: Routledge,.

This theory is important to the study because it focuses on the users of justice system to create and improve systems that would work for the benefits of citizens who are the users. This theory advocates for creating reforms through improving the disadvantages of an effective system to make it useful to the users. In respect to the case of managing backlog, the theory recommends a study of ADR and Litigation to make improvements where there are weaknesses and effectively reduces congestions. In this study, Theory of change mainly aimed at managing backlog and creating efficiency in the court system.

1.6.2.1 Theory of Change Critiques

Mathew Forti posits that despite the promising results from the theory of change, the theory has its shortcomings; among the shortcomings of the theory include tendency of the theorist to confuse accountability with hope. Forti explains that while organizations may be obsessed with creating change most of the time, the users of the theory mistake what they hope to achieve with measurable outcomes that institutions should be accountable[23]. Another weakness noted by the critiques postulates that the theory focuses so much on the internal factors of change and overlooks the possible effects from external factors.

1.6.2.2 Strengths of the theory

The theory of change provides framework that consultants' agencies and public institutions may use to adjust the system and improve efficiency. Despite the critiques, the theory is still relevant in adjusting organizations and creates desired results to stake holders.

---

[23]Yolles and Frieden, *"Information Theory*:" (2005) 103-136 Journal of Organizational Transformation & Social

1.6.3 Theory of Procedural Fairness

Procedural Fairness theory was established, verified, and put into practice by Tom Tyler and his colleagues over a period exceeding 25 years ago. The approach examines the procedures and applications of the rule of law in administering justice[24]. The theory has been popular among policymakers and politicians in the attempt to improve community relations in the United States. Tyler and his colleagues expended efforts to empirically test the theory over different domains such as obedience to the law, dispute resolution, and organization behavior. The approach examines the legitimacy of decisions based on the rule of law. The theory has been used to criticize the elements of ADR in solving disputes[25]. It advocates for litigation while speculating that alternative means of resolving conflicts may seek to create 'harmony' through exploring the explanation over disputes or request for an apology for the victim which in theory leaves the nuanced concern of the faulty application of the law. This theory is essential to this study, as it will shade light on the flaws of ADR and the strengths of litigation in settling disputes. The study considers the elements of litigation that are desirable when seeking justice and question the scenarios when these elements can work for ADR in Kenya.

1.6.3.1 Critiques of the theory

The most renowned critiques of procedural fairness theory are Lind and Tyler. These two scholars posit that the theory is more focused on the outcomes of an event and overlooks behaviors and

[24]John Hagan and Valerie Hans, "*Procedural Justice Theory And Public Policy*"(2018) An Exchange", Annualreviews.Org
[25]Brunsdon-Tulley'*There is an 'A' in 'ADR'* (2009) 28 (2), pp. 218–36 Civil Justice Quarterly,.

motives of individuals who rush to courts over disputes. Lind and Tyler also demonstrate that theory calls for means, which are costly and time consuming in administering justice[26].

Despite critiques, Procedural fairness is a vital theory in examining the processes and procedures used in solving conflicts and creating harmony. The theory will underpin reliance on ADR as means of settling dispute without overlooking the application of the rule of law.

1.7 Research Methodology

1.7.1 Research setting

Study of case disposal rate was carried out in Milimani High Court, Commercial Division. The court handles commercial matters involving huge amounts of money in Nairobi County, which is the headquarters of most investment companies and government institutions.

1.7.2 Data collection method

The first part of the study was on desk research that examined information available in books and journals and other academic information available.

The second part of the study collected information through interview. The researcher intended to collect data from the Deputy Registrar commercial division. Data collected from books journal, newspapers, reports and other internet sources provided information relating to nature of ADR system and its ability to manage case backlog in Kenyan Judiciary. Besides collecting and analyzing data from the above Court, analysis of data collated from performance Management and Measurement Directorate (PMMD), which gave general overview of case backlog in Kenya.of the Judiciary a directorate mandated to monitor performance of all Courts and judicial Officers in the

[26]Jeongkoo Yoon, "*Fairnes Issues And Job Satisfaction Among Korean Employee'* (1996): 121-143. Social Justice Research

country was undertaken. The information from PMMD gave insight into crucial information such as case disposition rates the nature of backlog and, the number of cases still awaiting judgment, the number of cases referred to litigation from ADR, the amount of money released back to the economy from litigation and the amount of money still held by litigation. The study intended to find and fill gaps that limit access to justice. This was possible by use of qualitative research. The records from PMMD informed the basis of examining the authenticity of information from desk research. The study interviewed persons of interest in case of managing case backlog. Beside Deputy Registrar of Milimani High Court commercial Division, other selected respondents interviewed were members of the Chartered Institute of Arbitrators office, lawyers, litigants and a senior KRA official. All the institutions and persons targeted for the interview have crucial and reliable information that build on testing the hypotheses of the study. The perceptions of the selected audiences are also critical in understanding credibility of the current ADR system.

1.7.3 Data Analysis

The study relied on content analysis to decipher meaning from information gathered from the field.

The researcher undertook Content analysis in two levels:

i) At Manifest primary level, the understudy provides an account of the data in detail without attachment of theories behind the results.

ii) At the potential level of analysis, the study offers an interpretation of information. At this stage the understudy analyses responses while discussing what respondents implied or inferred. The steps in analysis provide useful data that will give the audiences of this study meaningful information.

1.8 Literature Review

Literature on case backlog is limited. This section of the paper will examine available literature in both Kenya and other jurisdictions. Maya Gainer detailed how the Constitution of Kenya 2010 gave judicial reformers opportunity to clean up the Courts in order to earn people's trust. He talked of massive case backlog, which resulted from shortage of staff, corruption, and poor case management system among other factors[27].

He outlined measures taken by the Judiciary, which began with formulation and launch of judicial transformation framework (JTF).[28]JTF placed access to justice as its first pillar. It identified reasons for delay in disposal of cases and detailed mechanisms to be put in place to ensure effective and efficient disposal of Court matters. The research looked at internal reforms in the Judiciary. Reforms in the Judiciary have raised the level of confidence in the Judiciary resulting in many cases being filed. Despite recruitment of more judicial Officers by JSC, the Judicial Officers cannot dispose of cases as fast as is expected. ADR mechanisms are intended to sidetrack people from Courts but not many are ready to embrace ADR. The paper will inquire into gaps in the ADR mechanisms currently available.

The current CJ David Kenani Maraga launched blue print for sustaining Judiciary Transformation (SJT)[29]. SJT detail service delivery agenda between 2017 and 2021. The plans as per SJT is to clear case backlog in two years. It shows status of backlog and way forward[30].It recognizes that following implementation of JTF, pending cases have reduced from one million in 2010 to 530,000

[27] Article on case study by ISS, research contributed and editing by Caroline Jones
[28]Judicial Transformation framework launched by CJ Willy Mutunga In May 2012
[29] SJT Launched on 31st January 2017
[30] SJT Chapter Two

in 2013. This was achieved as a result of expansion High Court stations from 16 to 38 and 2 High Court sub registries; the number of Judges rose to 128 and Magistrates to 436.SJT is in the process of implementing recommendations consolidated by committee formed under JTF .Use of ADR to resolve disputes is recognized but the challenge as observed above, is reluctance by advocates and litigants to embrace ADR. The study seeks to find recommendations to bridge this gap.

Dr. Muigua Kariuki examined whether ADR is categorically substitute technique of managing conflicts for Kenyans. Ideally, Dr. Muigua hypothesized that if ADR would complement the court system which guarantees justice to particular conflict,"[31]then Kenyans will realize its efficiency. In the study, DR. Muigua concludes that, it is not straightforward to conclude whether or not ADR is really an alternative. Instead, he highlights that ADR will play a key role in the comprehension of accessing justice without delay in the Kenyan context[32]. In this regard, if citizens find justice through the ADR mechanisms, the process will no longer appeal as alternative but the right path of justice within the Kenyan Judiciary[33]. The conclusion from Dr. Muigua paper postulates that Kenyan justice system perceives ADR as an alternative different from Justice System. The study contributes so much in the subject of ADR and how Kenyans should perceive ADR to realize its benefits. However, this study mainly focused on the perception of people towards ADR without extending an assessment that leads to the perception highlighted in the study.

Another study by DR. Muigua titled "ADR": "The Road to Justice in Kenya"[34]. In the paper, Dr. Muigua explains that despite the realization of right to Justice (international and local level), the

---

[31]Kariuki Muigua, "ADR. *The Road To Justice In Kenya*" *2014*, 1-40 ciarb_conference presentation
[32] World Bank Group, *alternative dispute resolution guidelines* (2016)
[3333]Sandra Hale, '*Approaching The Bench*: Teach the Magistrate And the Judge How To Work ly With Interpreters (2015): 163-180', *Monti. Monografías De Traducción E Interpretación*, no. 7,
[34]Kariuki Muigua, "ADR:*The Road To Justice In Kenya*" *2014*, 1-40 ciarb conference presentation

current available legal and institutional frameworks are not sufficient in realization of` these rights by all persons. The study considers philosophical foundations and concepts of justices. The theories used in the study also identify the components of Justice that must be realized to fit the definition of justice. The paper gets to the height of evaluating litigation and ADR mechanisms to identify their effectiveness in actualizing justice and how persons may enjoy justice from these mechanisms. The Discourse by Dr. Muigua is another noteworthy contribution that must not be negated in the process of establishing an efficient Justice system. This study also forms a basis for assessing the Justice ingredients of ADR. In doing so, the study will compliment Dr. Muigua's work by inquiring whether the component of Justice is lacking in the current ADR. The assessment will answer the question on whether current mechanism of ADR has all the required components for realizing Justice.

Makau James A., inquired into factors influencing management of case backlog[35]. Court rules and procedures are among the factors he identified as causing backlog in the Judiciary. Among his recommendations are recruitment of additional staff by judicial service commission and use of technology to manage Court record. Use of ICT is in the process of being piloted. The backlog has however increased despite improvement in Court infrastructure and recruitment of more Judicial Officers. This study will go further to find reasons for the increase despite factors he identified being addressed.

California practicum[36]analyzed possibility of conflict between right of access to justice and property rights while implementing Rent–a–Judge system to reduce case backlog. Reason being

[35]Makau, James A. *factors influencing case backlog in Kenyan judiciary*. (2015)cases within Meru and Tharaka Nithi countries

[36] California law in both state and (VOL 14). 2014

that, once a referee is appointed on agreement of parties or on Courts own volition, the Court will not be involved until conclusion of the dispute: The system is criticized for being surrounded with secrecy and lack of proper record for scrutiny by public thus contravening the long standing common law tradition and legal provision for proceedings to be conducted in public[37].This is worsened by provision for agreement for selection of referee by parties who may agree to exclude pubic in the same agreement.[38]Courts have held that trial is a public event[39]. Closed trials have the affinity to breed misgiving of partiality, uncertainty that in turn bring forth contempt of the law.

A perusal of contribution of Geoff Williams a free-lance journalist[40], indicate that, private Judges have the same duties and legal authority that Judges in public Courthouses have. He added that, their rulings could be appealed unlike those of a professional mediator or arbitrator. He however criticized the secrecy surrounding private judging process. He added that emotive cases like divorce might require decorum and formality of Courtroom to command seriousness of the issues involved[41]. He cited the ability to select an arbiter rather than random allocation as positive effect in family matters like divorce [42]and inheritance.

Whereas previous studies have delved in assessing the problems with case backlog and advantages of ADR, there is still deficiency of literature concerning the effectiveness of ADR in managing case backlog. There is need for an academic data that would assess the nature of ADR in Kenya and give valid information as to why the system has not been effective.

---

[37] CAL CIV PROC CODE S 124.
[38]HARVI *The California Rent-a-Judge Experiment: constitutional and policy considerations* (1981)
[39] Craig v Harney (1980) 555, 448 U.SUS &Richmond Newspapers,Inc v Virginia
[40]Geoff Williams, US News 18 July2013
[41] commissioner of Assize Act LOK s 4
[42] Randall Kessler, a divorce attorney in Atlanta and a recent chairman of the American Bar Association Family Law Section.

This study took cognizance of legal issues posed by the system in some countries. The data collated informed recommendations that will lead to promotion of use of ADR to resolves disputes. The result is aimed at eradicating case backlog without limiting rights of public or parties involved.

1.9 Scope and Limitations of the Study

This paper acknowledged the fact there are many factors affecting Constitutional requirement for effective and efficient trial as evidenced under literature review. The scope of the research limits to case backlog and in particular gaps in ADR mechanisms. Empirical study was conducted in one court namely Milimani High Court Commercial Division. The Court was chosen for study because it is the only High court Division in Nairobi County, which handles commercial related disputes involving huge sums of money; Nairobi being headquarters of Kenya, all public institutions and most private business entities have their headquarters located in the city thus key decisions of the corporate entities and government bodies are made there. As far as the other Courts are, concerned, secondary data will be obtained from the PMU for general analysis.

1.9.1 Research Hypothesis

The research is premised on the following assumptions;

1. That it is only through the main stream Court systems that justice can be achieved.
2. That the general public are not aware of how ADR system works

1.10 Chapter Breakdown

This study has five chapters. Chapter one introduces the paper while providing the background, the statement of the problem, a review of collected works, and the methods employed in undertaking the study. Chapter two concerns the legal, policy and institutional framework for ADR in Kenya. Chapter three gives an overview and nature of ADR mechanisms in Kenya. Chapter four

present, interpret and discusses the findings while highlighting challenges experienced in utilizing ADR mechanism; strengths and weakness of ADR as per the analysis of the study. The discussion will show effectiveness of the mechanism. Finally, chapter five highlights findings from the study, and will discuss conclusion and recommendations.

CHAPTER TWO

2.0 LEGAL AND POLICY FRAMEWORK FOR ADR MECHANISM IN KENYA

2.1 Chapter Introduction

According to Dr. Kariuki Muigua, Alternative Dispute Resolutions mechanisms have been used extensively in the African systems as the ideal means of dealing with problems and reconcile situations[1]. As far as 2010 when Kenya passed a new constitution, different institutions took reforms aimed at making the elements of the new constitution effective. The Judiciary on its part is, in addition to other initiatives, finding a way to guarantee entrance to attainment of productive, powerful, speedy and affordable[2]justice. This chapter relates to the legal, policy and institutional framework for dispute resolutions.

2.2 The Legal Framework guiding ADR in Kenya

2.2.1 The Constitution of Kenya 2010

In Kenya, the constitution is the supreme law[3]. It recognizes the use of ADR and has made provisions that must be embraced by any formal justice process. Courts and tribunals created by constitution or any other law have a responsibility of giving a fair hearing of cases within a reasonable time and ensure that there is always inclination towards substantial justice over procedural justice. The constitution also requires that courts and tribunals promote as well as

---

[1]Muigua Kariuki. "*Settling Disputes through Arbitration in Kenya*,"(2012) Glenwood Publishers, Nairobi. Glenwood Publishers;

[2] Riley Harvill, "*The ADR Procedures Act"*(1988): 97-102TACD Journal.

[3] Article 2 constitution of Kenya 2010.

encourage reconciliation, arbitration, mediation among other dispute resolution alternatives in order to settle disputes. In the ten constitutional commissions that have been created by the constitution, it is required that they entrench ADR mechanisms in their structures[4]. Further, the constitution provides that procedures used in settling of inter-governmental dispute shall be provided in the national legislation. Although these provisions are not directly linked to the purpose of credit information sharing, they are an indication that ADR is a recognized way of resolving disputes at all levels. The basis of the recognition of ADR by the Constitution is to help in validating alternative means and processes that are useful in providing justice to Kenyan citizens[5]. Nevertheless, Article 159 (3) does not encourage the use of old-fashioned disagreement resolution means in situation that

(i) contravenes the Bill of Rights;

(ii) is offensive to justice and morality or brings results that are offensive to justice or morality; or

(Iii) is inconsistent with any of the written law or the constitution.

