



UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**COURT ANNEXED MEDIATION IN KENYA: AN EXAMINATION OF THE
CHALLENGES AND OPPORTUNITIES.**

Submitted by:

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DECLARATION

I **JOSEPHINE A. OYOMBE** do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any University.

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DEDICATION

To the litigant engulfed in conflict, seeking timely and efficient justice from the Court Corridors.

ABBREVIATIONS & ACCRONYMS

ADR -	Alternative Dispute Resolution
AOC -	Alternative Dispute Resolution Operationalization Committee
CAM -	Court Annexed Mediation
CAMP -	Court Annexed Mediation Project
CDR -	Court Dispute Resolution
CMC -	Community Mediation Centers
CPA -	Court Procedure Act
DCRT -	Daily Court Returns Template
JTF -	Judiciary Transformation Framework
JTI -	Judiciary Training Institute
KLR -	Kenya Law Reports
KLCMC-	Kuala Lumpur Court Mediation Centre
MAC-	Mediation Accreditation Committee
MDR -	Mediation Deputy Registrar
PDRC -	Primary Dispute Resolution Centre
TWG -	Technical Working Group Secretariat

CHAPTER ONE

1.1 INTRODUCTION

One of the biggest challenges facing access to justice in the Kenyan judicial system is backlog of cases.¹The judiciary continues to grapple with a backlog of cases, as it devises a way to manage the court cases within efficient and manageable time frames. The state of the Judiciary and the Administration of Justice Annual Report for the financial year 2018-2019 indicates that the timeline from filing to judgement of cases in Kenya should be twelve months². The report notes that for the period 2018/2019, the backlog of cases at the judiciary stood at 337,403 out of which the cases aged between five years and above were 39,428.³ Courts with the highest backlog of cases were noted as the Magistrates Court and the High Court at 437,387 and 87,477 respectively.⁴ Challenges facing the Judiciary as per the report include: low budgetary allocations due to austerity measures by government, lack of adequate infrastructure and lack of sufficient human Resource Capacity on Courts⁵.

The Judiciary has made efforts to improve the access of Justice in Kenya through a number of initiatives. Some of the initiatives include: the hiring of additional judicial officers; adoption of efficient case management practices; opening new court stations; Amendment of existing laws and enactment of laws with provisions on ADR ; incorporating technology in court processes such as digital filing of cases ; enhanced inter agency and government of co-ordination among others. In

¹The Judiciary (2020), 'Performance Management and Measurement Understandings Evaluation Report 2018/2019, pg 46.

² The Judiciary (2020), 'State of the Judiciary and Administration of Justice Report 2018-2019, pg 30

³The Judiciary (2020), 'State of the Judiciary and Administration of Justice Report 2018-2019, pg 13

⁴The Judiciary (2020), 'State of the Judiciary and Administration of Justice Report 2018-2019, pg 14

⁵ Ibid

as much as efforts have been put to enhance access to justice, of key importance is the Entrenchment of ADR Mechanisms in the Court Processes.⁶

In the inclusion of ADR mechanisms in Court dispute resolution process, the Judiciary has implemented the constitution of Kenya 2010, which inculcates a wholesome judicial authority that adopts co-existence of ADR alongside the justice system.⁷ In addition to the Courts, there are a variety of mechanisms for dispute resolution besides Courts, including: Tribunals, Regulatory Authorities, Alternative Dispute resolution Centres that offer Arbitration, among others

The Judiciary made the first step in institutionalizing and operationalizing Court annexed mediation by introducing it on a trial basis at the Family and Commercial Divisions of the High Court. “The choice of the two Divisions was deliberate. The cases in Commercial Division of the High Court are worth billions of shillings which if resolved expeditiously, would release substantial resources into the economy. On the other hand, the Family Division of the High Court is the Division in which disagreements tear families apart as generations fight over family wealth.”⁸

The Mediation Pilot Project, Court Annexed Mediation Project (CAMP), was commenced in April 2016. The Pilot project was run under the Mediation (Pilot Project) Rules 2015⁹ and operationalized by the Chief Justice on the 24th March, 2016.¹⁰ To steer the project, the Judiciary formed several organs that were mandated to execute the pilot program. There were: the Mediation Accreditation Committee (MAC), the Alternative Dispute Operationalization Committee (AOC) and

⁶The Judiciary (2017), ‘Sustaining Judiciary Transformation (SJT): A Service Delivery Agenda, 2017-2021, 19

⁷Article 159(2) (c),The Constitution of Kenya, 2010.

⁸The Chief Registrar of the Judiciary (2019), ‘Here’s the Judiciary’s Solution to Case Backlog’, available at <https://www.judiciary.go.ke/here-is-the-judiciarys-solution-to-case-backlog/>

⁹Legal Notice No. 197 of 2015.

¹⁰Vide Gazette Notice No. 1890.

the Secretariat. At the end of the pilot program, a multi stakeholder taskforce was formed with a number of objectives some of which are to establish and formulate an appropriate judiciary policy on Court Annexed Mediation as well as rolling out Court Annexed Mediation to all the Court stations in Kenya.¹¹

According to the Judiciary, in the financial year 2019-2020, a total of 4315 matters were referred to mediation and 1290 matters were settled with a total monetary value of Kshs. 7.3 Billion. The Average settlement period of the matters was noted as 90 days, which reveals a huge variance in comparison with the average time to disposition of matters that undergo the normal Court process. Mediation was also utilized in criminal matters during plea bargain and agreement.¹²

From the foregoing, it is noteworthy that the backlog of cases is still high, despite the fact that the judiciary is making efforts to reduce the backlog by hearing cases on a first in first out basis, embracing plea bargaining, alternative dispute resolution mechanisms, court annexed mediation, active case management, service weeks, bar bench meetings and court user committee meetings.¹³. Other than enhancing access to Justice for all, faster and cheaper dispute resolution and encouraging dispute resolution suited to parties' needs, CAM is instrumental and has the potential of reducing the backlog of cases at the Judiciary. Despite this potential, CAM faces challenges of inadequate funding, lack of infrastructure, lack of training for the Mediators among others. There is need for a review of the challenges and opportunities of Court Annexed Mediation to interrogate its potential to resolving the issue of Backlog of cases and to develop adequate laws and policies that will address the challenges highlighted.

¹¹Gazette Notice No.6869 of 2017

¹²The Judiciary (2020), 'The Judiciary Finance and Administration Sub-committee Report Financial Year 2019/2020.

¹³The Judiciary (2020), 'State of the Judiciary and Administration of Justice Report 2018-2019, pg 13.

1.2 STATEMENT OF THE PROBLEM

Court Annexed Mediation, embraced by the Judiciary at the end of the pilot program in 2017, still faces some challenges that were experienced at the pilot stage which include lack of: funding, a proper infrastructure, trained mediators and training personnel especially in stations outside Nairobi and proper advocacy / sensitization to the public on what mediation entails. Additionally, there is no unified curriculum towards the training of mediators. Training institutions have developed their own training programs leading to contrasting standards and practice.

This paper shall consider the existing legal and institutional mechanisms for dispute resolution in Kenya, by analyzing the extent to which Court Annexed Mediation is suitable or adequate for resolving disputes. The paper also considers the challenges that have been encountered in implementing Court annexed mediation and identifies the opportunities available in the implementation of CAM in Kenya.