2.2.2 The Civil Procedure Act

The civil procedure Act[6]contains the practical law and exercise in civil courts in Kenya. ADR is a viable avenue that enhances access to justice as recognized in the Civil Procedure Rules

[4]Muigua Kariuki. "*Settling Disputes through Arbitration in Kenya*,"(2012) Glenwood Publishers, Nairobi. Glenwood Publishers;.
[5] Article 159 of the Constitution
[6]Chapter 21 Laws of Kenya(LOK)

2010. The rules introduce amendments whose aim is to ensure "just, expeditious and proportionate resolution of civil disputes"[7]. The ADR mechanisms are explored in the rules. One of the key dispute determination mechanisms in line with ADR is mediation. Mediation Accreditation Committee is established under section 59 A of the Act[8] whereby the committee is expected to determine the certification criteria of mediators, and it should also propose the rules for the mediators' certification[9].

2.2.3 The Statute Law Act of 2012 (Miscellaneous Amendment)

The Act introduces provisions that lay a foundation from which the judiciary can approach ADR. The amendments introduce establishment of the High Court Rules Committee."[10] Kenya Bankers association is also represented in the committee. These developments have led to a greater opportunity for the institutionalization of ADR whose aim is to ensure a change in the manner in which civil disputes in Kenya are addressed. These provisions unavoidably require that an appropriate institutional structure be introduced such as the CIS dispute resolution mechanism, which has also been proposed.

2.2.4 The Banking (Credit Reference Bureau) Regulations 2008

There is no provision of a comprehensive dispute resolution mechanism in the 2008 regulations as the regulations apply only to institutions that are licensed by the Central Bank of Kenya (CBK) and leaves out all the other consumer credit providing agencies[11]. The regulations are made in

---

[7] Article 159 (2)(c)of the Constitution
[8] Supra no.48
[9] The Constitution, Article 189 (40
[10] World Bank Group, *alternative dispute resolution guidelines*, page 44, Available at *http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf*
[11] "Changes around Credit and Banking Regulations." Journal of Money, Credit and Banking 40, no. 8 (2008). doi:10.1111/jmcb.2008.40.issue-8

reference to the Banking Act sections 31(3) and (4) and 55(1) that deals with the publication of information falling under part VI of the Banking Act. This section concern is on information and report requirements by institutions that are licensed by the Act.

This section was never, meant for dealing with matters involving bankers and their clients. Neither does this section deals with establishment of Credit Registered Bureaus (CRBs). Sub section 3 and sub section 4 of section 31 thus seem to be misplaced. Therefore, the regulations stipulated here should be a subject to substantive amendment in the Act. The regulations on credit reference are therefore weak, as its foundation does not address all matters related to credit disputes. It is therefore liable to challenge and is likely to interfere with ADR processes

2.2.5 The Arbitration Act 1995

The Act requires that parties that have interest in arbitration to formalize an arbitration agreement in writing. Any parties that have a dispute can therefore enter into such kind of an agreement[12]. This Act has been a guide in the arbitration practice in Kenya and realistically, there are expectations that other ADR forms will be integrated in the Act, as there are new developments in the legal framework. In the practice, "courts do not entertain litigation arising from agreements with Arbitration clauses before arbitration process is first attempted"[13]. From the emerging trends, there is a formal recognition by the legal framework that ADR lays a clear foundation for the creation of structures such as the creation of ADR Mechanisms. These mechanisms will enhance collaboration with the judiciary which is essential. Thus, secure the commitment of the judiciary to support the recommended framework. By doing this, "consumer credit providers can have a

[12]"Costs of the Arbitration." *The Arbitration Act 1996*, 2014, 291–316. doi:10.1002/9781118853412.ch11.
[13]Kenya News Agency, "Judiciary to Recruit More Judges to Ease Backlog Cases", Kenya news.go.Ke, Last modified 2019, http://www.kenyanews.go.ke/tag/adr/.

legitimate expectation that courts will decline to consider and determine cases that have been filed without first submitting to the provided ADR mechanism".

2.2.6 Commission on Administrative Justice Act, 2011

Section 3 creates the Commission and gives it the directive under section 8 to perform various roles. Under section 8 (f), the Commission has an obligation to collaborate with public institutions in a bid to endorse ADR methods in resolving complaints pertaining to public organization. In this regard, an ADR method allows the Commission to examine disputes and the most suitable choices for resolution. The Commission has been active in encouraging the use of ADR mechanisms more so in handling disagreements between different State and Constitutional organs[14].

2.2.7 Income Tax Act Cap 470

Dispute resolution frameworks in line with tax revolves around tax charges, imposition of penalties, assessments, refusal to grant allowances and deductions, interpretations of the provisions of the Act, and where there is a challenge to administrative decisions that commissioner made under the Act. Income Tax Act is among the productive frameworks that have led to recovery of more than Six Billions owing to disputes resolved through ADR in a period less than two years[15]. KRA reports that more than 35 billion were caged courtesy of tax disputes before the ADR frameworks were established.

---

[14] Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Op cit. page 34
[15] The National Treasury. Accessed July 30, 2018. http://treasury.go.ke/draft-income-tax-bill-2018.html

The ADR framework provides for the relationship between KRA and ADR processes pertaining tax disputes. The frameworks provides for appointments of persons involved in ADR process[16]. The frameworks also provides for matters with respect to inter alia, independence and the integrity of ADR facilitators. However the rules of engagement are subject to the best interest and standpoints of concerned parties with the help of the appointed facilitator. The views must also not contravene the provision of the law which means that the parties are in no position to breach tax laws in their agreement. There are clear policies and statutes for the application of ADR in solving tax disputes as provided in article 159 of the Kenya's constitution. ADR is likely to play a crucial role in tax compliance.

2.3 The Policy Framework guiding ADR in Kenya

To date, there are no detailed standards as well as an integrated framework that can be used in governing dispute resolution in Kenya. However, the most recent developments recognize the use of ADR as one of the means through which disputes can be dealt with without necessarily using litigation. Inference can therefore be made from ADR policy position from the legislative and national frameworks, which have been adopted at various levels based on their application. Inference can also be made from judicial and finance sectors reforms.

2.3.1 Justice sector policy initiatives

In 2003, the GJLOS Reform Program was initiated in Kenya and thus justice reforms have been ongoing. GJLOS is led by the Kenyan government as a reform initiative, which aims at giving

[16]Changes around Credit and Banking Regulations." *Journal of Money, Credit and Banking* 40, no. 8 (2008). doi:10.1111/jmcb.2008.40.issue-8

citizens better governance mechanisms, justice systems, law and order[17]. The programs aims at enhancing access to justice for all and this mission of achieving justice can be done by use of ADR.

In the Kenya vision 2030, ADR promotion has also been provided. The goal of the political pillar in 2012 is enacting and implementing the policy, legal and institutional framework that are important in promoting as well as sustaining fair, equitable and affordable access to justice. The pillar also aims at ensuring a perfect reflection of ADR principles. The specified strategies in this pillar are inclusive of ensuring an increase in availability of service and accessibility to justice. ADR is one of the means through which justice can be accessed. To improve the business environment, credit information sharing is important and therefore litigation arising from grievances stemming from CIS could reverse the strategy route sought by Vision 2030

2.3.2. Financial sector policy initiatives

The blue print in the Kenya vision 2030 is "to be a world class financial service sector able to mobilize savings to fund investments requirements of the country"[18]. In 2012, the flagship project was to make Nairobi the leading international financial service center, able to compete with similar financial centers in western financial sectors." The main is to ensure that there is stability and efficiency in the sector as well as to incorporate financial system integrity. In the financial sector, its efficiency can be hindered by the long complicated procedures in court in case a dispute has arisen. Since Credit information sharing is part of the essential input in financial infrastructure, it

[17]The World Bank Groups, "Justice Reform", World Bank, Last modified 2019, http://www.worldbank.org/en/region/eca/brief/justice.
[18]Kenya News Agency, "Judiciary to Recruit More Judges to Ease Backlog Cases", Kenya news.go.Ke, Last modified 2019, http://www.kenyanews.go.ke/tag/adr/.

is therefore important that the gains that have been made under the initiative to be protected through the use of effective ADR mechanisms in order to address dispute that arise from CIS disputes

2.4. Institutional Frameworks

In March 2014, the retired Chief Justice Dr. Willy Mutunga made a move to gazette a committee of Alternative Justice System. That move marked the entry of conventional means where judiciary could explore court linked mediation programs for settling disputes. According to report by Dr. Willy Mutunga, the program was to be first introduced at the family and commercial divisions of the high Court at Milimani before rolling to the rest of the country[19].

Various legal policies and institutional frameworks were established to support the program. Article 159 of the Constitution lays out the legal foundations of the law by necessitating principles to guide the judiciary so that the judiciary is guided by principles while exercising judicial authority. It introduces Alternative means of dispute resolution, which include negotiation, mediation, conciliation, traditional dispute resolution and arbitration among others. Ongoing improvement that impacts on the judiciary's expedition to hold mediation as a dispute resolution mechanism are underpinned on the amendment of the Civil Procedure Act, which also established the Mediation Accreditation Committee (MAC). The Committee was established under Sec. 59A of the Civil Procedure Act (Cap 21) Laws of Kenya[20]. The members of MAC who were gazetted by the retired Chief Justice Willy Mutunga and drawn from the members of the judiciary and from

[19]The Star Newspaper, "Willy Mutunga: All Is Well until You Fight Graft", The Star, Last modified 2019, https://www.the-star.co.ke/news/big-read/2016-04-18-willy-mutunga-all-is-well-until-you-fight-graft/.
[20] Constitution of Kenya Sec. 59A of the Civil Procedure Act (Cap 21)

other legal stake holders such as Chartered institute of Arbitrators, Kenya Bankers Association and the central organization of trade unions.

Section 59A (4) of the constitutions empowers MAC to perform the following duties;

a) to determine the criteria for certifying mediators
b) to enforcing codes of ethics for mediators as required
c) to maintaining the register of qualified mediators
d) to set up and organize suitable training programs for mediators[21]

[21] The Kenyan Constitution Section 59A (4)

2.5. Institutions in the ADR

2.5.1 Dispute Resolution Centre

Dispute resolution Center is a registered institution with an objective of settling disputes in Kenya through ADR means[22]. The institution offers arrays of ADR related solutions. It is expected that this institution will continue to grow significantly given the recognition of ADR in the Kenya's constitution. The Dispute Resolution Centre is dominantly betrothed in ·Mediation and other ADR activities[23].

2.5.2 Chartered Institute of Arbitrators

The organization is an acclaimed International Arbitral Institution with the headquarters established in London. This institute has branches in several countries around the globe. The office in Kenya was established as early as 1984 as branch of London. This office in Kenya has been established for settling disputes through mediation and other ADR methods. The institute has published regulations on Mediation Arbitration and adjudication. Arbitrators in this institute are governed by the CIArb rules in conducting all the arbitral proceedings**.**

2.5.3 Nairobi Centre for International Arbitration

The capacities of the above named institutions are limited in meeting the demands of ADR as far as management of case backlog are concerned. Even though the law recognizes these institutions, their capacity is secondary to that of court system given that citizens may initiate the process and leave at will. In the entire country, the institutions that train ADR practitioners are still

---

[22] International Arbitration Act No 26 of 2013 Laws of Kenya

[23] Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010,* page 2. Available at *http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf*

limited. Given the population of citizens who are in dire need of the services, the appointed ADR facilitators are likely to be overwhelmed to deal with all the maters that the law permits to be handled by ADR. Even though these institutions offer training to its members, there is need to offer the same course to citizens the same way lawyers and Judges go through a curriculum in public institutions. The institutions are not in a position to offer training to the public the same way law is taught. There is therefore a need train ADR practitioners right from college level.

2.6 Conclusion

ADR is one of the doctrines allowed in exercising judicial authority and therefore a clear indication of its worth. In as much as the Constitution provides the right of accessing justice and even its recognition of ADR. The capacities of the institutions in ADR are limited in meeting the demands of ADR as far as management of case backlog are concerned. Despite the fact that the law recognizes these institutions, their capacity is secondary to that of court system given that citizens may initiate the process and leave at will. In the entire country, the institutions that train ADR practitioners are still limited.

CHAPTER THREE

3.0 OVERVIEW AND NATURE OF ADR MECHANISMS IN KENYA

3.1 Chapter Introduction

The legal foundation for the application of ADR mechanism at the international level for states is in article 33 of the United Nations Charter. It outlines different conflict management methods that parties to a dispute may resort to[1]. It provides that parties shall, first of all seek a peaceful means settling disputes of their own choice"[2]. The concerns regarding the efficiency of national court system in settling disputes across borders has as well led to preference of Mediation or Arbitration by international investors. Dispute resolution through ADR is no longer limited to domestic matters but also expands to the international level especially in cross border transaction contexts[3].

Article 159 (4) of the constitution provides that the law shall provide for ADR mechanisms in settling disputes including negotiations, mediation and arbitration. The provision underpins the ADR applications in Kenya. Below are ADR mechanisms applicable in Kenya's dispute resolutions.

---

[1] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: *http://treaties.un.org/doc/Publication/CTC/uncharter.pdf*(accessed on 8th Aug 2018)

[2]Riley Harvill, "The Alternative Dispute Resolutions Procedures Act: Some Questions Answered About Family Mediation", *TACD Journal* 16, no. 2 (1988): 97-102, doi:10.1080/1046171x.1988.12034334.

[3] Kariuki Muigua, "*Alternative Dispute Resolution and Article 159 of the Constitution of Kenya*" Op cit. page 2; See also Alternative Dispute Resolution, Available at *http://www.law.cornell.edu/wex/alternative_dispute_resolution*(accessed on 3rd Aug, 2018)

3.1.1 Negotiation

Negotiations present a two-way discussion avenue for two disputing parties without necessarily involving third party. This mechanism is an informal procedure, which gives two conflicting parties autonomy over the process. The conflicting parties arrange for meeting to discuss the details of matters giving rise to a dispute to arrive at a mutually acceptable decision[4]. Negotiation is a special mechanism of resolving conflict because it mainly focuses on interest of the conflicting parties and not their position or powers (level of influence). Furthermore, all this mechanism seek is a win-win positions for the concerned parties so that they may have their relationship restored

3.1.2 Mediation

Mediation is a mechanism of conflict resolution and prevention where a third party with limited authoritative decisions facilitates the process. The third party (mediator) does not make decisions like judges or magistrates but facilitate and guide the parties to reach an agreement[5]. This mechanism is useful in many areas when solving conflicts, which include commercial disputes, family disputes, workplaces disputes and violence prevention among other areas. Mediation increases the autonomy of conflicting parties over the decisions and resolution methods. This procedure helps in solving disputes with utmost confidentiality. The position of the mediator is limited to guidance and advisory. Mediation has been gaining grounds in Kenya leading to Court Annexed Mediation.

---

[4]Yilei Wang et al., "Fair Two-Party Computation With Rational Parties Holding Private Types", *Security And Communication Networks* 8, no. 2 (2014): 284-297, doi:10.1002/sec.979.

[5] Article 159 (2) (c) Kenyan Constitution

3.1.3 Court Annexed Mediation

These mediation mechanisms are a mediation process carried under the umbrella of the judiciary. The process is managed by deputy registrar designated as Mediation Deputy Registrar (MDR). It involves a registrar or officer of the court as the mediator. All cases filed after 4th of April 2016 in the above mentioned courts are subjected to screening, which involves reviewing the details of each case and identifying those that are suitable for mediation[6]. Matters that are ongoing before judges may also be referred to mediation at the request of the involved parties or court motion. Once matters have been found suitable for court-annexed mediation the MDR notifies the disputing parties that their case has been referred for mediation.

The MDR will then nominate 3 mediators from the list of accredited meditators and present to the parties who will indicate their preferred mediator. The appointed mediator then notifies the disputing parties of the dates and time for initial mediation. The process is expected to take not more than sixty days from referral date and determination date. However, the period of the mediation is dependent on the commitment of the parties to arrive at an agreement. The confidentiality of information shared during mediation process remains intact and not admissible as evidence in court in the event that the matter is referred for litigation. This provision allows the procedure to work in the best interest of the parties.

3.1.4 Conciliation

Conciliation process has close similarity with mediation; the slight difference being the fact that conciliation provides room for a third party who may propose solution over the dispute. The

[6]Annie de Roo and Rob Jagtenberg, "Mediation On Trial: Dutch Court Judgments On Mediation", *TijdschriftVoor Mediation En Conflict management* 21, no. 4 (2017): 27-46, doi:10.5553/tmd/138638782017021004004.

mechanism is suitable for settling trade disputes, state-to-state disputes as provided in the United Nation (UN) Charter among other disputes. The third party (conciliator) who offers solutions through suggestions may take away the autonomy of the parties in the process of trying to assist the parties to reach a settlement. The third party facilities the process and works to ensure that the disputing parties seat together to settle the issue. In most scenarios, the third party comes in to help the parties in interpretation and applications of statutes[7]. The conciliator recommends a decision to settle the matter. However, the decision is binding only if both parties accept it. The conciliator's role does allow forceful imposition of decisions on the parties. This gives the parties control over the process.

3.1.5 Arbitration

Arbitration is an adjudicative process whereby parties in dispute present their side of the story and evidence to an impartial third party with authority to make binding decisions, which are relevant to objective standards. This process is subject to statutory controls a provision, which has elicited intense arguments as to whether Arbitration is a conventional ADR mechanism or an extension of litigation. Various scholars argue that Arbitration is not within the range of ADR since it entails verbal and or written submissions from parties in dispute followed by the issuance of an arbitral award, which is supposed to be final and binding, nevertheless, the Arbitration Act allow challenge of arbitral award or rulings before the High court. In Kenya, this dispute resolution mechanism is common in commercial disputes.

[7]Marilou Giovannucci and Karen Largent, "Association Of Family And Conciliation Courts Guidelines For Child Protection Mediation", *Family Court Review* 51, no. 2 (2013): 193-194, doi:10.1111/fcre.12019.

Arbitration is more flexible and less formal. Parties agree on the nature of disputes to refer to arbitration, the law applicable, and appointment of arbitrators and venue of arbitration. Timelines are normally discussed and agreed either through exchange of correspondences or in the preliminary meetings[8]. In determining disputes, arbitration is more of a right based approached rather than interest based approach.

3.1.6 Adjudication

This is a dispute settlement means, which involves a neutral third party (Adjudicator) who has to make a fair decision over a dispute within a given timeframe[9]. The process mainly involves contractors. It addresses with power imbalances in contractors' relationships in a manner that allow weaker subcontractors to get a leeway of dealing with powerful contactors. Save for maters transferred to arbitration or litigation, the decisions of the adjudicator over the dispute is binding. Adjudication is effective in settling construction disputes that require solution within a short period. Adjudication may settle dispute but may not necessarily restore relationships between conflicting parties. The choice of third party specialist (adjudicator) is thus crucial because chances of reversing their decisions are low.

3.1.7 Expert Determination

Expert Determination is a procedure where two parties in dispute consult an expert with knowledge or skills in particular subject for an opinion on how the dispute may be determined. The Expert

[8] Kariuki Muigua, Settling Disputes Through Arbitration in Kenya (2nd Edition. Glenwood Publishers Ltd. 2012 Nairobi)
[9] Section 59A of the *Civil Procedure Act*, Cap 21, Laws of Kenya

Determinant approached by the concerned parties then evaluates the dispute and makes a decision. The expert may range from different fields for instance an accountant may be the expert determinant in the case where there is dispute relating to company valuation. This process is gaining currency in the construction companies no matters relating to quantitative and qualitative problems[10].

3.2 Dispute Resolution Mechanisms within institutions in Kenya

While ADR are all the various means of settling disputes other litigation, Industry have a way of settling disputes that is akin to court system (litigation) except that decisions are made by either the chairman or the Tribunal who performs the functions of a judge and make a legally binding decision based the merits of the underlying issues[11]. While the Industrial institutions may function at the diversionary alternative to the court systems, they work together with ADR in managing case backlog in court system. This section will analyze and compare various industrial based institutions (and tribunals) with respect to their function and management of case backlog in Kenya.

3.2.1 Insurance Regulatory Authority (IRA)

IRA is an independent governmental institution created by an Act of parliament to regulate insurance industries in Kenya. This institution does not sell insurance products to the public. The institution was created under the Insurance Act of 2006 cap 487[12].The office of Insurance commissioner where clients are allowed to file complaints is in the same level of the magistrate's

---

[10] Op cit note 113; Patrick M Sanders 'Alternative ADR Mechanisms' (2007) *American Bar Association Labour and Employment Section* accessed on 22nd Aug 2018.

[11]John Mukuna, "Constitution-Making Dispute Resolution Mechanisms: Lessons From Kenya", *Mediterranean Journal Of Social Sciences*, 2014, doi:10.5901/mjss.2014.v5n23p727.

[12]Steven P. Nyoike, "Regulatory Capture and Efficacy in Workers' Compensation", *Journal Of Risk And Insurance* 85, no. 3 (2016): 663-694, doi:10.1111/jori.12183.

court. However, incase complaints pertaining insurance are pursued through IRA it will handle the complaints as filed by the citizen in an informal way. The IRA dispute mechanism is more like ADR mechanisms and goes to the extent of advising complainants whether or not the insurance claims are payable. Since the decision of the IRA is not legally binding an individual may still pursue the case through the Insurance commissioner or court system. IRA may minimize chances of reporting insurance matters to the court; nevertheless its capacity does not guarantee that it will settle dispute reported. It is therefore insufficient in managing case backlog through prevention means.

3.2.2 Cooperative Tribunal

The cooperative tribunal was established to settle cooperative disputes with fairness and justice. This tribunal was established under the "co-operative societies Act, Cap 490 as amended by Act No. 2 of 2004"[13].It has a total of eight members of the board. This board consists of the chairperson and the deputy who are nominees of Judicial Service Commission. The tribunal requires the presence of a chairperson and two other members to form a quorum that hears and determines any matter presented before the tribunal[14].

The cooperative tribunal has strict timelines. Unlike litigation proceedings and other ADR mechanisms, the tribunal is not bound by rules of evidence in making decisions. A party aggrieved by the decision of the tribunal, is at liberty to file appeal in the high court within 30 days. The decision by high court on appeal shall be final.

---

[13]Manuel J. Okwiri, "The Prosecution of Corporations before a Hybrid International Criminal Tribunal", *African Journal Of International Criminal Justice* 2, no. 1-2 (2016), doi:10.5553/aj/2352068x2016002001004.
[14]Jonathan B. Hill, "An Empirical Process P-Value Test When a Nuisance Parameter Is Present under Either or Both Hypotheses", *SSRN Electronic Journal*, 2013, doi:10.2139/ssrn.2334406.

3.2.3 Federation of Women Lawyers (FIDA) Kenya

FIDA Kenya is a women's rights organization, which offers free services to women and children. It has granted legal assistance to over 320,000 women and their children in Kenya for more than 32 years. FIDA handles matters ranging from custody, matrimonial disputes, Work Discriminations, sexual harassments and participation in public positions[15]. FIDA Kenya also conducts trainings and arenas for advocacy that definitely impact on institutional and legal transformations to ensure gender thoughtfulness and responsiveness in Kenya. FIDA works with available ADR mechanisms to provide "quick justice for the indigent woman in Kenya"[16]. In instances where parties are riled due to long drawn litigation processes, they may abandon the court procedures and opt to settle the matter out of court with the consent of a judge. However, in most cases, there could be a perception for biasness towards woman disputant. Given that ADR should be a voluntary matter either one party who perceive impartiality may be hesitant to take the option despite display of explanation from the handbook that may help parties understand the process. Like any other mediators in ADR, FIDA has limited authority and only take up matters based on need of the parties concerned. Their role in settling disputes is limited to guidance and advisory functions. The decision of the procedures relies on the intentions of the parties to settle the matter.

[15]Warren CE, Ndwiga C, Sripad P, et al. Sowing the seeds of transformative practice to actualize women's rights to respectful maternity care: reflections from Kenya using the consolidated framework for implementation research. *BMC Womens Health*. 2017;17(1):69. Published 2017 Aug 30. doi:10.1186/s12905-017-0425-8
[16]FIDA KENYA, "Feedback Sought On Proposed Mandatory ADR Reporting", *Reactions Weekly* 1660, no. 1 (2017): 4-4, doi:10.1007/s40278-017-32969-8.

3.2.4 Media Complaints Commission

"The Complaints Commission is an autonomous arm of the Media Council of Kenya whose obligation is to arbitrate in disputes"[17]. The commission deals with matters in respect of media coverage and the questions regarding the conducts of a journalist. This commission's services are free of charge. Even though the commissions has been handling cases and delivering rulings, the commission has not met the standard set for ADR dealing with disputes to a level that will reduce appetite for litigation in settling disputes related coverage. There is also perception that the commission is not that independent to deliver rulings given that the commission is established and financed by the Media council. This notion this casts doubt on the commissions' ability to render fair and just determination on disputes filed before the commission. However, aggrieved parties may appeal to the High court when not satisfied with rulings made by the commission. It is apparent that the main challenge that the commission encounters is the perception over authority and autonomy to deliver fair and just rule.

3.2.5 Strathmore Dispute Resolution Centre SDRC

It was established in 2012 with objective of promotion of mediation[18]. Through its panel of mediators and arbitrators, SDRC offers top quality Mediation, Arbitration, Med-Arb, and Arb-Med services to individuals, groups, and organizations[19]. Conflicts that may be presented to SDRC

[17]Media Council of Kenya, "Complaints Commission", Media council.or.ke, Last modified 2018, http://www.mediacouncil.or.ke/en/mck/index.php/9-about-mck/38-about-us-7.
[18]Ijeoma Ononogbu, "Transformation of Dispute Resolution in Africa", *International Journal On Online Dispute Resolution* 2, no. 1 (2015), doi:10.5553/ijodr/235250102015002001004.
[19]Nokukhanya Ntuli, "Africa: Alternative Dispute Resolution in a Comparative Perspective", *Conflict Studies Quarterly*, no. 22 (2018): 36-61, doi:10.24193/csq.22.3.

for resolution include contractual, commercial, family, environmental, labor community matters and among others.

3.2.6 Political parties tribunal

The tribunal has the mandate to hear and determine political parties' disputes. The tribunal has five members operating on part time basis. The tribunal only requires three members to make up a quorum who can hear and determine a dispute. The quorum only requires a minimum of one advocate[20]. The tribunal was established to allow political authorities to make decision affecting political parties. Internal disputes in line with nominations are left within the premise of the party to decide.

3.2.7 Tax Appeal tribunals

The process begins after an objection decision is communicated to the taxpayer. The taxpayer or tax representative make a formal appeal to the Tax Appeal Tribunal first before requesting for the ADR process. A formal application is then made to the Tax Appeals Tribunal and forwarded to Corporate Tax Dispute Resolution Division (CTDR). CTDR office is responsible for facilitating the ADR procedure between the Taxpayer and the Commissioner. Settlement of the dispute within 90 days of date the Tribunal permits the settlement - Section 55(1) of the TPA[21].

3.2.8 Civil Aviation Appeals tribunal

The tribunal hears and determines any appeal against the orders of the authority according to the provisions of the Act[22]. The tribunal hears and determines appeals or complains arising from;

---

[20] The Judiciary Website, "Political Parties Disputes Tribunal – PPDT – The Judiciary Of Kenya", Judiciary. go.ke, Last modified 2018, https://www.judiciary.go.ke/political-parties-disputes-tribunal-ppdt/#1533114581955-66ab24a3-a2e0.

[21] Tribunal permits Acts - Section 55(1)

[22] Civil Aviation Act No. 21 of 2013

- Refusal to grant licenses, certificates or any other transfer of licenses under this Act
- Imposition of conditions, limitations or restrictions on a license under these regulations
- Revocations, suspensions or variations of licenses under this Act
- Amount of money required to be paid as a fee under these regulations

The tribunal consists of four officials: The chairperson who is nominated by the judicial service commission. The chairperson must also be a qualified as the High Court judge. Among the other member of the tribunal includes three individuals who are also recruited through competitive processes. The tribunal only requires three people to form a quorum that can determine any appeal; that is the chairperson and any other two officials. The composition of the tribunal is sufficient however given that that the tribunal has only one chairperson who must be part of the quorum, chances that a case may be delayed while waiting for chairperson are high. This is another gap, which leads to forwarding appeals for litigation especially if there are several appeals to the determined by the same tribunal.

3.2.9 Small claims court

The court was to be established to handle civil disputes, cases, and cases involving claims less than KES 200,000[23]. The courts are designed to reduce backlog of cases. Instead of Magistrates and Judges, the adjudicators would preside over cases. The jurisdiction of small claims courts would be limited to their geographical areas. Though the pecuniary jurisdiction of small claim court is

[23]Robert L. Spurrier, "The Trial Court With Small: Small Claims Adjudication In Oklahoma", *Southeastern Political Review* 10, no. 2 (1982): 59-83, doi:10.1111/j.1747-1346.1982.tb00048.x.

limited to KES 200,000, Section 12(4) empowers the Chief Justice to review that limit to any amount he thinks fit via a Gazette notice. The small claims court would reduce case backlog by ensuring that small claims are dealt with at constituency level leaving Magistrates and Judges to deal with other issues[24]. However, despite the enactment small claims court Act No.2 of 2016(SMCA), the Act is yet to be operationalized. Until then, it means other forms of ADR mechanisms will be utilized to manage case backlog.

[24] The Kenyan Constitution Section 12(4)

3.3 Overview of select ADR mechanisms across the globe

ADR is slowly developing and gaining mileage in African countries. According to the Independent Development Fund of Uganda"[25], ADR also worked successfully in Rwanda after the genocide where the communities elected judges to preside over cases in the Gacaca courts. This section will analyze the ADR mechanisms in other jurisdictions.