1.3 RESEARCH OBJECTIVES

This study seeks to:-

- 1.** To evaluate the existing legal and institutional mechanisms for resolving civil disputes through Court Annexed Mediation.
- 2.** To examine whether CAM is living up to its intention, if not to identify the challenges and opportunities for Court Annexed Mediation in Kenya.
- 3.** To review the best practices for Court Annexed Mediation and to make proposals drawn from a comparative case study of jurisdictions with the best practices

1.4 RESEARCH QUESTIONS

This paper shall answer the following questions:-

1. Is the current legal and institutional framework for Court Annexed Mediation in Kenya adequate in resolving civil disputes?
2. What is the status of CAM and what are some of the challenges and opportunities that have been faced?
3. What lessons / best practices from other jurisdictions can the Kenyan system adopt to strengthen Court Annexed Mediation in Civil Cases?

1.5 HYPOTHESES

This paper will study the following Hypothesis:-

1. CAM is an excellent step towards embracing Article 159(2) (c) in resolution of civil disputes.
2. The legal framework for CAM is not effective in resolving civil disputes in Kenya.

1.6 LITERATURE REVIEW

1.6.1 HISTORICAL DEVELOPMENT OF MEDIATION

Mediation is a process that is as old as the existence of man as evidenced in the resolution of disputes (under various levels namely: disputes among neighbors, parents, young children, societies and tribal communities).¹⁴

The large scale adoption of ADR generally and mediation specifically in dispute resolution occurred in the 1960s. This period was marked by ‘instability’ due to the Civil Rights movement, the Vietnam War, labour unrests, the inclusion of women in the work place, greater awareness

¹⁴Antoine Cremona,(2004) “ Forced to Mediate: Critical Perspectives on Court-Annexed Dispute Resolution Schemes” Chamber of Advocates (Malta) paper, p.2

about consumer rights, prosecution of drug related cases and rise in the number of domestic disputes leading to divorce. This led to an explosion in the number of cases filed in court to seek redress amounting to huge case backlogs. As a result, courts at the family divisions, implemented court-connected family mediation. This intervention was successful as parents were more willing to accept child custody plans developed with court mediators than those imposed by judges. Consequently, less post-divorce motions were filed following the mediation. At the same time, the delay forced business people who could not afford lawyers; and who could not afford to wait for court dates to seek alternative dispute resolution mechanisms.¹⁵

For Nordic countries, mediation has been part of their culture since the pre-modern times. During that time, legal, administrative and common disputes were resolved through local assemblies. Decisions were made through consensual negotiations between the people. The parties were able to come to an understand on the various disputes. For example in murder cases the parties could settle for compensation of the victim's family. Therefore, it is not surprising that in the late eighteenth and nineteenth century, the countries introduced mediation in all civil cases for parties prior to filing complaints in court. Mediation was further entrenched in the 1980s when these countries adopted victim offender mediation systems¹⁶.

In Kenya, mediation together with arbitration and negotiation have been in use by communities since the pre-colonial era. The traditional council of elders, for example, was able to settle disputes in a manner that was fast, less acrimonious, flexible and addressed the interest of the parties.¹⁷ Mediation was however, informal. The growth of court annexed mediation was triggered by the

¹⁵Jay Folberg(2015), "Development of Mediation Practice in the United States Año 16. Vol 17 febrero- julio at https://www.usfq.edu.ec/publicaciones/iurisDictio/archivo_de_contenidos/Documents/IurisDictio_16/iurisdictio_016_002.pdf (accessed 5/7/2019)

¹⁶Nylund, Anna &Ervasti, Kaijus& Adrian, Lin. (2018). Introduction to Nordic Mediation Research. Springer Open

¹⁷ J. Kenyatta, 'Facing Mount Kenya, The Tribal Life of the Kikuyu', 1965. Pg 95-124.

passing of the Constitution, which requires Courts and Tribunals to be guided by alternative forms of dispute resolution. It is on this background that the Court Annexed Mediation project was launched.¹⁸ For a long time since the setting up of formal judicial structures in Kenya, the most common form of dispute resolution was Litigation. This was due to the adoption of the adversarial common law system. Litigation is inherently costly, uncertain and time consuming mode of dispute resolution.¹⁹

1.6.2 TYPES OF MEDIATION

Mediation facilitates parties to communicate and negotiate so as to arrive at a decision by an impartial third party²⁰. The disputants are helped to find solutions to their conflict through searching for a common ground in a creative and yet realistic way to resolving their issues²¹.

Court Annexed mediation on the other hand is mediation imposed by Court, whereby parties are required to attempt mediation of the dispute, prior to a hearing of the dispute in Court. Under the Kenyan legal regime, the Court encourages dispute resolution of cases filed in Court through mediation.²²

Court Annexed mediation has had an impact in dispute resolution of different types of civil disputes.²³

¹⁸ World Bank, 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans' available at <<https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>>

¹⁹ South African Law Commission Issue Paper 8 (Project 94) Alternative Dispute Resolution 3; Brand, Steadman and Todd Commercial mediation 13-14

²⁰ Timothy Hedeem (2005) "Coercion and Self Determination in Court Connected Mediation: All Mediations are Voluntary but some are more voluntary than others. Vol.26 Justice System Journal pg. 274

²¹ Allan J. Stitt (2004) Mediation, A Practical Guide, Cavendish Publishing limited

²² Kariuki Migua (2015) , Court Sanctioned Mediation in Kenya, an appraisal, pg 9

²³ Jomo Nyaribo, Edel Ouma (2018), 'Keeping Disputes out of Court...Mediation Gaining Ground in Kenya' available at <https://mman.co.ke/content/keeping-disputes-out-court%E2%80%A6mediation-gaining-ground-kenya> accessed 08/11/2020

Mediation allows the management of conflicts with a holistic approach. Mediation involves hearing the parties, understanding the dispute and allowing parties to reach a decision. This varies with the litigation or arbitration process which formal and rigid in nature.

It also enhances collaborative legal practice, whereby lawyers can take a more active role and be included in the processes of ADR. Litigation, Arbitration, Mediation and other forms of ADR all have their rightful place in dispute resolution. By combining all these avenues to help resolve disputes in an amicable way, justice will not only be done but will manifestly be seen to be done.²⁴

The two definitions have salient similarities that underline the principles of mediation as voluntary and autonomy of the party. It also follows that the adjudicator does not have any power to decide on behalf of the parties. This is different from Arbitration, which is another form of ADR where an arbitrator has absolute adjudication powers.²⁵

Bush and Folger²⁶ discuss the various schools of mediation that exist. These are facilitative mediation, evaluative mediation and transformative mediation. Under facilitative mediation: the role of the mediator is to guide the parties reach a mutual and consensual outcome; the mediator identifies the interests from the position taken by the parties; the mediator gives his/her opinion on the dispute /tries to advise the parties on the best way forward based on what the court is likely to decide; the mediator ensures that before the parties come to an understanding they are informed; the mediator guides the process and the parties are responsible for reaching an outcome; and the mediator ensures that the parties not their lawyers come to an understanding.