3.3.1 The United Kingdom

The Civil Procedure Rules (CPR), which was implemented on 26 April 1999, and the new English Arbitration Act 1996 marked the two most important legislative reforms in England. The CPR provides enormous support for utilization of ADR in England. The reforms were driven by several groups, which include lawyers involved in commercial litigation, groups of scholars and the courts. The court of Appeal has also explained the importance of disputing parties to solve their issues through ADR first before opting for litigation. Most remarkably, "in Cowl v Plymouth City Council, Lord Woolf, the architect of the CPR, himself delivered a clear and unconditional reminder to those involved in public law cases to remember that trial litigation should be the last resort"[26]. The subsequent ADR systems that currently exist in England are:- Central London County Court, Commercial Court, Court of Appeal, employment tribunals, and the family law disputes, Patents County Court, Technology and Construction Court. Direct negotiations and mediations are among the most common techniques in the UK. However, The ADR mechanism is so apparent in England such that the users of ADR system are no longer concerned with resolution

[25]IDF Uganda. "The Success of ADR Mechanism | Independent Development Fund (IDF)". Idf.Co.Ug, Last modified 2018. http://idf.co.ug/content/successstory/successes-of-the-alternative-dispute-resolution-mechanism/.
[26] Mistelis, Loukas (2003) "ADR in England and Wales: a successful case of public private partnership," ADR Bulletin: Vol. 6: No. 3, Article 6. Available at: http://epublications.bond.edu.au/adr/vol6/iss3/6

of the dispute rather than the process or technique used. Apparently, ADR mechanisms are popular in UK and disputes are settled without strict application of the law.

3.3.2 United States (California)

The courts in New York, Los Angles, San Francisco, and Houston are facing the most significant backlogs, data show[27].The United States operate a multi option ADR programs that aims at encouraging litigants and provide disputing parties with sophisticated assistance, which identifies the mechanism that is best suited for specific case. Majority of civil cases are assigned automatically to the ADR multi-option program for filling[28]. Under this program all litigants acquire ADR handbook and must go through all the available ADR processes and select at least one of the non-binding techniques available in the courts. The procedures include, Early Neutral Evaluation (ENE), Mediation, "Settlement Conferences with a Magistrate Judge". The parties are then given 21 days before the initial case management process to certify that they have read the ADR handbook after which parties select one ADR mechanism to submit their case. After deadline and none of the parties have communicated, Legal staff in charge of ADR organizes for phone conference to help the parties select available ADR mechanism which suitable for their case.

3.3.3 Nigeria

A survey in the Nigerian Justice system showed that delay occurred in every stage of legal proceedings[29]. Among the cases that experienced delays from the survey, include criminal, contract and property cases. The surveys also show that the average time for case dispositions is

---

[27]Alexandre Baird, "Monitoring Consumer ADR in the EU: A Critical Perspective", *SSRN Electronic Journal*, 2018, doi:10.2139/ssrn.3160800.
[28]Phyllis J. Hamilton, "Overview of the ADR Multi-Option Program | United States District Court, Northern District of California", Cand.Uscourts.Gov, Last modified 2018, https://www.cand.uscourts.gov/overview.
[29]Obianuju Osude et al., "Public Perception Survey Report on the Nigerian Criminal Justice System", *SSRN Electronic Journal*, 2014, doi:10.2139/ssrn.2526720.

between 6- 10 years. On the other hand, it took at least two years for the Supreme Court to hear an Appeal the court of Appeal. Ideally the delays would mean that an accused person would spend up to eight years before they are brought to trial. From the survey the causes of delays included corruption, congestion which also emanates from Nigeria's large population, inadequate resources in the judiciary, strikes among other factors. Nigeria introduced measures that were meant to curb the issues. The measures included;

Adoption of new High Court rules and practice directions: Summit stake holders in Administration of Justice reviewed the rules that would enhance reduction of delays by the end of 2003.

Dismissal of corrupt judges: The judicial service commission of Lagos appointed 26 judges who also took a week training program. The initiative recorded a notable difference in Nigeria.

Introduction of Citizen Mediation Centers: Other than adjustment the justice program Nigeria introduce five mediation centers where 38 trained mediators would settle dispute that would otherwise take long to settle in court.

3.3.4 Uganda

Uganda is slowly developing the perception of ADR. The country is moving away from the old concept that litigation is more effective for settling disputes than ADR. However, there is still much to be done to get to the point where ADR will be popular than litigation in settling disputes. Business concerns are opting for ADR mechanism instead of litigation processes. The theory at work supporting ADR in Uganda posit that businesses prefer to protect their interests, contacts and reputations when settling disputes rather than choose the lengthy, confrontational and embarrassing processes that comes with litigation. Legal training in Uganda is slowly taking the route to modern means of involving ADR.

CHAPTER FOUR

4.0 PRESENTATION, INTERPRETATION AND DISCUSSION OF THE FINDINGS

4.1 Chapter Introduction

This chapter covers the presentation, interpretation and discussion of the findings. The purpose of this study was find reason for continued rise in cases filed/registered in Court despite existence of ADR mechanisms anchored in Constitution of Kenya 2010. Study of case disposal rate countrywide was done by collecting data from director of performance, management and measurement Directorate (PMMD). In respect of specific court's performance, the researcher interviewed and obtained data from Mediation Deputy Registrar Milimani High Court, Commercial Division. The court handles commercial matters involving huge amounts of money in Nairobi County, which serves as headquarters of most investment companies. The study examined programs which have been implemented in other jurisdictions globally and regionally to address case backlog.

The information from Mediation Deputy Registrar gave insight to crucial information such as ADR success rates, the number of cases still awaiting judgment, the number of cases referred to litigation from ADR, the amount of money released back to the economy from litigation and the amount of money still held by litigation. In addition to the data collated, books, journals, newspapers and other internet sources provided information relating to nature of ADR system and its ability to manage case backlog in Kenyan Judiciary. The researcher also interviewed key stakeholders in the justice system whose input will go a long way in ensuring effectiveness of ADR as process of settling disputes. Among the selected respondents to be interviewed questions were The Chief Justice, the Solicitor General, director PMMD, Mediation Deputy Registrar Milimani High court commercial Division, a committee member of Chartered Institute of

Arbitrators office, lawyers, and senior official KRA. All the institutions and persons targeted for the interview have crucial and reliable information that built on testing the hypothesis of the study. The perceptions of the selected audiences were also critical in understanding credibility of the current ADR system. For respondents who the researcher was not able to interview due to busy work schedule, information from reports and PMMD answered the research questions.

4.1 Data Analyses and Presentation of the Findings

The respondents

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Lawyers	5	22.7	23.8	23.8
	Litigants	12	54.5	57.1	81.0
	The Chief Justice	1	4.5	4.8	85.7
	The Solicitor General	1	4.5	4.8	90.5
	KRA office	1	4.5	4.8	95.2
	CIArb	1	4.5	4.8	100.0
	Total	21	95.5	100.0	
Missing	System	1	4.5		
Total		22	100.0		

Table 4.1 Showing the Statistics of the respondents

As presented in Table 4.1, Five Advocates from select law firms, 12 litigants and other key stakeholders in the justice system were interviewed. The total number of respondents was 21. Since this was a qualitative study it requires no sample however scholars recommend that "failure to reach data saturation has an impact on the quality of the research conducted and hampers content validity"[1].According to Nelson 2016 "Data saturation is reached when there is enough information to replicate the study when the ability to obtain additional new information has been attained, and when further coding is no longer feasible"[2].However when saturation state is uncertain within confined environment like this study Nelson recommends a multiple of ten as an optimal measure for saturation. Other than the sources dealing with records the respondents for this study was 21 which were more than the recommended and therefore valid to give credible information. The information from lawyers was obtained from law firms, which not only represent the perception of one individual lawyer but that of the selected law firm. The information from the target respondents is also sufficient to replicate this research and provide additional information.

[1] Nicole Ruggiano and Tam E Perry, "Conducting Secondary Analysis Of Qualitative Data: Should We, Can We, And How?", *Qualitative Social Work: Research And Practice*, 2017, 147332501770070, doi:10.1177/1473325017700701.
[2] James Nelson, "Using Conceptual Depth Criteria: Addressing The Challenge Of Reaching Saturation In Qualitative Research", *Qualitative Research* 17, no. 5 (2016): 554-570, doi:10.1177/1468794116679873.

4.1.1 Nature of Case backlog in the Kenyan Justice system

Table 4.2 Showing pending cases within the judiciary countrywide

Court Type	Pending cases as at 30th June 2017			Pending Cases as at 30th June 2018		
	CR	**CC**	**ALL**	**CR**	**CC**	**All**
Supreme Court	N/A	73	73	N/A	95	95
Court of Appeal	1,074	2,313	3,387	1,393	2,812	4,205
High Court	16,888	102,889	119,777	20,329	78,359	98,668
ELRC	N/A	13,723	13,723	N/A	15,733	15,733
ELC	N/A	27,242	27,242	N/A	24,380	24,380
Magistrate Court	167,407	198,726	366,133	198,420	204,219	402,639
Kadhi Court	N/A	3,015	3,015	N/A	3,816	3,816
All Courts	**185,369**	**347,981**	**533,350**	**220,142**	**329,414**	**549,556**

From the above records the number of pending cases keeps on increasing with time. At June 2017, the pending cases were at **533,350;** however by the end of June 2018 the pending cases had increased to **549,556.** The state of case backlog shows that numbers of cases registered for litigation are higher than disposition rate. Within a span of one year the number of pending cases rose by **16,206**. The scenario shows that unless something is worked out within the justice system there will come a time when Kenyans will have no faith in the entire justice department due to the number of cases they have to wait upon. The scenario according to the theory of change suggests that the Judiciary require a change of system to meet the needs of the users (members of public).

Theory of change articulates the underlying principles and suppositions that direct a service provision strategy, which are critical for producing change and improvement. The findings from the Court state of affairs show that the Judiciary department is ripe for change. The second segment of the model of Change includes building a comprehension of the connections among the three center components and communicating those connections explicitly[3].

[3] Anthony D Smith, *Concept Of Social Change* repr., London: Routledge, 2010.

Table 4.2.1 Showing numbers of cases were filed countrywide in the last reporting year

Court Type	Filed cases FY 2017/18		
	CR	**CC**	**ALL**
Supreme Court	N/A	61	61
Court of Appeal	485	1,528	2,013
High Court	11,898	13,151	25,049
ELRC	N/A	5,645	5,645
ELC	N/A	5,834	5,834
Magistrate Court	271,405	78,972	350,377
Kadhi Court	N/A	7,556	7,556
All Courts	**283,788**	**112,747**	**396,535**

As shown by the above table within 2017 and 2018 alone, 396,535 cases were filed. The number is too huge and only shows that Kenyans continue to rush to courts to resolve disputes other than checking for alternative means. The total numbers of case file in 207/2018 alone were more than half of the pending cases by the end of June 2018. Ideally report the statistics shows that not only are pending casing continued to rise but the new cases are being filed at alarming rates. Almost half for the new filed cases are civil cases. So in theory if ADR could handle just half of the civil cases, the number of new pending cases between 2017 and 2018 would be at 0. The model in the

theory of change concerns the Populations (that is who the theory serves), Strategies: what approaches the researcher believes the procedures will achieve desired outcomes, which the institution intend to accomplish. The structure of Change model describes the gap that Judiciary requires to adjust and make the change to fit the population that thirsts for justice.

Table 4.2.2 showing the numbers of cases were disposed of in the last reporting year

Court Type	Resolved cases FY 2017/18		
	CR	**CC**	**ALL**
Supreme Court	N/A	39	39
Court of Appeal	166	1,029	1,195
High Court	8,179	29,503	37,682
ELRC	N/A	3,661	3,661
ELC	N/A	7,887	7,887
Magistrate Court	235,476	77,886	313,362
Kadhi Court	N/A	6,662	6,662
All Courts	**243,821**	**126,667**	**370,488**

A case disposition rate in all Kenyan courts in the year 2017/2018 was recorded at 370,488. The number is slightly lower than all cases filed in the same, which was 396,535. Therefore the difference between registered cases and those resolved in the entire country was 26 047 in the same reporting year. Arguable the rate at which case are filed in Kenyan Courts are higher than disposition rate. This means that to manage the backlog the ADR system should at least process 60,000 cases in every reporting year. Otherwise, delay of justice will always be the case in the Kenyan judiciary.

Table 4.2.3: Showing the number of cases which have been in the system for 5 years and above

Court Type	Over 5 years as at 30th June 2018
Supreme Court	0
Court of Appeal	592
High Court	26,681
ELRC	734
ELC	4,878
Magistrate Court	70,051
Kadhi Court	0
All Courts	**102,936**

1.0

Table 4.2.4 Showing cases have been in court system for over 10, 15 and 20 years respectively?

Court Type	1-3 years	3-5 years	Over 5 years	All Ages
Supreme Court	38	6	0	44
Court of Appeal	1,377	598	592	2,567
High Court	33,380	20,605	26,681	80,666
ELRC	8,079	2,310	734	11,123
ELC	8,986	6,571	4,878	20,435
Magistrate Court	155,627	46,482	70,051	272,160
Kadhi Court	1,151	0	0	1,151
All Courts	**208,638**	**76,572**	**102,936**	**388,146**

The records of all the all the cases that have been in the system all the recorded ages is almost the same as the number of cases that were filed in year 2017/ 2018. Arguably if all the cases were too disposed by ADR in one year then ADR alone should be able to settle as much cases as those reported in one reporting year. The researcher also notes that the number of pending cases has been rising in every reporting year. Which means that if the state of events persist the will be more cases pending in the courts in the coming reporting years. Unless the ADR system comes strong to settle cases without giving leeway for appeal in the Kenyan courts delay of justice will always be the case.

4.2 ADR Facilitations

4.2.1 Qualifications for accreditation of a mediator

The qualifications for accreditation of a mediator are found in section 4 of the Mediation Accreditation standards. Applicants seeking accreditation must;

(a) Possess an undergraduate degree from a University accredited by the Commission for University Education.

(b) Be a current member, in good standing of a Professional body.

(c) Be Certified as Professional Mediator from established Mediation Training Centers.

(d) Attended and completed a mediation course of not less than 40 hours training.

(e) Completed at least 3 Mediation

The qualifications for accrediting mediators is of good standard but not sufficient to match the qualifications of High court Judges. The difference in experience could be the reason Kenyans has little faith on ADR as means to settle disputes.

4.2.2 The criteria for screening matters in mediation

The criteria for screening matters in mediation are found in the Judiciary Mediation Manual and are as follows;

a) Public interest matters. Cases involving public interest matters are unsuitable for mediation
b) Matters based on pure issues of law are unsuitable for mediation

c) Matters involving or affecting children where there are issues of child abuse, child neglect, defilement, domestic violence or related criminal or illegal purposes are unsuitable for Mediation

d) Whether or not the contract in issue between the parties has a dispute resolution clause referring the matter to arbitration is a factor considered before a file is referred to mediation.

The criteria for screening mediation matters at Milimani courts are sufficient for managing cases that can be solved by the mediators. However the scope of cases that can be settled within the boundaries and the qualifications of the mediators are still narrow.

At Milimani courts, there are 308 mediators currently accredited to facilitate mediations with CAMP. However, there approximately 353 matters referred to mediation yearly. Out of the all the referrals so far 318 matters settled via mediation. The percentage of matters settled looks great but the ratio of mediators and the cases is too small. On an average, given the ratio it suggests that in a whole year each mediator had only one case to handle. Arguable the mediators in Milimani courts are under-utilized. The theory of procedural fairness has been used to criticize the elements of ADR in solving disputes[4]. From the findings the qualifications of mediators could be the reason of withheld faith on ADR.

4.3 Effectiveness of ADR in settling Disputes

Different groups of respondents were asked to rate the effectiveness of ADR system as a means of settling disputes. The following are summaries of the responses provided.

[4] Brunsdon-Tulley, M 'There is an 'A' in 'ADR' but Does Anybody Know What It Means Anymore?' Civil Justice Quarterly, 28 (2), 2009, pp. 218–36.