²⁴Antonia Engel(2005), 'Negotiation and Mediation Techniques for Natural Resource Management' Food and Agriculture Organization' available at <http://www.fao.org/3/a0032e/a0032e00.htm#Contents> accessed 08/11/2020

²⁵Alessandra Sgubini, Mara prieditis& Andrea Marighetto (2004), 'Arbitration, Mediation and Conciliation: Differences and Similarities from an International and Italian Business Perspective', available at <https://www.mediate.com/articles/sgubinia2.cfm>, accessed 08/11/2020

²⁶Obert A Bush & Joseph Folger, 'The Promise of Mediation', Jossey-Bass Publishers,1994

Evaluative mediators: This approach of mediation is stated to be focused on the rights of the parties on the assumption that the mediators focus on the legal rights of the parties²⁷.

The mediator: advises the parties on the merits of the case and suggest how it would be decided if it was decided in court and the mediator could make formal or informal recommendation to the parties on the outcome of their dispute. The mediator is primarily concerned with the legal rights of the parties rather than their interests that is, the mediator will advise on the legal realities of the case such as the legal position and costs and benefits of pursuing litigation to mediation. The mediator plays an active role rather than a passive role.

Transformative mediation involves the ‘empowerment’ and ‘recognition’ of the parties. Each party recognizes the other’s needs, interests, values and points of view. Mediators allow and support the parties in mediation to determine both the process and the outcome of mediation.²⁸

1.6.3 NATURE OF MEDIATION

Whether mandatory mediation denies parties the right to exercise their choice of dispute resolution by subjecting them to mandatory mediation is a topic that is subject to debate.²⁹ When mediation is mandated whether for the benefit of the parties or to reduce the backlog in the judiciary, it takes away from the very essence of mediation which is a more voluntary.

Sander, William and Debra argue that here is a difference between “*Coercion in mediation*” and “*coercion into mediation*”. The authors note that Court Mandated Mediation is not an oxymoron as a party cannot be forced to voluntarily agree to a result. This simply means that in as much as the Court Annexed Mediation may be mandatory, the parties concerned are granted a chance to

²⁷ Supra note 10

²⁸ Brad Spangler (2003), ‘ Transformative Mediation’ pg 1

²⁹ Vettori, Stella. (2015). Mandatory mediation: An obstacle to access to justice? African Human Rights Law Journal, 15(2), 355-377. <https://dx.doi.org/10.17159/1996-2096/2015/v15n2a6>

arrive at their decisions voluntarily. On the other hand, coercion in mediation does not amount to mediation.

Coercion is also discussed at a different level whereby a party may be “coerced within the mediation” which may occur within entry or exit. Mediators may be involved in the controlling of the process of mediation.³⁰

Some writers have labeled Coercion as encouragement of parties to mediate by pointing out the need for some coercion for persons to accept the mediation process and that such coercion would be acceptable especially when the mediation is court referred.³¹

Dr. Kariuki Muigua³² approaches mediation from a legal and political approach. The author notes mediation from the legal perspective is focused on settlement and does not bear the attributes to mediation. He notes that mediation from a political perspective offers little or no autonomy for parties to elect the mediator, the process and outcome.. He notes that the root cause of the mediation is not addressed because of the power balance. On the other hand, mediation from the political perspective reflects true mediation since it allows parties to have autonomy in choosing the mediator and consenting into the process. He notes that the political process does not rely on any coercion and that it is focused on finding a common ground towards obtaining an amicable solution among the parties concerned.

³⁰Frank E.A Sander, H. William Allen and Debra (1996), ‘Judicial (Mis) use of ADR? A Debate’, 27, *University of Toledo Law Review* 885.

³¹Timothy Hedeem(2005)Coercion and Self-determination in Court-Connected Mediation: All Mediations Are Voluntary, But Some Are More Voluntary than Others,Justice System Journal,26:3,273-291,DOI: [10.1080/0098261X.2005.10767773](https://doi.org/10.1080/0098261X.2005.10767773)

³² Kariuki Muigua, ‘Court Sanctioned Mediation in Kenya- An Appraisal’, available at <<http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf>>

1.6.4 BENEFITS OF MEDIATION

According to Kenya's Judiciary when parties enter into Court Annexed Mediation, they are able to enjoy the many benefits. First it is less expensive to solving dispute through the court process.

Parties who opt to enter into Court Annexed Mediation are able to minimize costs especially legal fees. Unlike litigation where lawyers are needed mostly because parties are not familiar with the procedural aspects of this form of dispute resolution, Court Annexed Mediation does not require lawyers as the parties solve their disputes 'on their own terms' in terms of the substance and procedure of dispute resolution. Second, parties who participate in Court Annexed Mediation are able to decide on the solution of their dispute and customize it to their needs. The mediator plays a key role in helping the parties to isolate the matter in dispute and to come up with a solution on their own. This is unlike in litigation where the role of crafting the solution lies with the lawyers and the judges. This denies the parties the ability to own up to the solution that is reached in court. Also, the lawyers and judges might get lost in legal 'jamboree' and end up solving the legal aspects of the dispute which might be unhelpful to the parties.³³

Other writers have also commented on the benefits of mediation. Wall argues that mediation helps maintains relationships between the parties in conflict. According to him, parties' value mediation even after completion of dispute resolution, this is because it promotes communication and reconciliation between the parties. He gives the example of mediation in solving disputes between parents and children. Mediation opens up communication between the parents and children hence improving the relationship. Also, he notes that lawyers who participate in the process are co-

³³ The Judiciary, 'Court Annexed Mediation', available at <<http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf>>

operative than in court largely because in this case they are defending their client's interests rather than their positions.³⁴

Lawrence posits that parties are more willing to comply with mediated agreements than court orders. The compliance rate for mediated rate is high in Canada. It is estimated that mediation has a 60% to 80% compliance rate. This especially the case for divorce. This level of success is attributed mainly to the open communication between the parties.³⁵

Adrian argues that parties who engage in mediation achieve higher levels of satisfaction than in litigation. This level of satisfaction is attributable to several aspects. First mediation takes into account all aspect of the mediation for example the relationship between the parties. The approach for disputes between commercial parties will vary from that of married persons or parent and child. Second the process of mediation is understood. The parties determine the mediation process while the Mediator opens up the channels of communication between the parties. Once the parties start talking the process will be discussed amongst them. This position is contrary to that in litigation, where the process of dispute resolution is cast on stone and parties do not play any role in crafting the process. The process is further complicated in the sense that it is purely legal. Third the process is flexible; parties can mend the process to fit their dispute.³⁶

³⁴ Wall, James A., and Ann Lynn. "Mediation: A Current Review." *The Journal of Conflict Resolution*, vol. 37, no. 1, 1993, pp. 160–194. *JSTOR*, www.jstor.org/stable/174500.

³⁵ Lawrence A, Nugent J, Scarfone C (2007) The effectiveness of using mediation in selected civil law disputes: a meta-analysis. Canada Department of Justice, Canada

³⁶ Relis T (2009) Perceptions in litigation and mediation: lawyers, defendants, plaintiffs, and gendered parties. Cambridge University Press, Cambridge

Other authors point out the discontent of parties in the Court Annexed Mediation process. Vidmar points out that some parties settle because they feel that the process has been forced on them. They could also have issues with the techniques applied by the mediator in dispute resolution.³⁷ Rubin argues that some parties would prefer to have less involvement of the mediator. Although he does not expound on this point, it is not far-fetched to think that this is because of the confidential nature of the information discussed by the parties.

Mediation creates a space where the parties get to face and address each other and the kind of information shared could be more personal than would have been disclosed in court. This is regardless of the fact that the process is confidential.³⁸ Moore on the other hand attributes this dissatisfaction to the inability of mediation to provide distributive justice to the parties. Because the role of the mediator is passive, parties feel that where the parties are 'unequal' the mediator cannot do anything to stand up for the little guy because they lack authoritative decision-making power.³⁹

This paper is of the view that in as much as jurisprudence keeps evolving, and in as much as the processes in alternative dispute resolution may keep changing, the key attributes to mediation should be maintained and kept intact. Consequently, the Court Annexed Mediation laws and guidelines should be flexible so as to allow parties to have the autonomy in selection of the mediators. Whereas this paper appreciates the arguments on the need for some extent of coercion of parties into mediation, this paper views that the attributes of Court Annexed Mediation may still be maintained even without the coercion of parties into mediation. Furthermore, this paper relies on the distinction between Coercion in mediation and coercion into mediation. The paper views

³⁷Vidmar N, 'An Assessment of Mediation in a Small Claims Court', *Negotiation Journal*, 367-374, 1985

³⁸Rubin J. 'Experimental Research on Third-Party Intervention in Conflict: Toward Some Generalizations', *Psychological Bulletin*, 379-391, 1980

³⁹Moore, C.W., 'The Mediation Process: Practical strategies for resolving conflict', 1986, Jossey-Bass, San Francisco

that in as much as Court Annexed Mediation is mandatory, the parties involved in the mediation process are the ultimate decision makers and therefore at some point the parties do consent to the process. The Courts are only discharging the constitutional mandate on providing various alternatives for dispute resolution, which have been beneficial as shall be addressed when considering the status of Court Annexed Mediation as shall be seen in Chapter 3 of this study.

1.7 JUSTIFICATION OF THE STUDY

The study and findings that will be made, will make it suitable for suggesting ways and further improvements to be made to CAM to enable it contribute to addressing the existing case backlog within the judiciary. The paper focuses on the understanding of mediation practices in Civil disputes in Kenya and the factors that contribute to the growth and development of Court Annexed Mediation. The paper also addresses the readiness of the affected stake holders to accept this new practice.

The findings of this research will be used to generate recommendations of Court Annexed Mediation practice in Kenya. In fulfillment of the objectives above, this paper will contribute to the taskforce on Court Annexed Mediation, object to roll out Court Annexed Mediation throughout the country, which It will also contribute to the operationalization and implementation of Court Annexed Mediation in the Court system in Kenya as it will provide a better understanding on the mediation process within the Court system.

In addition to the foregoing, this paper will have an important impact on the growth of Court Annexed Mediation in Kenya as it will provide new insights from various perspectives including: Lawyers, Judges, Mediators and parties to the mediation, who are the key stake holders to Court Annexed Mediation.

1.8 RESEARCH METHODOLOGY

The research methodology that shall be utilized in this study is qualitative. The study shall engage secondary methods through an analysis of international laws, conventions and principles providing for ADR as well as the national legislation. The national laws include: the Constitution, the Civil Procedure Act & Rules, the Arbitration Act, Mediation Rules, 2015, Judiciary Mediation Manual, ADR Bill 2019, Draft ADR policy and the Mediation Bill 2020. The international laws and principles include: the Singapore Convention on Mediation and the UNCITRAL Model Law on Conciliation and Mediation.

The study shall also rely on case reports, textbooks, journal articles, periodicals, newspaper and magazine articles, market research insight papers, and other relevant articles and documents obtained physically from various libraries or the internet.

The study shall also conduct a comparative study to obtain insights on the best approaches to take in further improving Kenya's legal and institutional framework. The jurisdiction chosen for this particular comparative study are the United States (US), United Kingdom, Canada, South Africa, Uganda, Nigeria and Malawi which have the potential to provide good benchmarks to guide reforms to Kenya's framework.

1.9 LIMITATIONS

The current study is limited to civil cases. The Study will therefore explore the adoption and use of CAM to resolution of civil disputes.

Also, the Mediation process requires confidentiality, which will definitely pose a challenge in terms of conducting the case study.

1.10 CHAPTER BREAKDOWN

This contains Five Chapters as follows:

Chapter 1

This Chapter provides the background of Court Annexed Mediation in Kenya and presents the problem surrounding Court Annexed Mediation in Civil disputes through analysis of the challenges and opportunities faced. The challenges form a basis of the research questions to be answered, objectives and the hypothesis.

The Chapter shall also consider the literature review from various scholarly works so as to capture various theories on Mediation. The chapter shall also capture the methodologies that will be utilized in the study.

Chapter 2

The chapter analyses the legislative and policy gaps as well as institutional and enforcement challenges hindering CAM. This Chapter will analyze the shortcomings of the legal provisions with respect to Alternative Dispute Resolution while focused on Court Annexed Mediation. It will also review rules and guidelines applicable to the CAM. The Chapter will basically seek to answer the question whether the current legal and institutional framework for CAM in Kenya is adequate in resolving civil disputes.

Chapter 3

The chapter maps out the concept of mediation in view of dispute resolution. The Chapter provides considers the current status of CAM in Kenya; the successes achieved so far, as well as the opportunities and challenges of CAM in resolution of civil disputes in Kenya and in so doing attempt to answer the question on the challenges and opportunities faced by CAM in Kenya.

Chapter 4

This Chapter will identify the best practices from other jurisdictions can the Kenyan system adopt to strengthen Court Annexed Mediation in Civil Cases by making a comparative study of African and other international countries that have already implemented Court Annexed Mediation in their jurisdictions. The specific focus of the comparative study undertaken in this chapter include: Malaysia, Singapore, South Africa, Nigeria and Uganda by capturing the best practices based on the successes that the different countries have had.

Chapter 5

This Chapter will give recommendations on the areas that would require more focus and attention in making Court Annexed Mediation a success. This chapter will also make a conclusion based on the findings and recommendations of the study.

CHAPTER TWO

THE LEGAL & INSTITUTIONAL FRAMEWORK FOR COURT ANNEXED MEDIATION IN KENYA

2.1. INTRODUCTION

In the pre-colonial African societies, there existed several dispute resolution mechanisms among the different African tribes. The mechanisms utilized were informal with no specific guidelines to govern the process. However, over time the individual tribes developed traditions, customs and culture around resolving certain dispute which made the process of dispute resolution more predictable and certain although it was not codified.⁴⁰

Whereas, the mechanisms of dispute resolution varied from tribe to tribe, the common feature among them was that at the helm of the process was a council of elders. The elders played a fundamental role in dispute resolution and conflict management. They decided the disputes placed before them in accordance with the laws of the people-their culture and practices.⁴¹

It is on this background that when Kenyans got the opportunity to craft a ‘Kenyan breed’ constitution, they inculcated several alternative dispute resolution mechanisms as part the power vested in the judiciary. The Constitution⁴² vests alternative dispute resolution in the judicial authority with an obligation to promote the use of alternatives forms of dispute resolution Before 2010, alternative dispute resolution mechanisms did not have a comprehensive legislative backing.⁴³

⁴⁰ Ajayi, Adeyinka Theresa & Buhari, Lateef Oluwafemi (2014), ‘Methods of Conflict Resolution in African Traditional Society’, Africa Research Review, pg 4