Out of the 5 lawyers interviewed the following results were obtained:

The **respondents * Lawyer/ Advocates views on ADR as means of settling Disputes Cross tabulation**

Count

		Lawyer/ Advocates views on ADR as mean of settling Disputes		Total
		Ineffective	Effective	
The respondents	Lawyers	4	14	18
Total		4	14	18

Table 4.3 showing Lawyer/ Advocates views on ADR as means of settling Disputes Cross tabulation. Out of 18 lawyers interviewed 4 representing 22% of lawyers felt the ADR system was ineffective for settling disputes. However the other 14 which represent 80% of advocates interviewed found the current ADR system effective for settling disputes.

4.3.1 Effectiveness of ADR in settling Disputes to Advocates

Respondents suggested that ADR system is less time consuming when compared to litigation. Another responded pointed that the system is still inefficient in settling disputes and has largely failed to achieve the desired result. Another respondent pointed that the system is effective and can yield better result to Kenyans; the responded exclaimed that the citizens who are supposed to benefit from the system are largely ignorant of how ADR works. All the above responses shows that the lawyers are aware of how ADR system works and trust that it can be used to settle disputes. However, the dissatisfaction expressed by the remaining lawyers is large and may not be ignored. Several Advocates suggested that "ADR system is less time consuming when compared to

litigation. Some responded that the system is still inefficient in settling disputes and has to a large extent failed to achieve the desired result".This confirms Rawls theory of Justice which postulate that "justice as fairness relates to a theory of justice that generalizes and carries to a higher level of abstraction …the social contract". Ideally, the theory speculates that elements of ADR such as mediation would work well to solve conflicts between parties when a neutral person reminds the two parties of the possible outcomes (worst and best outcome). From the theory, conflicting parties are able to reflect on the alternatives and the results of their actions then conform to a just solution without necessarily involving the punitive actions of the law.

4.3.2 Effectiveness of ADR in settling Disputes to Advocates and litigants

5 **Case Processing Summary**

	Cases					
	Valid		Missing		Total	
	N	Percent	N	Percent	N	Percent
The respondents * Litigants *Lawyers perception on ADR	17	100.0%	0	0.0%	17	100.0%

Table 4.4.3 **Case Processing Summary**

The responses from litigants and advocates concerning effectiveness of ADR show that three out of eleven litigants still find the ADR system ineffective. Two of the litigants were uncertain of whether the system works or not. 8 litigants are still in favor of ADR. The large percentage still has faith in ADR despite the shortcomings.

The respondents * Litigants and lawyers perception on ADR Cross tabulation

Count

		Litigants perception on ADR			Total
		Effective	Ineffective	Mixed Reaction	
The respondents	Lawyers	9	4	5	18
	Litigants	7	3	2	12
Total		16	7	7	30

Table 4.2.4 **Litigants and lawyers perception on ADR Cross tabulation**

Ideally, the responses show that litigants are not fully aware of how ADR system works. For example during the interview one of the litigants indicated, that ADR could be effective but quite expensive. The common knowledge about ADR system suggests that the system should be cost effective and less time consuming. So when litigants say that it is an expensive, there is likelihood that a good number of people still view ADR as an elitist idea.

Respondents with mixed reactions view the system as a waste of time especially in situations where a dispute gets back to court after unsuccessful resolution through ADR. Given that litigants have doubts in the system, there are high chances many will continue filing cases in courts for litigation. It is noteworthy that litigants more often than not make the following statement "sometimes cases are referred to ADR yet after resolution we have to go back to court to start all over again"… From the statements, it is apparent that litigants see ADR as a different system from the courts; which do not settle disputes with finality. The same problem appears from Critiques of Rawlsian theory of Justice. Hsieh is concerned that if conflicting parties are at will to

leave at any moment they deem fit then they are likely to use their freedom to frustrate the process. This weakness is also in the elements of ADR which may making it difficult to coerce parties to commit to ADR processes until the final resolution can be realized. Their view is that after ADR the dispute is referred to court for final settlement. These viewpoints also point at ADR system as different path to justice system away from the courts. The above sentiments also draw attention to Dr. Muigua study which examined whether the perception that ADR is alternative to the formal court process is a fallacy and if this perception has continued to affect its effective application in conflict management in the country. Dr. Muigua postulates that ADR ought to be treated as a mechanism that is the most appropriate in the effective resolution of certain kinds of conflicts. Ideally, Dr. Muigua hypothesized that if ADR would be viewed as complementary to the court system; " that is working together to ensure that access to justice is achieved for all through employment of the most appropriate mechanism for the particular Dispute or conflict"[5].

4.4 Types of cases suitable for ADR

When asked the type of cases suitable for ADR, the lawyers listed the following:

- Labour related cases
- Trade disputes
- Family disputes
- Corporate commercial matters

[5] Kariuki Muigua, "ADR: The Road To Justice In Kenya", *Paper Presented At The Chartered Institute Of Arbitrators Kenya Arbitrators Kenya Branch, International Arbitration Conference Held On 7 The & 8 The August, 2014 At Sarova Whitesands Hotel, Mombasa, Kenya*, 2014, 1-40,

- Land Disputes

The above listed cases are issues that are likely to arise between people who relate in one way or another. The common factor in all the listed matters is the relationship and respect that is likely to exist between disputing parties. These cases are best suited for ADR because parties involved may be keen in maintaining peace and harmony between conflicting parties after the settlement of dispute. Secondly, the above stated cases may still be solved through litigation but the advocates would opt for ADR because of the adverse effects litigation may cause to the relationship between conflicting parties.

4.5 Effectiveness of current ADR system in managing case backlogs

The responses from lawyers suggest that the current and the available ADR system cannot manage case backlog in Kenya. The litigants' also believe that though the system is making progress, it still needs improvement to settle pending cases. Part of the responses suggest that ADR system can work but within a narrow scope settle given the varied number of cases that still awaits the decisions of the court.

4.5.1 ADR as an Idea of the Elite

When asked whether ADR is sufficient for managing backlog a group of advocates pointed that it will only work if the citizens stop viewing the system as the system for the elite. The choice of words "elitist thing" suggest that there is a little awareness of ADR to the users. This statement is another demonstration of ignorance on the sides of primary users.

4.5.2 The narrow scope of ADR

The Reponses from groups of advocates also pointed that the scope is limited in the kind of cases that can be settled through ADR. Even when listing the number of cases suitable for ADR all the

advocates interviewed gave less than ten cases as matters they would opt for ADR resolutions. If ADR is limited to a number of cases, then it would not be prudent to state that the system will sufficiently manage to settle the pending cases.

4.5.3 How fast is ADR

Even though there are mixed reaction as to whether or not ADR can be used to speed the wheels of justice in Kenya, all respondents agree that cases settled by ADR means took shorter time when compared to those settled through litigation. Speed is what the justice system requires to reduces the number of pending cases. However, speed alone will not be useful if the cases would be processed through a system that works fast but is limited in scope and has no finality with high chances of appeal.

4.5.4 How much support does the Justice System give ADR

ADR system requires the support and the faith of every person in the Justice a system for it to be successful in settlement of disputes that the court system settles daily. Below are finding from the field on the state of support that ADR systems receive from litigants and lawyers.

The experiences of lawyers and litigants regarding ADR are expressed in the following tables When asked if they accepted referral for ADR to settle a matter six out of eleven litigants accepted that they have allowed ADR referrals.

Have you ever agreed to your dispute being referred to ADR Mechanism

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	6	35.3	54.5	54.5
	NO	4	23.5	36.4	90.9
	NOT APPLICABLE	1	5.9	9.1	100.0
	Total	11	64.7	100.0	

Table 4.4.4.2

Have you ever recommended ADR to anyone as means of accessing justice?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	7	41.2	63.6	63.6
	NO	4	23.5	36.4	100.0
	Total	11	64.7	100.0	
Missing	System	6	35.3		
Total		17	100.0		

Table 4.4.4.3

The recommendations of ADR by litigants are also low which also suggest that few litigants have embraced ADR as a means of settling disputes.

Has any of you disputes been solved through ADR

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	7	41.2	63.6	63.6
	NO	3	17.6	27.3	90.9
	NOT APPLICABLE	1	5.9	9.1	100.0
	Total	11	64.7	100.0	

Table 4.4.4.4

From the above table ADR has settled a good number of issues for the interviewed Litigants. It is prudent to say that the system has worked despite the challenges.

Are there disputes that you have filed for litigation after unsuccessful attempt of ADR

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	YES	6	35.3	54.5	54.5
	NO	3	17.6	27.3	81.8
	NOT APPLICABLE	2	11.8	18.2	100.0
	Total	11	64.7	100.0	

Tables 4.4.5

More than half of the litigants interviewed had disputes which remained unsettled after ADR processes and had to go back to court for hearing and determination. The responses show that many litigants have attempted to settle disputes through ADR mechanisms. If a dispute is referred back to court it shows that the system has challenges resulting in dissatisfaction on part of conflicting parties which drive them back to court system for determination of their disputes.

What are your views on referral of cases to ADR?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Helpful	6	35.3	54.5	54.5
	Not Helping	3	17.6	27.3	81.8
	Indifferent	2	11.8	18.2	100.0
	Total	11	64.7	100.0	
Total		17	100.0		

Table 4.4.4.6

The litigant views regarding referral of cases to ADR are somewhat satisfactory. However given that that some interviewee is not supportive of referring cases to ADR system raises concern on their attitude towards ADR. However, given that the majorities have positive view, shows that the system can still work for many.

4.5.4.1 Litigants

The litigants interviewed exhibited mixed reactions on ADR system. Some of the litigation Attorneys said that it's "**eating into"** their work… since "**Delayed cases generate more fees on the face of it".** Other lawyers prefer ADR Mechanisms as they guarantee quick disposal of disputes. The mixed feeling may appear normal but given that the opposing side view ADR from a fiscal perspective it is apparent that lawyers within justice system still view ADR as a competition for their service. An interview with litigants further reveals that Parties not appreciating what ADR is or how it works in practice; however majority are in support of the system as cases are resolved faster.

4.5.4.2 Advocates

Advocates interviewed were of the view that ADR is faster, efficient and cost effective and should be encouraged. However, the general concern is on the public as most of their clients have little knowledge of the system or how it works. They indicated that on being explained to for the first time, most litigant are hesitant and Advocates have difficulties in convincing to accept ADR process for settlement of their disputes.

4.6 Effectiveness institution based ADR mechanisms

4.6.1 Kenya Revenue Authority (KRA) Disputes

Tax disputes arise where there is an objection from a taxpayer. The commissioner is required by law to make an objection decision within 60 days from the date of the taxpayer's objection.

An analysis of reports from KRA offices regarding ADR shows that more disputes have been unlocked in a timely manner thereby significantly reducing both administrative and financial costs for parties involved. Relationships have also been maintained since ADR process is conducted on a without prejudice basis and with utmost confidentiality. The introduction of ADR system has improved service delivery to the taxpayers and by extension improved tax compliance rate.

4.6.1.1 Dispute disposition rates as a results of ADR

Where there is an appeal at the Tax Appeals Tribunal or further appeal to the court, section 55 of the Tax Procedure Act requires that the dispute be resolved within 90 days once the taxpayer seeks leave from the respective body to engage in an out of court settlement discussion. On average, barring specific exemptions, parties take around 80 to 90 days to settle the dispute. There are however instances where disputes may not be settled within the stipulated timelines due to inability of the parties to agree on the terms, or reluctance of one of the parties to comply with the agreed action points arising from the ADR discussions. In some cases, parties engage in deliberate delay tactics which then frustrate the process and as a result, some disputes have gone beyond the recommended 90 days.

From the KRA records, disputes have been resolved swiftly since the introduction of ADR Mechanisms. The following is a summary of ADR case disposition for tax related issues spurning a period of 4 years backward

Financial Year	Case disposition
2015/2016	49
2016/2017	56
2017/2018	90
Between July and October	42

Below is a graphical representation of the same information

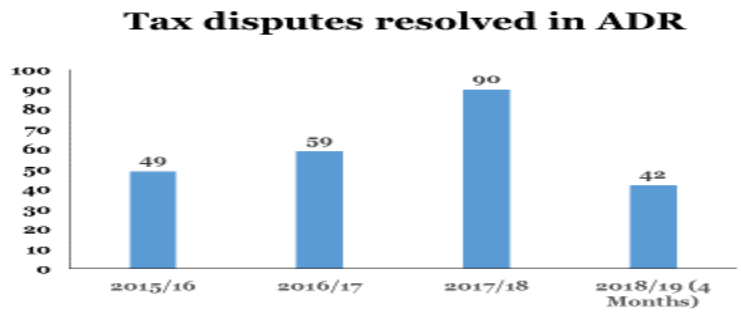

Fig 4.5 Showing tax disputes disposition through ADR

Not all tax disputes have been settled through ADR. On average, the disputes referred back to Tax Appeals Tribunal or court across the years from 2015 when ADR process was conceptualized is between 30%. A success rate of 70 percent shows that ADR will continue to manage tax related disputes to large extend. The success factor in KRA confirms the theory of change strengths. The theory of change provides framework that consultants' agencies and public institutions may use to

adjust the system and improve efficiency. The adjustment made by KRA and results achieved confirms speculations on theory of change that system adjustments may lead to better results.

4.7 Challenges facing ADR system

In as much as the Constitution provides the right of accessing justice and even its recognition of ADR, there is still a lack of proper policy framework to ensure their effective application.

The capacities of the institutions in ADR are limited in meeting the demands of ADR as far as management of case backlog are concerned. Even though these institutions are recognized by the law their capacity is secondary to that of court system given that citizens may initiate the process and leave at will. In the entire country the institutions that train ADR practitioners are still limited.

4.7.1 Why do Kenyans rush to courts despite the Provisions of the ADR

4.7.1.1 The Authority ADR facilitators

An interview with Attorneys showed that in the minds of many, cases are resolved before a judge/magistrate in court, who is approached by a lawyer. This kind of mindset from disputing parties makes it hard to accept that the system is efficient to settle the cases without involving the courts. Arguably in the mind of disputing parties ADR is different from the Kenyan Justice system and so the parties presume that it is less likely to deliver justice.

Even within institutions like KRA there are cases where parties continue to treat the provided ADR process with a lot suspicion especially given the fact that it is an internal process and these institutions have continued to allay their fears as they go through the process.

4.7.1.2 Issues with awareness

Attorneys, litigants and officials from various institutions demonstrated that the primary users of ADR are not aware of the existence of the system let alone its benefits. While there is excess information to learn about Kenyan court system how it functions, the researcher cannot ascertain for sure that the same saturation is also with the case of ADR system. It makes it hard for citizens to identify with system they have little information about. Other instances showed that Kenyans view ADR as an elitist thing and find it hard to believe that it can work for common Kenyan.

4.7.1.3 The Narrow scope of ADR

The ADR system is only limited to the number of cases it can handle. The cases are mostly civil cases. In other words criminal cases will automatically be settled in courts. In most instances

Even within the institutions not all cases are considered for ADR resolutions. For example in KRA the criteria for determining the disputes suitable for ADR is provided for under the KRA ADR Framework. The general rule is that all tax (Income Tax Act, VAT, Excise Duty Act, EACCMA) are suitable for ADR with the following exceptions;

a) Where settlement would be contrary to the Constitution, the Revenue Laws or any other enabling Laws
b) Where the matter borders on technical interpretation of law
c) Where it is in the public interest to have judicial clarification of the issue
d) Where pursuit of the matter through the Courts will significantly promote compliance
e) Where the parties have not complied with the provisions of any Act and there is evidence that the non-compliance is consistent or deliberate.
f) One party is unwilling to engage in ADR discussions

4.7.1.4 The law treats ADR as an option

Within the Kenyan constitution parties can never be coerced into settling disputes through ADR. However parties have taken this liberty as a leeway to frustrate ADR related resolutions. For instances Litigants attorneys and Kenya Revenue Authority pointed that parties fail to show up for meetings are use other delay tactics that frustrate the process. The excessive freedom and control bestowed on parties in ADR process is another opening that citizens take for granted.