⁴¹ The Judiciary, ‘The Judiciary Mediation Manual’, available at <<https://www.judiciary.go.ke/download/the-judiciary-mediation-manual/>>

⁴² Article 159(2)

⁴³ Kariuki Muigua, ‘Court Annexed ADR in the Kenyan Context’, available at <<http://kmco.co.ke/wp-content/uploads/2018/08/Court-Annexed-ADR.pdf>>

Mediation is “an informal process, where a mediator who is a third party with no decision-making authority attempts to bring the conflicting parties to end their conflict by agreement. A mediator is not part of the conflict, but an outsider who strives to ensure that the process of the conflict resolution turns out to be a perfect picture in the estimation of the parties”.⁴⁴

Court-annexed mediation occurs where litigants are directed by the court to explore dispute resolution outside the court process. The mediation agreement arising from the mediation process is thereafter enforced as a Court Judgment. If the parties are not unable to resolve the dispute, the process of dispute resolution resumes in court.⁴⁵

The Chapter will seek to answer the question whether the current legal and institutional framework for CAM in Kenya is adequate in resolving civil disputes by examining the provision of the laws underpinning CAM in Kenya and where possible highlighting the shortfalls of the laws.

2.2. LEGAL FRAMEWORK

There are several of laws, regulations (locally and internationally) governing the use of ADR mechanisms in the judiciary. The national laws include: the Constitution, the Civil Procedure Act & Rules, the Arbitration Act, Mediation Rules, 2015, Judiciary Mediation Manual, ADR Bill 2019, Draft ADR policy and the Mediation Bill 2020. The international laws and principles include: the Singapore Convention on Mediation and the UNCITRAL Model Law on Conciliation and Mediation.

⁴⁴ M. Mironi, “From Mediation to Settlement and from Settlement to Final Offer Arbitration: an Analysis of Transnational Business Dispute Mediation”, 73(1) Arbitration 52 (2007), p. 53

⁴⁵ Kathy, “What is court-annexed mediation?” Available at <http://www.janusconflictmanagement.com/2011/10/q-what-is-court-annexed-mediation>

2.2.1. CONSTITUTION OF KENYA

The Constitution of Kenya binds all organs of the state at the different levels of government.⁴⁶ The enactment of the new Constitution through a referendum conducted in 2010 brought changes in the judiciary through recognition of alternative dispute resolution under Article 159 as an important tool for resolving conflict at the Parliamentary level⁴⁷, judicial level⁴⁸, Intergovernmental level⁴⁹ and for Independent Commissions.

2.2.1.1 Parliamentary Level.

The Constitution provides that where the National Assembly and the Senate cannot agree on a Bill concerning County Governments, the speakers of both Houses shall refer the Bill to a mediation committee.

Article 112 provides that;-

(1) If one House passes an ordinary Bill concerning counties, and the second House—

a) Rejects the Bill, it shall be referred to a mediation committee appointed under

b).....

(2) If, after the originating House has reconsidered a Bill referred back to it under clause

(a) Rejects the Bill as amended; the Bill shall be referred to a mediation committee under Article 113.

Article 113 further provides that the “*Speakers of both Houses shall appoint a mediation committee made of an equal of members from both houses who shall attempt to develop a version of the Bill that both Houses shall pass.*”

⁴⁶ Article 2(1), Constitution of Kenya 2010.

⁴⁷ Article 112, Constitution of Kenya, 2010.

⁴⁸ Article 159 (2) (c), Constitution of Kenya, 2010.

⁴⁹ Article 189(4), Constitution of Kenya, 2010

The mediation committee on Mediation at the parliamentary level is headed by a Chairperson and it comprises of 16 members. The mediation process is expected to enhance the public understanding, awareness and knowledge of the work assembly and its operations. The mediation at the parliamentary level is guided by the Mediation process in Law Making⁵⁰. Parliamentary mediations are held when the senate does not agree to all or any of the amendments made by the National Assembly Bill or amendments relating to the proceedings, processes and operations of the business.

The role of the Court in the parliamentary mediations was witnessed in the Advisory Opinion Reference No. 2 of 2013 filed in the Supreme Court⁵¹ on the division of revenue Bill 2019 whereby the national government and the county government were not able to agree on the division of revenue bill. The Supreme Court directed the senate to appoint a mediation team to meet with the National Assembly team in an effort to resolving the row on revenue allocation. This clearly demonstrates that the Court is keen to see the mediation process enforced, and that it may elect to refer a matter for mediation as it may deem fit.

2.2.1.2 Judicial Level.

The Constitution provides that when the Judiciary is exercising the power delegated to it by the Constitution it shall as a principle promote the application of ADR mechanisms.⁵² This provision is the backbone of the alternative dispute resolution system at the Judiciary. Article 159(2)(c) promotes access to justice by creating a multi-door judicial organ which guarantees access to

⁵⁰ Fact Sheet 18: The Mediation process in law making.

⁵¹ Speaker of the Senate & Another vs Attorney General & 4 Others (2013) eKLR

⁵² Article 159(2)(c)

justice imperatives such as expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost effectiveness; party satisfaction and effectiveness of remedies.⁵³

2.2.1.3 Intergovernmental Level

To promote cooperation between the National and County Governments, Article 189(4) provides that:

“National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.”

Pursuant to the provision above Parliament enacted the Intergovernmental Relations Act⁵⁴ which governs the relationship between the different levels of government. In case, of a dispute between the National Government and County Government(s) or amongst County Governments, the parties shall in good faith make every reasonable effort to resolve the dispute by negotiation.⁵⁵ If the dispute is not resolved, it shall be submitted to the National and County Government Co-ordinating Summit or the Council of County Governors which shall determine the dispute by mediation or arbitration.

2.2.1.4 Mediation by Independent Commissions.

Article 252(1) (b) provides as follows;--

Each commission and each holder of an independent office—

(a)

⁵³ Kariuki Muigua, ‘Resolving Environmental Conflicts through Mediation in Kenya’,48

⁵⁴No. 2 of 2012

⁵⁵ Section 33, Intergovernmental Relations Act

- (b) *has the powers necessary for conciliation, mediation and negotiation;*
- (c)

Kenya has various independent Commissions including: the National Human Rights Commission (NHRC), the National Land Commission (NLC) among others. Among the independent commissions listed above, the Public Service Commission has approved guidelines for Mediation, Conciliation and Negotiation. The rationale of the mediation guidelines is for purposes of providing alternative dispute resolution so as to facilitate private resolution of disputes considering the increase of suits filed in Court and also in view of the significant costs incurred in Court. The rules are however limited to human resource management related disputes. The rules cover attributes of mediation by allowing parties to make a choice of the mediators⁵⁶, they allow parties to participate in the process voluntarily and parties are expected to be the ultimate decision makers in the mediations. This paper is of the view that the Mediation within the Independent commission and specifically, the developed mediation rules at the Public Service Commission should be expanded to cover other matters as opposed to the limitation of the disputes to employment matters.

2.2.2. CIVIL PROCEDURE ACT

As noted above, the Constitution deals with determination of disputes by mediation. It also provides the general principle for adoption of alternative dispute resolution as a judicial principle. The Civil Procedure Act takes the batons from the Constitution and provides for the utilization of mediation in the resolution of disputes of civil nature.