4.7.1.5 Most ADR decisions are not legally binding

Unlike the ADR systems decisions made by courts on matters are legally binding and an appeal goes to higher courts. The ADR decisions are mainly guided and arrived at by the parties. The functions of facilitators are mostly guiding the parties.

ADR is not a new concept; it has worked successfully in many countries across the globe. These natures of dispute resolution mechanism have taken on many forms in different societies, and they continue to evolve and mature. ADR is slowly developing and gaining mileage in African countries. In as much as the Constitution provides the right of accessing justice and even recognizes ADR, there is still a lack of proper policy framework to ensure their effective application.

4.8 Chapter Summary

This chapter has covered presentation, interpretation and discussion of the findings. The discussions on this chapter also found the reason for continued rise in cases being filed in Court despite the fact that there exists alternative dispute resolution mechanisms anchored in Constitution of Kenya 2010. The presentation also looked at the nature of case backlog and case disposition rates and realized the need for an efficient ADR system that would speed the wheels

of justice. The next chapter will conclude the discussions from these chapter and the previous chapters and make recommendations that would work to improve the ADR system. Furthermore the study will identify an additional gap that still needs to be covered by other scholars to complement this research.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 The study sought the reasons for continued rise in cases being filed in Court notwithstanding the existence of ADR mechanisms anchored in Constitution of Kenya. The study focused on Milimani High court commercial Division. Objectives of the researcher were to establish the nature of ADR mechanisms available for commercial disputes, the policy and frameworks in place for the implementation of ADR, and whether ADR mechanisms are sufficient in managing case backlog. The study hypothesized that "it is only through the main stream Court systems that justice can be achieved" and assumption that "the general public are not aware of how ADR system works". Upon carrying out research, the researcher used qualitative method of research, which answered the research questions to achieve objectives of the study. Specific research method used was questioner and desk reasrch.These two methods enabled the researcher to find if the two hypothesis set out above were true or not. The findings are summarized below.

5.1.1 Summary of findings

The researcher found answers to the research questions. From the desk research and interviews with key respondents in respective to application of ADR, the researcher noted that the available ADR mechanisms are useful but have not been able to speed up the wheels of justice because of a number of challenges which include lack of awareness by majority of Kenyans, excess control of the process by parties involved which in the end frustrates the process of settling dispute resulting in delay. The researcher noted from the analysis that Kenyan citizens view ADR as an alternative to litigation and makes it challenging to convince the parties involved in disputes that decisions of

facilitator is fair and should have finality. From the findings, the application of ADR in case backlog management would produce positive results in reducing case backlog if challenges are addressed.

This analysis also tested the two hypotheses of the study that citizens have little information regarding ADR. However, the notion that, it is only through the main stream Court systems that justice can be achieved was disapproved given the recent success outcomes from ADR as documented in the study. The study recommends that ADR work as complimentary to litigation and be viewed as giving final solution to a dispute. In respect to the second hypothesis, the researcher established that majority of Kenyans are not aware of ADR mechanisms available and how the the process works in resolving disputes.

5.2 Conclusions

5.2.1. The nature of ADR Mechanism available for commercial disputes

At Milimani courts, there are 308 mediators currently accredited to facilitate mediations with CAMP. However, there approximately 353 matters referred to mediation yearly. Out of the all the referrals so far 318 matters settled via mediation. The percentage of matters settled looks great but the ratio of mediators and the cases is too small. On an average, given the ratio, it suggests that in a whole year, each mediator had only one case to handle. Arguably, the mediators in Milimani courts are under-utilized. The theory of procedural fairness has been used to criticize the elements of ADR in solving disputes. From the findings, the qualifications of mediators contribute highly to reason of withheld faith on ADR.

Negotiations mechanism, which is an informal procedure, gives two conflicting parties autonomy over the process. Negotiation is a special mechanism of resolving conflict because it mainly focuses on interest of the conflicting parties and not their position or powers (level of influence).

Mediation increases the autonomy of conflicting parties over the decisions and resolution methods. This procedure helps in solving disputes with utmost confidentiality. The position of the mediator is limited to guidance and advisory. Annexed court mediation mechanism becomes enforceable by Court as a court order yet the processes have to be voluntary and work in the best interest of the parties. Conciliation mechanism is available for trade disputes as provided in the United Nation (UN) Charter among other disputes.

Arbitration is subject to statutory provisions; the controls through statutes has elicited intense arguments as to whether Arbitration is a conventional ADR mechanism or an extension of litigation.

Adjudication process mainly involves contractors. It addresses power imbalances in contractors' relationships in a manner that allow weaker subcontractors to get a leeway of dealing with powerful contactors. Adjudication is effective in settling construction disputes that require solution within a short period.Howver, adjudication may settle dispute but may not necessarily restore relationships between conflicting parties. The Expert Determinant approach used by the concerned parties evaluates the dispute and makes a decision. The expert may range from different fields for instance an accountant may be the expert determinant in the case where there is dispute relating to company valuation. This process is gaining currency in the construction companies in matters relating to quantitative and qualitative problems. The Tax Appeals Tribunal (TAT) was established to preside over tax disputes, and serve as "the forum of first instance before tax litigation can commence a tax dispute". "CTDR is the office charged with the responsibility of

facilitating the ADR process between the Taxpayer and the Commissioner. Settlement of the dispute within 90 days of date the Tribunal permits the settlement - Section 55(1) of the TPA.

Small claims courts are designed to reduce backlog of cases. Instead of Magistrates and Judges, the adjudicators would preside over cases whose subject matter does not exceed a value of kshs 200,000. The jurisdiction of small claims courts would be limited to their geographical areas. Though the pecuniary jurisdiction of small claim court is limited to KES 200,000, Section 12(4) empowers the Chief Justice to review that limit to any amount he thinks fit via a Gazette notice.

5.2.2 Legal, policy and institutional framework in place for implementation of ADR

Despite the realization of right to access Justice at both the international and local level, the current available legal and institutional frameworks are not sufficient in realization of these rights by all persons. To date, there are no detailed criterions as well as an integrated framework that can be used in governing alternative dispute resolution in Kenya. However, the most recent developments recognize the use of ADR as one of the means through which disputes can be resolved without resorting to litigation. Inference can therefore be made from ADR policy position from the legislative and national frameworks, which have been adopted at various levels based on their application. Inference can also be made from judicial and finance sectors reforms.

The constitution is the highest law in Kenya, in it, there is a formal recognition of the use of ADR and has therefore made provisions that must be embraced by any formal justice process. Courts and other authorities in the constitution have a responsibility of giving a fair hearing of cases within a reasonable time and also ensure that there is always prevalence of substantial justice over procedural justice. The constitution provides that procedures used in settling of inter-governmental dispute (i.e. disputes between national and county governments) shall be provided in the national legislation through the use of dispute resolution mechanisms such as mediation, negotiation as

well as arbitration. The constitution also provides a formal recognition of the traditional justice systems as they play a great role in resolving disputes. Nevertheless, Article 159 (3) does not encourage the use of old-fashioned disagreement resolution means in situation that

(i) contravenes the Bill of Rights;

(Ii) is offensive to justice and morality or brings results that are offensive to justice or morality; or

(Iii) is inconsistent with any of the written law or the constitution.

To date, there are no detailed standards as well as an integrated framework that can be used in governing dispute resolution in Kenya. However, the most recent developments recognize the use of ADR as one of the means through which disputes can be dwelt with without necessarily using litigation. Inference can therefore be made from ADR policy position from the legislative and national frameworks which have been adopted at various levels based on their application. Inference can also be made from judicial and finance sectors reforms.

Various legal policies and institutional frameworks were established to support ADR program. Article 159 of the Constitution lays out the legal foundations of the law by necessitating principles to guide the judiciary so that the judiciary is guided by principles while exercising judicial authority in addition to other things. It introduces Alternative means of dispute resolution including arbitration conciliation, and mediation. The capacities of Institutions within ADR institutions are limited in meeting the demands of ADR as far as management of case backlog are concerned. Even though these institutions are recognized by the law their capacity is secondary to that of court system given that citizens may initiate the process and leave at will. In the entire country the institutions that train ADR practitioners are still limited. Given the population of citizens who are in dire need of the services, the appointed ADR facilitators are likely to be overwhelmed to deal

with all the maters that the law permits to be handled by ADR. Even though these institutions offer training to its members, there is need to offer the same course to citizens the same way lawyers and Judges go through a curriculum in public institutions. The institutions are not in a position to offer training to the public the same way law is taught. There is therefore a need train ADR practitioners right from college level.

The capacities of the institutions in ADR are limited in meeting the demands for management of case backlog. Even though the law recognizes these institutions, their capacity is secondary to that of court system given that parties are at liberty to initiate and leave the process at will. Institutions that train on ADR are limited in Kenya.

5.2.3 Effectiveness of ADR Mechanisms

Compared to litigation, ADR system is less time consuming. Lawyers know how ADR system works and have faith in its use to settle disputes. The use of ADR as a form of dispute resolution has increasingly received buy-in by both taxpayers and their respective agents, i.e. both accountants and advocates. This is evidenced by the gradual increase in the number of parties seeking the ADR process as the preferred mode of dispute resolution. However, there are cases where parties continue to treat the process with a lot suspicion more so due to the fact that it is an internal process for institutions. According to advocates, ADR should be encouraged, as it is faster, efficient and cost effective. However, their general concern is that the public are not aware of the system resulting in resistance by their clients.

From the data collected, it is evident that the available ADR Mechanisms are not sufficient to manage case backlog. ADR mechanisms can serve Kenyans well by acting as diversionary measure to litigation saves for the challenges it is encountering currently. The system still requires

improvement and or restructuring to attract new and pending cases. The system will only work for Kenyans if the citizens stop viewing the system as the thing for the elite.

The concern by respondents interviewed is that, the scope of ADR related cases is narrow. For the system to attract more matters there is need to widen its scope to allow a wider nature of disputes suitable for resolution through ADR mechanisms

Income Tax Act has incorporated ADR framework, which has led to recovery of more than Six billion Kenya Shillings as a result of disputes, resolved through ADR in a period less than two years. KRA reports that more than 35 billion was locked up in tax disputes before the ADR frameworks were established.

The available ADR for Media Council commission hear and determine disputes. The commission has however not met the standard set for ADR to enable it attract disputes to reduce appetite for litigation in dispute settlement. There is also perception that the commission is not able to act independently as it is established and financed by the Media council. This notion casts doubt on the commissions' ability to render fair and just determination on disputes filed before the commission.

5.2.4 Why do Kenyans rush to courts despite the availability of ADR?

Even though the law recognizes these institutions, their capacity is secondary to that of court system given that citizens may initiate the process and leave at will. In the entire country, the institutions that train ADR practitioners are still limited. According to lawyers in the minds of Kenyans, cases are resolved before a judge/magistrate in court and the litigation process is initiated prosecuted by lawyers. While there is excess information to learn about how Kenyan court system functions, the researcher cannot ascertain for sure that the same situation applies to

ADR system. In the premises, the public find it difficult to identify itself with a system not well known to them.

Despite the fact that the Kenyan constitution provide for ADR Mechanism, parties cannot be coerced into settling disputes through ADR mechanism. Parties have taken this liberty as a leeway to frustrate resolution of disputes through ADR mechanisms. From data collected, it came out clearly that Litigants, lawyers and senior official from Kenya Revenue Authority indicated that parties fail to show up for meetings as a delay tactic aimed at frustrating the process. The autonomy bestowed on parties in ADR process is another opening that parties to a dispute may abuse instead of utilizing to ensure quick and less tedious way of resolving disputes.

Unlike the ADR mechanisms, determinations made by courts are legally binding and can only be challenged by appeal to higher courts. On the other hand, decision arrived through ADR process have more of party control as the facilitators are guided by parties or their jurisdiction is determined by parties in so far as arbitration process is concerned.

5.3 Recommendations

The researcher appreciates and recognizes all the efforts put in place in the Kenyan justice system to enhance access to justice. The previous contribution by legislature and the judiciary have supported the Kenyans relationships and interactions for the past fifty years. In this regard the study does not underestimate the efforts made to amend and implement laws. The study recommends long term and short-term recommendation as strategy that will increase the statistics of cases that ADR will settle in Milimani High court commercial Division and other courts within Kenya.

5.3.1 Short Term Recommendations

These recommendations include all the initiatives that will take judiciary approximately one year to implement without necessity to repetition.

5.3.1.1 Categorize cases suitable for ADR mechanisms

Some cases should be made mandatory for settlement through ADR process. The Judiciary ought to carry out a process of categorizing cases that should first be processed through ADR and only proceed to litigation once the ADR facilitators recommend litigation with valid reason for application for litigation. It should then be made compulsory for such matters to be resolved through ADR to minimize chances for parties to take advantage of the system to keep appealing unnecessarily. That measure will reduce the number of cases that are already filed in courts .This will address delay tactics by parties who opted to go to courts in matters that be dealt without resorting to litigation. However, while doing that there is need to ensure that right to fair trial is upheld.

For matters yet to be filed, courts should not allow registration of disputes already categorized as suitable for ADR; Such matters should be subjected to mandatory ADR process before litigation.

5.3.2 Medium Term Recommendations

These recommendations include resolutions that might take more than a year and less than three years to ascertain and state automating.

5.3.2.1 Operate multi option ADR programs

Like the United States, Kenya should embrace and operate multi option ADR programs, which would encourage litigants and provide disputing parties with sophisticated assistance, which identifies the mechanism that is best suited for specific case. Majority of civil cases should then be assigned automatically to the ADR multi-option program for filing. Under this program, all litigants would acquire ADR handbook and be compelled to go through all the available ADR processes and select at least one of the non-binding techniques available in the courts. The parties

should then be given 10 working days before the initial case management process to certify that they have read the ADR handbook; after which parties select one ADR mechanism to submit their case. After deadline, if none of the disputing parties has communicated, a court official should organize phone conference to help the parties select available ADR mechanism which suitable for their case.

5.3.2.2 Automation of the application for ADR process

It takes much time to go through the processes of filling and applying for arbitrators. Automation will save on time and bureaucracies involved in initiating an ADR process. ICT directorate shall do automation, which is under the chief registrar of the judiciary. This should be established in courts countrywide.

5.3.2.3 Advocacy and education campaign on ADR process

Litigants and advocates express a view that ADR is a new language to citizens who file cases in Kenya Courts. The idea shows that ADR is not as popular to Kenyans to give them two sides of information for making a choice with cases presented in courts. There is need for sensitization of the public on the importance of ADR in resolution of disputes in the society. Awareness will correct attitude towards ADR as a dispute resolution dispute mechanism. From data collated, it came out clearly that parties do not utilize ADR Mechanisms because they know very little about the processes. Advocacy and education campaign on process and benefits of ADR is imperative. The government should initiate programmers of sensitization either through radio, televisions networks, newspapers, public gatherings and other forums. The information on ADR should be available and accessible to every Kenyan citizen.

5.3.2.4 operationalize small claims courts

The Small Claims court Act (SMCA) was passed in the year 2016 but up until now. The regulations to operationalize it are still being worked on. There is need to FastTrack formulation of regulations

to operationalize claims court. Once established in every sub county claims whose subject matter is valued at less than 200,000 will not be filed in mainstream court. This will greatly reduce case backlog.