⁵⁶ Rule 1.5.1

Right from the onset, the overriding objective of the Act to settle disputes in a manner that is just and expeditious⁵⁷. This is achieved through, among other things, efficient disposal of the courts business and the efficient use of the available judicial resources.⁵⁸

The Act defines mediation as

*“an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto”.*⁵⁹

It then proceeds to provide for the establishment of a Mediation Accreditation Committee (MAC)⁶⁰ which is to be appointed by the Chief Justice through gazette and is to consist of: the chairman of the Rules Committee; a nominee of the Attorney General (the current MAC Committee was chaired by Hon. Justice Alnasir Visram currently retired); two nominees of the Law Society of Kenya; and eight other members to be nominated by various professional bodies and trade unions.

The mandate of the Mediation Accreditation Committee shall be:

- a) Determine the criteria for the certification of mediators;*
- b) Propose rules for the certification of mediators;*
- c) Maintain a register of qualified mediators;*
- d) Enforce a code of ethics for mediators; and*
- e) Set up appropriate training programs for mediators.*⁶¹

⁵⁷ Section 1A, Civil procedure Act, CAP 21

⁵⁸ Section 1B, Civil procedure Act

⁵⁹ Section 2, Civil Procedure Act

⁶⁰ Section 59(A) Ibid

⁶¹ Section 59A, Civil Procedure Act

Under section 59B of the Act, the court may refer a matter to mediation, under the mediation rules, if: a party requests; where it is deemed appropriate or where the law so requires. An agreement between the parties in the mediation process shall be registered with the court and enforced as if it were a judgment of the court. No appeal shall lie on such an agreement.⁶² Additionally, the court can enforce a private mediation agreement entered into with the assistance of qualified mediators.⁶³

The MAC is expected to develop a proper ethical standard / code/ guidelines for mediators to ensure that they conduct themselves in a manner that does not endanger public trust. The Code of Ethics for Mediators in Kenya is one of the key guideline that ought to be developed so as to improve the current Court Annexed Mediation Process. The guidelines shall streamline the mediation practice and the manner in which the Court Annexed Mediations are conducted.

2.2.2.1. Civil Procedure Rules, 2010

The Civil Procedure Rules provides the practice guidelines for implementing the Alternative Dispute Resolution provisions under the Act. Order 46 Rule 20, the court is empowered to adopt any means of alternative dispute resolution in an effort to implement the overriding objective under Section 1A and 1B of the Act.

2.2.3. PRACTICE DIRECTIONS/ RULES ON MEDIATION.

On 9th October, 2015 the Mediation (Pilot Project) Rules were gazetted and operationalized by the then Chief Justice, on the 24th March, 2016 vide a gazette Notice No. 1890. It provided a specific framework for the implementation of Court Annexed Mediation. After the pilot phase and comprehensive assessment, a Mediation Taskforce was gazetted in July, 2017, with a mandate to rollout Court Annexed Mediation (CAM). Simultaneously, the Mediation (Pilot Project) Rules

⁶² Section 59B

⁶³ Section 59D

were repealed by the Practice Directions on Mediation, 2017⁶⁴ which were subsequently amended.⁶⁵ The amendment to the Practice Directions was to expand the scope of the Direction to civil suits filed at High Court, all other courts with the same status as the High Court, subordinate Courts and Tribunals throughout the country designated by gazette notice.

According to the Practice Directions all civil suits instituted in court are screened by a Mediation Deputy Registrar. An internationally accepted criteria in use for mediation screening will be applied to each case. The Mediation Deputy Registrar will screen cases qualifying for mediation.⁶⁶ Some of the cases which are precluded from Mediation include: Public interest matters, matters based on pure issues of law, domestic violence and criminal cases.

The mediations is to be conducted by a person registered as a mediator by MAC. Mediation proceedings are to be completed within sixty days after referral to mediation. However, the registrar can extend this time limit for a further ten days (10). At the start of the proceedings the mediator takes the parties through the rules of engagement.

The Registrar may file a Certificate of Non-Compliance and refer the matter back to court in the event of non-attendance/ noncompliance by parties. The Mediator also files a mediation report with the Mediation Deputy Registrar within 10 days of conclusion of the Mediation. No appeal lies on an agreement reached in Mediation.⁶⁷

2.2.3.1. Judiciary Mediation Manual

After the pilot phase of the CAM, the Judiciary Mediation Manual was published by the Judiciary to a practice guideline in the implementation of the roll-out to other courts. The Judiciary

⁶⁴Gazette Notice No. 5214

⁶⁵Vide Gazette Notice No. 7263

⁶⁶The Judiciary, Court Annexed Mediation- Frequently Asked Question.

⁶⁷ Practice Direction on Mediation, Gazette Notice No. 5214.

Mediation Manual sets standards, best practices, solid foundations and expectations in the administration of justice towards the implementation of Court Annexed Mediation. The manual is a useful guide to Registry Staff, Deputy Registrars, Magistrates, Judges, Parties, Advocates and Mediators on the processing of files referred to the Court Annexed Mediation.

The main area that this paper wishes to examine with respect to the Judiciary mediation manual is the mode of appointment of the mediator which provides that the Deputy Registrar, Magistrate or Kadhi shall appoint a mediator from the register of mediators appointed by MAC⁶⁸. In the previous guidelines, parties were required to state their preference of the preferred mediators from among 3 recommended mediators. This provision has since been repealed and the Deputy Registrar is granted the power to appoint the Mediator to take up the mediation case. This process of granting the parties an opportunity to select the mediator was eliminated since this was contributing to the delays in Court Annexed Mediation. This action contains its own merits and demerits. The merits are that the Mediation timelines are adhered to and the process is completed within a short time frame.

The demerits are that the attributes of mediation are interfered with because parties no; longer have the autonomy to elect the mediator who they wish to conduct their matter.

The paper is of the view that the mediation manual still has room for improvement. The paper shall give recommendations on the possible amendments to the manual upon analyzing the Comparative Study in Chapter 4 below.

2.2.4. Alternative Dispute Resolution Bill 2019

⁶⁸ Rule 4 – Judiciary Mediation Manual

This bill is being proposed by the Senate to provide for the resolution of disputes by ADR and to set out the guiding principles applicable. If the Bill is passed it shall be the overarching statute on alternative dispute resolution in Kenya. The Bill does not apply to: disputes subject to arbitration under the Arbitration Act; disputes where a tribunal established under written law has exclusive jurisdiction; election disputes; disputes involving the interpretation of the Constitution; a claim for a violation, denial of fundamental freedom under the Bill of Rights; or disputes where public interest involving environmental or occupational health and safety issues are involved.⁶⁹ Dispute resolution is guided by:

- a) Voluntary participation;*
- b) The right to information on the existence of an alternative dispute resolution process prior to the commencement of process of determining a dispute;*
- c) Confidentiality except in the case of traditional dispute resolution;*
- d) Determination of disputes in the shortest time practicable;*
- e) Impartiality in the determination of a dispute and disclosure of any conflict of interest that may arise;*
- f) A conciliator, mediator or traditional dispute resolver shall facilitate disputes which he or is competent to facilitate; and*
- g) The parties may use more than one alternative dispute resolution mechanism in an attempt to resolve a dispute.⁷⁰*

The Bill further provides that a person shall not practice as a conciliator or a mediator unless that person has been accredited and registered as a conciliator or mediator by the Committee