5.3.3 Long Term Recommendations

These recommendations consider all the adjustment the researcher deem should last for considerable long period if not permanent given the bearing they might have on the lives of Kenyans;the researcher recommends that the Kenyan Judiciary give it an assessment period and adjust it to meet the nature and needs of Kenyan cases presented in courts.

5.3.3.1 Conduct ADR within Court Premises

ADR processes should be conducted within the court premises through a Multi Door Courthouse model (MDC) and be presided over by Judges, magistrates, or the equivalent. Multi door Courthouse may allow all three levels of starting with early neutral evaluation, followed by mediation and then arbitration. This will ensure that parties do not undermine the authority of ADR facilitator and in any case there parties are dissatisfied the case will be forwarded to the higher court. This provision will not only manage the delay tactics but also ensure that cases are not delayed. The findings of this study showed that large number of Kenyan citizens view ADR as new procedure and distrust the system. The involvement of judiciary through the oversight watch may boost their confidence on ADR. These recommendations complement Dr. Muigua study on whether ADR is an alternative to litigation. In the Study Dr. Muigua also concluded that ADR can play a key role in the realization of the right to access justice in society, which is a human

right". "If justice can be effectively realized through ADR, it can no longer be viewed solely as alternative"[1].

5.3.3.2 Amend Evidence act

For the few who know about ADR, there is a percentage that presumes that ADR system is not just and may only seek for an apology to settle issues. The view could be the reason why ADR facilitators face a negative attitude with most Kenyans who seek for ADR help. In this regard the Judiciary should consider running the system with the same seriousness that litigation gives Kenyans. The Evidence Act should also be amended to foster production of evidence in A.D.R. This way the parties will consider ADR mechanism as serious system that takes into considerations of every available events leading to dispute. Consideration of evidence will also give the parties the expectations of the standards they are looking for in litigation.

5.4 Areas for further Research

This study mainly focused on Milimani court which may or may not resemble the case of ADR in the entire judiciary. Other studies should also be carried to reflect the summary of the ADR system in Kenya. The study showed that the understanding of Kenyans on ADR is increasing gradually. Most Attorneys pointed that their clients are still not aware of ADR process. While this study mainly looked at the key people who have information on ADR, other studies should do a quantitative survey on Kenya population to find out how well Kenya citizens understand the concept of ADR.

---

[1] Kariuki Muigua, "ADR: The Road To Justice In Kenya", *Paper Presented At The Chartered Institute Of Arbitrators Kenya Branch, International Arbitration Conference Held On 7 The & 8 The August, 2014 At Sarova Whitesands Hotel, Mombasa, Kenya*, 2014, 1-40, https://profiles.uonbi.ac.ke/kariuki_muigua/files/paper_on_adr_the_road_to_justice__in_kenya_-_ciarb_conference_presentation.pdf.

BIBLIOGRAPHY

Books

[1] Alexander Beard, "Monitoring Consumer ADR in the EU: A Critical Perspective", SSRN Electronic Journal, 2018, doi:10.2139/ssrn.3160800.

[2] Banakar, Law through Sociology's Looking Glass: Conflict and Competition in Sociological Studies of Law.

[3] California Pepperdine Law Review.

[4] Catherine R. A., Expanding the Empirical Study of Access to Justice, 2013 WIS. L. Rev. 101 (2013).

[5] Coulson, S. Private Settlement for Public Good 66 Judicature, June-July 1982.

[6] De Roo, A., and Rob J. "Mediation on Trial: Dutch Court Judgments on Mediation". TijdschriftVoor Mediation en Conflict management 21, no. 4 (2017): 27-46. doi:10.5553/tmd/138638782017021004004.

[7] Mensah, F.B. 'Indigenous Approaches to Conflict Resolution in Africa,' in the World Bank, Indigenous Knowledge: Local Pathways to Global Development, 2004. pp. 39-44. Available at http://www.worldbank.org/afr/ik/ikcomplete.pdf [Accessed 4/07/2015]

[8] Mill J. S., On Liberty 13 (Stefan Collinied,, Cambridge Univ. Press 1989) (1859)

[9] Joshua Olukayode OlotokeO. O et al., Readings in Jurisprudence and International Law.

[10] Kenya Judiciary High Court Registry Manual, 2nd Edition 2013.

[11] Kenya Judiciary Judicial Transformation Framework 2012-2016.

[12] Kenya Judiciary Magistrate's and Kadhis Courts Registry Manual, 2nd Edition 2015.

[13] Kenya Judiciary State of the Judiciary Annual Report 2012-2013.

[14] Kenya Judiciary Sustaining Judiciary Transformation 2017-2022.

[15] London Court of International Arbitration (LCIA)

[16] M.D.A Freeman Lloyd's Introduction to Jurisprudence 7th Edition.

[17] Marilou Giovannucci M. and Karen L., "Association Of Family And Conciliation Courts Guidelines For Child Protection Mediation", Family Court Review 51, no. 2 (2013): 193-194, doi:10.1111/fcre.12019.

[18] Perry L. G. – Analysis of A First Amend Challenge To Rent-A-Judge Proceedings, 14 Repp. L. Rev. 4 (1987).

[19] Section 59A of the Civil Procedure Act, Cap 21, Laws of Kenya

Journals

[20] "Changes around Credit and Banking Regulations" Journal of Money, Credit and Banking 40, no. 8 (2008). doi:10.1111/jmcb.2008.40.issue-8

[21] Annie de Roy and Rob Jagtenberg, "Mediation On Trial: Dutch Court Judgments on Mediation", Tijdschrift Voor Mediation en Conflict management 21, no. 4 (2017): 27-46, doi:10.5553/tmd/138638782017021004004.

[22] AT Ajayi and LO Buhari, "Methods of Conflict Resolution in African Traditional Society," An International Multidisciplinary Journal, Ethiopia, Vol. 8 (2), Serial No. 33, April, 2014, pp. 138-157

[23] Blanco G., Ana I. "THE ADR METHODS TO SETTLE Smes DISPUTES IN SPAIN". Culture, Meida, and Entertainment Laws 11, no. 2 (2017): 57-90. doi:10.20995/cmel.11.2.3.

[24] Brett J. "Attitudinal Structuring, Alternative Dispute Resolution, and Negotiation Strategy". Negotiation Journal 31, no. 4 (2015): 359-360. doi:10.1111/nejo.12107.

[25] Elirlich E. Fundamental Principle of Sociology of Law.

[26] Environment and Land Court Act, 2011, Laws of Kenya.

[27] Faber, A. J. "A Theory Of Justice By John Rawls Reexamined". SSRN Electronic Journal, 2012. doi:10.2139/ssrn.1989677.

[28] Gaynor, T., and Hindy L. S. 2014. “Revisiting the Theory of Justice.” Public Administration Quarterly 38 (4): 440–44. http://165.193.178.96/login?url=http%3a%2f%2fsearch.ebscohost.com%2flogin.aspx%3fdirect%3dtrue%26db%3dbth%26AN%3d100740608%26site%3deds-live

[29] Gichuhi, J. "Revisiting Article 159 (2)(C) Of The Constitution Of Kenya: How The Judge Sees It". SSRN Electronic Journal, 2018. doi:10.2139/ssrn.3235391.

[30] Gill, R. "A Framework for Comparative Judicial Selection Research". SSRN Electronic Journal, 2007. doi:10.2139/ssrn.1539889.

[31] Giovannucci, M., and Karen L. "Association of Family and Conciliation Courts Guidelines for Child Protection Mediation". Family Court Review 51, no. 2 (2013): 193-194. doi:10.1111/fcre.12019.

[32] Hill, J. B. "An Empirical Process P-Value Test When A Nuisance Parameter Is Present Under Either Or Both Hypotheses". SSRN Electronic Journal, 2013. doi:10.2139/ssrn.2334406.

[33] Ijeoma O., "Transformation Of Dispute Resolution In Africa", International Journal On Online Dispute Resolution 2, no. 1 (2015), doi:10.5553/ijodr/235250102015002001004.

[34] Jacob K.G. 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' International Journal of Humanities and Social Science 1 (6) June 2011.

[35] Kariuki M., Settling Disputes Through Arbitration in Kenya (2nd Edition. Glenwood Publishers Ltd. 2012 Nairobi)

[36] Kariuki M., Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010, Op cit. page 7; The use of Mediation is envisaged by statute, s. 59A& B of the Civil Procedure Act, Cap 21, Laws of Kenya

[37] Karuiki M.. "Traditional dispute resolution mechanisms under Article 159 of the constitution of Kenya 2010." Retrieved 16th August (2014).

[38] Okwiri M. J., "The Prosecution Of Corporations Before A Hybrid International Criminal Tribunal", African Journal Of International Criminal Justice 2, no. 1-2 (2016), doi:10.5553/aj/2352068x2016002001004.

[39] Myers, Rent-a-Judge System in California, 131 NEW L. J. (1981)

[40] Ntuli, N. "Africa: Alternative Dispute Resolution In A Comparative Perspective". Conflict Studies Quarterly, no. 22 (2018): 36-61. doi:10.24193/csq.22.3.

[41] Osude, O., Godwin U., Chioma A., and Ogechi O. "Public Perception Survey Report on the Nigerian Criminal Justice System". SSRN Electronic Journal, 2014. doi:10.2139/ssrn.2526720.

[42] Nyoike, S.P., "REGULATORY CAPTURE AND EFFICACY IN WORKERS' COMPENSATION", Journal Of Risk And Insurance 85, no. 3 (2016): 663-694, doi:10.1111/jori.12183.

[43] Theresa, A. 'Methods of Conflict Resolution in African Traditional Society,' Indexed African Journal Online, vol. 8(2), Serial No. 33, April, 2014: pp. 138-157.

[44] Warren C.E, Ndwiga C, Sripad P, et al. Sowing the seeds of transformative practice to actualize women's rights to respectful maternity care: reflections from Kenya using the consolidated framework for implementation research. BMC Womens Health. 2017;17(1):69. Published 2017 Aug 30. doi:10.1186/s12905-017-0425-8

[45] Yolles, M.I., and B.R. Frieden. "A Metahistorical Information Theory of Social Change: The Theory". Journal of Organizational Transformation & Social Change 2, no. 2 (2005): 103-136. doi:10.1386/jots.2.2.103/1.

Articles and Scholarly work

[46] "Costs of the Arbitration." The Arbitration Act 1996, 2014, 291–316. doi:10.1002/9781118853412.ch11.

[47] Brian B. Jurisprudence: Theory and Context Articles by Society of Professionals in Dispute Resolution.

[48] Karuiki M. "ADR: The Road to Justice in Kenya". Paper Presented At The Chartered Institute Of Arbitrators Kenya Branch, International Arbitration Conference Held On 7th & 8th August, 2014 At Sarova Whitesands Hotel, Mombasa, Kenya, 2014, 1-40. https://profiles.uonbi.ac.ke/kariuki_muigua/files/paper_on_adr_the_road_to_justice__in_kenya_-_ciarb_conference_presentation.pdf.

[49] FIDA KENYA, "Feedback Sought On Proposed Mandatory ADR Reporting", Reactions Weekly 1660, no. 1 (2017): 4-4, doi:10.1007/s40278-017-32969-8.

[50] Governance, Justice, Law and Order Sector (GJLOS

[51] Hale, S. "Approaching The Bench: Teaching Magistrates And Judges How To Work Effectively With Interpreters". Monti. Monografías De Traducción E Interpretación, no. 7 (2015): 163-180. doi:10.6035/monti.2015.7.6.

[52] Harvill, R,. "The Alternative Dispute Resolutions Procedures Act: Some Questions Answered About Family Mediation". TACD Journal 16, no. 2 (1988): 97-102. doi:10.1080/1046171x.1988.12034334.

[53] Hamilton, R. "NEMA Sets Sites on Energy Policy Act Implementation for T&D Products [NEMA News]". NEEMA 22, no. 1 (2006): 56-57. doi:10.1109/mei.2006.1618982.

[54] Herbert F., "Alternative Dispute Resolution In Africa (Part 4)", Herbert Smith Freehills - ADR Notes, Last modified 2014, https://hsfnotes.com/adr/2013/05/01/alternative-dispute-resolution-in-africa-part-4/.

[55] IDF Uganda. "The Success Of ADR Mechanism | Independent Development Fund (IDF)". Idf.Co.Ug, Last modified 2018. http://idf.co.ug/content/successstory/successes-of-the-alternative-dispute-resolution-mechanism/.

[56] John H. and Valerie H., "Public Policy: An Exchange", Annualreviews.Org, Last modified 2018, https://www.annualreviews.org/doi/full/10.1146/annurev-lawsocsci-121416-011426.

[57] Makau J. A., Factors Influencing Management of Case Backlog in Judiciary: a case of Courts within Meru and Tharaka Nithi Counties.

[58] Media Council of Kenya, "Complaints Commission", Media council.or.ke, Last modified 2018, http://www.mediacouncil.or.ke/en/mck/index.php/9-about-mck/38-about-us-7.

[59] Mistelis, L. (2003) "ADR in England and Wales: a successful case of public private partnership," ADR Bulletin: Vol. 6: No. 3, Article 6. Available at: http://epublications.bond.edu.au/adr/vol6/iss3/6

[60] Mukuna, J. "Constitution-Making Dispute Resolution Mechanisms: Lessons From Kenya". Mediterranean Journal of Social Sciences, 2014. doi:10.5901/mjss.2014.v5n23p727.

[61] Nyakundi, F. M. "Development of ADR mechanisms in Kenya and the role of ADR in labour relations and dispute resolution." PhD diss., University of Cape Town, 2015.

[62] Odote, Co. “Public Interest Litigation and Climate Change – An Example from Kenya.” Climate Change: International Law and Global Governance, 2013, 805–30. doi:10.5771/9783845242781_805.

[63] Patrick M S. Op cite note 113; 'Alternative ADR Mechanisms' (2007) American Bar Association Labour and Employment Section accessed on 22nd Aug 2018.

[64] Phyllis J. H., "Overview of the ADR Multi-Option Program | United States District Court, Northern District of California", Cand.Uscourts.Gov, Last modified 2018, https://www.cand.uscourts.gov/overview.

[65] Report of the Case Backlog Review Committee – 29th March, 2017, Uganda.

[66] Revisiting the Theory of Justice. Public Administration Quarterly 38 (4): 440–44.

[67] Roseritta, A. & Shapwo H., Invoking Private Judge Dispute Resolution, H CAL. LAW, Sept. 9, 1984.

[68] Sara T., Staff Correspondent of the Cluster Science Monitor, February 9, 1982.

[69] Singer, A. “There Is No Rawlsian Theory of Corporate Governance.” Business Ethics Quarterly 25, no. 1 (January 2015): 65–92. doi:10.1017/beq.2015.1.

[70] Spurrier, R. L. "THE TRIAL COURT WRIT SMALL: SMALL CLAIMS ADJUDICATION IN OKLAHOMA". Southeastern Political Review 10, no. 2 (1982): 59-83. doi:10.1111/j.1747-1346.1982.tb00048.x.

[71] Summary Report on Court Services Situation Analysis – UNDP.

[72] The California Rent-a-Judge Constitutional and Policy Considerations of Pay-as-you-go Courts, 94 Harv. L. Rev. 1592 (1981).

[73] Theory Proceduralfairness.Org, Last modified 2018, http://www.proceduralfairness.org/Theory-and-Research/Theory.aspx.

[74] Wang, Y., Duncan S. Wong, C. Z., and Qiuliang X. "Fair Two-Party Computation With Rational Parties Holding Private Types". Security And Communication Networks 8, no. 2 (2014): 284-297. doi:10.1002/sec.979.

ANNEX 1:

LETTER TO THE OFFICE OF THE CHIEF JUSTICE

The Honourable chief Justice

And president of supreme court Kenya,

Hon. David M. Maraga,

The undersigned is a Master of Laws student at the University Of Nairobi conducting a study on „„ **effectiveness of Alternative Dispute Resolution Mechanism (ADR) in case backlog management in Kenyan courts with focus on Milimani High Court Commercial Division**". This research project is for purposes of partial fulfillment of Master of Laws degree. The objective of this study is to assess effectiveness of ADR in reduction of case backlog.

Being the head of the judicial arm of Government, I do request you to grant me an opportunity to have a discussion with you on the subject. Your responses will not be identified with you personally. Nothing you say during the interview will be shared out.

I must add that I rely on your voluntary co-operation in undertaking this study and would be very grateful if you would agree to take part in the study, which will go a long way to help me in achieving the objective for which this study is being undertaken.

Sincerely,

Rachel Chepkoech Biomndo Ngetich,

Master of Laws Student, UNIVERSITY OF NAIROBI

INTERVIEW QUESTIONS TO THE CHIEF JUSTICE

1. What is your position concerning case backlog in Kenya's Justice System? Is the situation a concern in the Judiciary?
2. What measures and policies are in place in addressing case backlog?
3. Are the policies sufficient?
4. The Judiciary earmarked over 5,000 cases that had lasted more than five years in the court system for conclusion within a period of a month, how far has the initiative gone?
5. Are there challenges encountered by the judiciary in its efforts to reduce case backlog? If so what are the challenges?
6. Is the current ADR system adequate in reduction of case backlog
7. What can be done (by you or other parties) to enhance the efficiency of ADR in settling disputes?

ANNEX 2:

LETTER TO THE OFFICE OF THE SOLICITOR GENERAL

Dear Respondent

The undersigned is a Master of Laws student at the University Of Nairobi conducting a study on „„ **effectiveness of Alternative Dispute Resolution Mechanism (ADR) in case backlog management in Kenyan courts with focus on Milimani High Court Commercial Division**". This research project is for purposes of partial fulfillment of Master of Laws degree. The objective of this study is to assess the effectiveness of ADR in reduction of case backlog.

By virtue of your office as government representative in court litigation, your feedback on use of ADR as a dispute resolution mechanism as an alternative to litigation, will enrich this study.

I therefore do request you to accord me an opportunity to interview you on the above subject. The interview is estimated to take about one hour. Your responses will not be identified with you personally. Nothing you say during the interview will be shared out.

I look forward for your voluntary co-operation. Your participation in the study will go a long way in enabling me achieve the objective of this study

Sincerely,

Rachel Chepkoech Biomndo Ngetich,

Master of Laws Student,

INTERVIEW QUESTIONS TO THE SOLICITOR GENERAL (Commercial Office)

1. What are your views on the use of ADR as a means of administering Justice?
2. Is the available ADR system sufficient in managing case backlog in Kenya?
3. Can you categorize the kind of matters (commercial) that are referred to ADR?/ How do you decide on the commercial matters that would be settled through ADR vis-a-vis those to be settled through litigation
4. On an average how long, does it take to settle cases through ADR? How many matters have been processed through ADR so far?
5. Is it possible to for the Kenyan Justice system to rely on the available ADR system to manage case backlog?
6. In your experiences how effective is the Kenyan ADR system
7. What challenges have you encountered in the use of ADR as a means of settling disputes?
8. What can be done (by you or other parties) to enhance the efficiency of ADR in settling disputes?

ANNEX 3:

LETTER TO LAWYERS

Dear Respondent

The undersigned is a Master of Laws student at the University Of Nairobi conducting a study on „„ **effectiveness of Alternative Dispute Resolution Mechanism (ADR) in case backlog management in Kenyan courts with focus on Milimani High Court Commercial Division**". This research project is for purposes of partial fulfillment of my Master of Laws degree. The objective of this study is to assess the effectiveness of ADR in reducing case backlog.

By virtue of your engagement in commercial litigation and in particular arbitration matters, your feed on effectiveness of ADR will enrich this study.

I therefore do request you to accord me an opportunity to interview you on the above subject. The interview estimated to take about one hour. Your responses will not be identified with you personally. Nothing you say during the interview will be shared out.

I look forward for your voluntary co-operation. Your participation in the study will go a long way in enabling me achieve the objective of this study

Sincerely,

Rachel Chepkoech Biomndo Ngetich,

Master of Laws Student, UNIVERSITY OF NAIROBI

INTERVIEW QUESTIONS TO LAWYERS

1. What are your views on the use of ADR as a means of settling disputes?
2. Is the available ADR mechanism sufficient in managing case backlog in Kenya?
3. What kind of commercial cases would you rather have your client settle through litigation?
4. Is it possible for the Kenyan Justice system to rely on the available ADR system to manage case backlog?
5. Do you find ADR as an economic sabotage for your service when compared to litigation?
6. What challenges have you encountered in the use of ADR as a means of settling disputes?
7. What can be done (by you or other parties) to enhance the efficiency of ADR in settling disputes?

ANNEX 4:

LETTER TO THE LITIGANTS

Dear Respondent

The undersigned is a Master of Laws student at the University Of Nairobi conducting a study on „„ **effectiveness of Alternative Dispute Resolution Mechanism (ADR) in case backlog management in Kenyan courts with focus on Milimani High Court Commercial Division**". This research project serves as partial fulfillment of Master of Laws degree. The objective of this study is to assess whether ADR mechanisms are effective in reduction of case backlog.

By virtue of your position as a litigant in commercial dispute you feedback will be crucial in this study.

I therefore request you to participate in responding to question in the attached questionnaire.

Your responses will not be identified with you personally. Nothing you say during the interview will be shared out.

I must add that your voluntary participation in this interview will go a long way in enabling me achieve the objective for which this study.

Sincerely,

Rachel Chepkoech Biomndo Ngetich,

Master of Laws Student,

INTERVIEW QUESTIONS TO LITIGANTS

1. What kind of case are you involved in?
2. What are your thoughts in the use of ADR in settlement of disputes?
3. What are your views on referral of cases to ADR?
4. Have you ever agreed to your dispute being referred to ADR Mechanism?
5. Have you ever recommended ADR to anyone as means of accessing justice?
6. How many matters have you filed for litigation after unsuccessful attempt of ADR?
7. What can be done (by you or other parties) to enhance the efficiency of ADR in settling disputes?

ANNEX 5:

LETTER TO THE CHARTERED INSTITUTE OF ARBITRATORS (CIArb)

Dear Respondent

The undersigned is a Master of Laws student at the University Of Nairobi conducting a study on „„ **effectiveness of Alternative Dispute Resolution Mechanism (ADR) in case backlog management in Kenyan courts with focus on Milimani High Court Commercial Division**". This research project is partial fulfillment of my Master of Laws degree. The objective of this study is to assess the effectiveness of ADR mechanisms in settlement of disputes.

Your institute being the main organ that coordinates arbitration in Kenya, your feedback will go a long way in enriching this study. The interview should take about an hour. Your responses will not be identified with you personally. Nothing you say during the interview will be shared out.

I must add that I rely on your voluntary co-operation in undertaking this study. Your participation in this study will enable me achieve its objective.

Yours faithfully,

Rachel Chepkoech Biomndo Ngetich,

Master of Laws Student, UNIVERSITY OF NAIROBI

INTERVIEW QUESTIONS TO THE CHARTERED INSTITUTE OF ARBITRATORS (CIArb)

1. How many Arbitrators do you have in your system?
2. What are the qualifications of Arbitrators in your lists?
3. How many clients request for your assistance in a year?
4. What is the nature of cases that are referred to arbitration?
5. Are the available Arbitrators sufficient to handle all the applications you receive?
6. How many international arbitrations has the institute handled?
7. What challenges have encountered in the use of arbitration as a means of settling disputes?
8. What can be done (by you or other parties) to enhance the efficiency of Arbitration in settling disputes?

ANNEX 6:

LETTER TO THE DEPUTY REGISTRAR (Commercial Division)

Dear Respondent

The undersigned is a Master of Laws student at the University Of Nairobi conducting a study on „„ **effectiveness of Alternative Dispute Resolution Mechanism (ADR) in case backlog management in Kenyan courts with focus on Milimani High Court Commercial Division**". This research project is partial fulfillment of Master of Laws degree. The further objective of this study is to assess the capacity of ADR system in managing case backlog effectively.

By virtue of your position as Mediation Deputy Registrar, your feedback will be crucial in achieving the objective of this study. The interview period is estimate at about an hour. In order to fully capture your responses, I will tape record the discussions to compliment hand written notes. Your responses will not be identified with you personally. Nothing you say during the interview will be shared out.

I must add that I rely on your voluntary co-operation in undertaking this study. Your participation will go a long way in enabling me achieve the objective of this study.

Sincerely,

Rachel Chepkoech Biomndo Ngetich,

Master of Laws Student,

ANNEX 7
INTERVIEW QUESTIONS TO THE MEDIATION DEPUTY REGISTRAR

1. How many mediators are available to facilitate ADR?
2. What are the qualifications of the available mediators?
3. How are mediators enumerated?
4. What are the criteria for screening cases for mediation process?
5. What is the reaction of lawyers to referral of cases to court annexed mediation?
6. What is the approximate number of cases referred to mediators?
7. How many of the cases referred are settled through mediation?
8. How much money is held in litigation?
9. How much money is released to the economy as a result of litigation?
10. Is court-annexed mediation effective in case backlog reduction?
11. Which other ADR mechanisms are utilized? If any what percentages do they contribute to reduction of case backlog?
12. What is the effect of failed mediation proceedings on litigation?
13. What challenges have you encountered in the use of ADR as a means of settling disputes?
14. What can be done (by you or other parties) to enhance the efficiency of ADR in settling disputes?

ANNEX 8

LETTER TO THE KENYA REVENUE AUTHORITY (KRA) OFFICE

Dear Respondent

The undersigned is a Master of Laws student at the University Of Nairobi conducting a study on „„ **effectiveness of Alternative Dispute Resolution Mechanism (ADR) in case backlog management in Kenyan courts with focus on Milimani High Court Commercial Division**". This research project is partial fulfillment of Master of Laws degree.

I am aware that you are implementing ADR mechanism in KRA; I do request that you accord me an opportunity to interview you. Your feedback will go a long way in enriching my research project. If you accept, I could either send a questioner or do a one on one interview. If we scheduled one on one meeting, the interview period is estimated at about an hour. In order to fully capture your responses, I will tape record the discussions to compliment hand written notes. Your responses will not be identified with you personally. Nothing you say during the interview will be shared out.

I must add that I rely on your voluntary co-operation in undertaking this study. Your participation will go a long way in enabling me achieve the objective of this study.

Sincerely,

Rachel Chepkoech Biomndo Ngetich,

Master of Laws Student,

ANNEX 9

INTERVIEW QUESTIONS TO THE KRA OFFICER

1. What are your views on the use of ADR as a means settling tax related disputes?
2. Is the process more efficient when compared to Tax Appeal Tribunal?
3. How do you decide on the commercial matters that would be settled through ADR vis-a-vis those to be settled through Tax Appeal Tribunal?
4. On an average how long, does it take to settle cases through ADR? How many matters have been processed through ADR so far?
5. Is it possible to for the KRA office to rely on the available ADR system to manage various tax disputes?
6. (Given that KRA ADR system is manly facilitated by KRA officials) Do you receive complaints regarding the partiality of facilitators during disputes in your ADR?
7. How many issues have you referred to litigations after unsuccessful ADR process?
8. What challenges have you encountered in the use of ADR as a means of settling disputes?
9. What can be done (by you or other parties) to enhance the efficiency of ADR in settling disputes?
10.

Part 2

INFORMATION FROM PMMD RECORDS

Table of generalized basic information

about Available ADR system at Milimani Law Courts

Number of ADR facilitators in payroll

Number of judges in payroll

Actual number of ADR facilitators

Actual number of judges

Actual number of court staff

Number of judicial chambers

Number of courtrooms

Number of rooms allocated for ADR

Required funding for ADR system according to budget request for the reporting period (1 year)

Budget funding for ADR for the reporting period (year)

Actual funding for ADR for the reporting period (year)

Amount of money held in Litigation in the last reporting year

Actual Amount of money held in litigation in the reporting year

Amount of money released in the economy for circulation after successful Annexed mediation in the last reporting year

Amount of money released in the economy for circulation after successful Annexed mediation in the reporting year

Number of cases considered during the previous reporting period (year)

Number of cases referred to ADR during the previous reporting period (year)

Number of settled cases through ADR

Incoming cases from the first day of the current reporting period to the last day of the current reporting period

Completed cases from the first day of the current reporting period to the last day of the current reporting period

Matters referred to mediation by the Attorneys/ Lawyers in the last reporting year

Matters referred to mediation by the Attorneys/ Lawyers in the reporting year

Total matters referred to mediation by the Attorneys/ Lawyers

Matters referred to mediation by the court in the last reporting year

Matters referred to mediation by the court in the reporting year

Total matters referred to mediation by the court

Backlog of cases as of the last day of the current reporting period

Total number of litigation applications (complaints, etc.) of citizens and legal after unsuccessful ADR for the previous reporting period

Number of litigation applications (complaints, etc.) of citizens and legal entities regarding improper organization of ADR system for the previous reporting period

Total number of litigation applications (complaints, etc.) of citizens and legal for the current reporting period

Number of applications (complaints, etc.) of citizens and legal entities regarding improper organization of ADR for the current reporting period

Arbitration matters filed in court for the courts intervention in the last reporting year

Arbitration matters filed in court for the courts intervention in the reporting year

All Arbitration matters filed in court for the courts intervention

Gender composition of ADR Facilitators	Females
	Males

PART 3

Case Analyses

The aim of analysis of record and statistical data of ADR decision is to obtain generalized information about current situation in ADR systems as to the compliance of actual timelines of performing procedural actions with reasonability and optimality of ADR timelines and normative timelines provided for by law.

ADR proceedings	Quantity	Measuring unit
Average duration of dispute resolution periods		Calendar days
Average Duration of period from the day the dispute was filed to the day the ADR process commenced		Calendar days
The longest period between ADR sessions		Calendar days
Total number of ADR sessions		Sessions
Number of ADR sessions that were appointed but did not take place		Sessions
Average Duration of the period between the first ADR session and the day of last decision		Calendar days

Total number of ADR cases in a year	cases
Numbers of ADR successes	cases

PART 4

Statistics of ADR Facilitators

Fill in the blanks as per the relevant number of ADR facilitators Milimani Law courts (Numeric)

Respond with (1, 2, 3 …)

1.	Highest Academic Qualifications	Diploma	Bachelor's Degree	Master Degree	PHD	
2.	Age Brackets	Below 30 years	30- 39 years	40- 49 years	50- 59 years	60 years and Above
3.	Work Experience	Below 5 years	5- 9 years	10- 14 years	15- 20 years	21 years and above
4.	Work Related Experience (ADR related)	Below 5 years	5- 9 years	10- 14 years	15- 20 years	21 years and above

5.	Judicial Experience	Below 5 years	5- 9 years	10- 14 years	15- 20 years	21 years and above		
6.	Legal Work Experience	Below 5 years	5- 9 years	10- 14 years	15- 20 years	21 years and above		