⁶⁹ Section 4, Alternative Dispute Resolution Bill, 2019

⁷⁰ Section 5, ADR Bill

established under section 59A of the Civil Procedure Act. The Bill outlines the criteria for referring disputes for alternative dispute resolution in section 11;

- (1) A court before which a dispute is filed or pending may refer the dispute for determination through conciliation or mediation where —*
 - (a) The dispute is with respect to a matter that provides for resolution through alternative dispute resolution;*
 - (b) The law requires the dispute to be settled through alternative dispute resolution;*
 - (c) The court is of the view that alternative dispute resolution will facilitate the resolution of the dispute; or*
 - (d) A party to the dispute, with the consent of the other party, apply to the court to have the whole or part of the dispute referred for resolution through alternative dispute resolution*
- (2) A court shall not refer a dispute for resolution through conciliation or mediation if—*
 - (a) The court determines that there is no dispute between the parties requiring resolution through conciliation or mediation;*
 - (b) There is no dispute between the parties with regard to the matter agreed to be referred to alternative dispute resolution or covered under this Act;*
 - (c) The clause making provision for alternative dispute resolution of the agreement, contract or any arrangement entered into by the parties is inoperative, incapable of being performed or void;*
 - (d) Previous attempts at determining the dispute through alternative dispute resolution have failed;*
 - (e) Substantial public interest involving constitutional, environmental, or occupational health and safety issues are involved;*

- (f) The costs that are likely to be incurred would be disproportionately high;*
- (g) There is a likelihood of delay;*
- (h) A binding judicial precedent is required; or (i) a party is likely to be prejudiced as a result of power imbalances.*

The Alternative Dispute Resolution Bill is a draft that has not been validated or presented to parliament for approval. The Bill still contains gap in terms of failing to address a unified curriculum for the training of Mediators in Kenya. The Bill is also silent on the appointment of an oversight body to regulate and oversee the appointed mediators of the Court.

2.2.5. Mediation Bill, 2020

The Mediation Bill is a National Assembly bill proposed to be enacted to provide for the settlement of all civil disputes by mediation; to set out the principles applicable to mediation and to provide for the accreditation and registration of mediators.

The bill also seeks to consolidate all provisions on CAM by amending the Civil Procedure Act to replace the Mediation Accreditation Committee with the Mediation Committee (M.C). The function of the M.C is to regulate, develop and promote mediation as a mechanism for dispute resolution. The M.C register and accredit mediators in Kenya. It shall consist of nominees of: the Chief Justice; the Attorney General; the Law Society of Kenya; Dispute and Conflict Resolution International; the Institute of Certified Public Secretaries; the Kenya Private Sector Alliance; the Central organization of Trade Unions and the Federation of Kenya Employers. The nominees shall serve for a term of three years, renewable once.

Under the Bill, parties are required to file a Mediation Certificate confirming that mediation has been considered prior to commencing judicial proceeding and before entering appearance.⁷¹ Furthermore, the Court may refer the dispute before it at any time before judgement to mediation if: the dispute is with respect to a mediation agreement; the court is of the opinion that mediation shall facilitate the resolution of the dispute or part of it or the parties apply to refer the dispute to mediation.⁷² This referral shall serve as a stay of proceedings.⁷³

The parties to the dispute shall equally pay mediation expenses on the basis of a written agreement entered into between the parties and the mediator at the commencement of the mediation process.⁷⁴

Although the bill is a step in the right direction, it is riddled with some inadequacies including: although the M.C has the power to register and accredit mediators, the bill does not provide the criteria for accreditation; the bill provides that the mediation expenses shall be paid by the parties.

Given that some disputes will be referred to mediation, the bill fails to provide on how fees in such cases shall be determined given that parties may decline mediation only because of the costs; the bill does not define who a ‘mediator’s and the bill by implication excludes criminal cases from the application of the Bill squandering an opportunity for the incorporation of ‘criminal cases of a civil nature’ for example assault where the complainant and the accused would be interested in pursuing mediation.

2.2.6. The Draft Alternative Dispute Resolution Policy 2019 (“the Draft ADR Policy”).

The Draft ADR policy is at its early stage of formation and is currently in the form of a draft zero policy document and is currently undergoing stakeholder discussion and engagement. The Draft

⁷¹Section 34, Mediation Bill,2020.

⁷²Section 35, Mediation Bill,2020

⁷³Section 37,Mediation Bill,2020

⁷⁴Section 42, Mediation Bill,2020

ADR Policy seeks to provide for a national framework for dealing with all forms of alternative dispute resolution both in criminal and civil disputes. It also proposes the creation of the National Council for Alternative Dispute Resolution which shall be mandated to implement the policy and to strengthen ADR sector through facilitating knowledge development, community of practice, research, and use of technology among others in enhancing access to justice. The Council shall be supported by Practice Area Oversight Committee for practice areas of arbitration, mediation, Traditional Dispute Resolution Mechanisms, informal mechanisms, religious bodies, tribunals and court annexed/based ADR. The committees shall develop specific codes of conduct, develop continuous professional development programs and develop remuneration schemes for practitioners.

The Draft ADR Policy is a critical legislative tool given that it forms the basis for all legislation on ADR. The draft policy as is still undergoing stakeholder consultation however, it is critical to ensure that the policy promotes the development of ADR in line with the expectation of article 159(2)(c) of the Constitution.

2.2.7. United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention).

The Singapore Convention was enacted by the General Assembly of the United Nations in recognition of “the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably”.⁷⁵ The Convention applies to International Settlement Agreements that is, where the settlement agreement is between two parties who have their place of business in different states or where the state of place of business is different from the state of performance of obligations or the state the subject matter of the agreement is located.⁷⁶ The Convention does not apply to settlement agreements relating to family, inheritance or employment law or settlement agreements enforceable as judgments or arbitral awards.⁷⁷ For a party to rely on a settlement agreement under the Convention it must show that the settlement agreement is signed by the parties and prove that the agreement resulted from mediation.⁷⁸ A party to the Convention may refuse to grant relief if: there are deficiencies in the settlement agreement (it is null and void, it is not binding, it has been subsequently modified or the obligations in the agreement have been performed or are not clear); Incapacity of a party to the Settlement Agreement or flaws in the mediation process (breach of standards or partiality of mediators).⁷⁹

⁷⁵The Preamble, United Nations Convention on International Settlement Agreements Resulting from Mediation.

⁷⁶Article 1 paragraph 1, United Nations Convention on International Settlement Agreements Resulting from Mediation

⁷⁷Article 1 paragraph 2, United Nations Convention on International Settlement Agreements Resulting from Mediation

⁷⁸Article 3, United Nations Convention on International Settlement Agreements Resulting from Mediation

⁷⁹Article 5, United Nations Convention on International Settlement Agreements Resulting from Mediation

2.2.8. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)
(“UNCITRAL Mediation Model Law”)

The UNCITRAL Mediation Model Law serves as a skeleton legal framework for states to adopt when enacting legislation on Mediation. The UNCITRAL Mediation Model Law was adopted in 2002 and amended in 2018 with the key amendment being the adoption of the word ‘mediation’ instead of the word ‘Conciliation’ used in the earlier version. Conciliation was used with the understanding that ‘Conciliation’ and ‘Mediation’ were interchangeable terms.

According to the UNCITRAL Mediation Model Law, the mediation process begins when the parties engage in the mediation proceedings⁸⁰ with one mediator unless the parties decide to appoint two or more mediators. Parties shall determine the manner in which the mediation process shall be conducted and where they cannot agree the mediator can proceed in any manner he/she considers appropriate.⁸¹ Information relating to mediation proceedings shall be considered confidential unless the parties agree otherwise, in case of disclosure pursuant to the law or enforcement of Settlement Agreement.⁸² The information shall also not be admissible in arbitral or judicial proceedings.⁸³

⁸⁰Article 5, UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

⁸¹Article 7, UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

⁸²Article 10, UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

⁸³Article 11, UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018.

2.3. CONCLUSION

This Chapter has addressed the existing legal framework and institutional mechanisms for resolving disputes through Court Annexed Mediation. From the foregoing analysis, it is evident that the Kenyan legal framework, albeit inadequate, has embraced and continues to embrace alternative dispute resolution. In as much as the legal framework on Court Annexed Mediation has been captured in a variety of laws, the framework contains gaps, some of which have been identified from the above analysis.

The mediation process is inculcated in the Constitution, largely with respect to matters that are of a political nature such as division of revenue or intergovernmental disputes. The constitution adequately provides for the institutional framework for the resolution of disputes at the parliamentary level. Mediation of Intergovernmental disputes is also adequately dealt with under the Intergovernmental Relations Act. The application of CAM in civil disputes is undertaken under the Civil Procedure Act which lays down the legal and institutional framework. To further improve the current legal framework, the Arbitration Bill, the Mediation Bill and the Alternative Dispute Resolution Policy are currently in the legislative pipeline.

CHAPTER THREE

COURT ANNEXED MEDIATION IN CIVIL SUITS IN KENYA: STATUS, OPPORTUNITIES AND CHALLENGES.

3.1. STATUS OF CAM IN KENYA

3.1.1. Pilot Phase

3.1.1.1 Introduction

As the custodian of judicial authority, the Judiciary is under a mandate to ensure that there is access to justice for every citizen.⁸⁴ In furtherance of this mandate, the Judiciary developed the Judiciary Transformation Framework (JTF) 2012-2016. Under the JTF access to justice was identified as a fundamental pillar thereby mandating the judiciary to set up frameworks of alternative dispute resolution mechanisms. To support the JTF, the Judiciary Strategic Plan (JSP) 2014-2018 and the blueprint on Sustaining Judiciary Transformation incorporates CAM in dispute resolution. This Chapter shall analyze the effectiveness of these steps that have been taken by the Judiciary to increase the uptake of CAM in the country by examining the data collected by the Judiciary on the number of cases referred to CAM, the Court station implementing CAM, the settlement rate and the monetary value that has been unlocked by CAM.

3.1.1.2. Antecedents

To roll out the CAM project, the Judiciary embarked on several legislative re-organization and update to facilitate the setting of a legal framework for Court Annexed Mediation. In 2012, the Civil Procedure Act was amended to enable the court to refer disputes to mediation upon the request of the parties or if in the opinion of the court the matter was best handled by mediation. The Mediation Accreditation Committee (MAC) was also created by the amendment.

⁸⁴ Article 48, Constitution of Kenya

The mandate of the MAC was to create a training and code of conduct frame work for professional mediators who were to play a key role in CAM. These amendments had been recommended and pushed forward by a Rules Committee. After the Civil Procedure Act had been amended the Rules Committee approached several stakeholders including: Family Mediation Centre; International Commission of Jurists; the Law Society of Kenya; The Dispute Resolution Centre; the Federation of Women Lawyers; and the Chartered Institute of Arbitrators, to develop the Mediation (Pilot) Project Rules 2015 (“the Rules”).⁸⁵ The various stakeholders contributed diversity and multi-jurisdictional approach to the Rules. At a retreat of the stakeholders, a target of 200 cases was set for resolution by CAM. On October 09, 2015 the Rules were gazetted however they became operational on March 24, 2019. According to the Rules, CAM was applicable at the Family and Commercial Court. The CAM project became operational on April 04, 2016, spearheaded by the MAC, Alternative Dispute Resolution Operationalization Committee (AOC) and the Technical Working Group Secretariat (TWG). The role of MAC was to establish Accreditation Standards to be met by every mediator. The AOC developed the Mediation Manual and met regularly to review the progress of mediation. The TWG, headed by the Registrar High Court, was responsible for the day to day running of the project.⁸⁶

3.1.1.2 Statistics

Although no funds were specifically set aside for the project by the Judiciary, funds for: payment of mediators, infrastructure, stationery and operational expensed were drawn out of the Registrar of High Court’s budget. The Chief Registrar of the Judiciary also contributed towards payment of the mediators.

⁸⁵Legal Notice No. 197 of 2015

⁸⁶Mediation Taskforce Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21,2018, P. 4

The secretariat which consisted of one interim Project Manager, two Program Officers and eight mediation clerks was funded jointly by the Judicial Performance Improvement Project and the International Development Law Organization.⁸⁷ Despite the funding challenge highlighted above, the Mediation Pilot phase achieved a settlement rate of 55.17%. This translated to a monetary value of Kenya Shillings Seven Hundred and Seventy Million (770M) which had been held up in litigation. The details of the pilot phase, as at July 04, 2017, are as set out in the table below;

DESCRIPTION		DIVISION		TOTAL
		FAMILY	COMMERCIAL	
Total number of files screened		541	1110	1651
Total number of matters referred to mediation		325 out of 541	292 out of 1110	671 out of 1651
Total Number of concluded matters		237 out of 325	110 out of 292	347 out of 617
Total number of matters with settlement agreements		118 out of 237	60 out of 110	178 out of 347
Breakdown	Full Settlements	102 out of 118	40 out of 60	142 out of 178
	Partial settlements	10 out of 118	5 out of 60	15 out of 178
	consents	6 out of 118	15 out 60	21 out of 178

⁸⁷ Mediation Taskforce Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21,2018, P. 7

Total number of matters where parties failed to reach an agreement	119 out of 237	49 out of 110	168 out of 347
Terminated	7 out of 325	12 out of 292	19 out of 617
Total number of mediations where settlement agreements have been adopted	84 out of 118	69 out of 110	153 out of 228
Total value of matters in mediation	2,550,267,864	18,038,733,756	20,589,001,620
Total value of matters in mediation with settlement agreements	349,092,000	2,058,071,949	2,407,163,949
Average duration of matters in mediation (Days)	69	63	66

(Table from Mediation Taskforce Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21, 2018, P. 8)

3.1.1. National Rollout Phase.

The Pilot phase of CAM ended on July 07, 2019. Having been seen as a success, the Judiciary initiated a national roll out of the alternative dispute resolution mechanism.

On July 21, 2017, the Honorable Chief Justice gazetted the Mediation Taskforce to oversee roll out of CAM.⁸⁸ Among others, the Terms of Reference of the Taskforce are to: undertake an

⁸⁸Taskforce on Alternative Dispute Resolution Mechanisms Used to Access Justice in Kenya-Court Annexed Mediation, Gazette Notice No. 6869 of 2017.

analysis of the Court Annexed Mediation Pilot Project (CAMPP) to understand its conceptualization, successes, challenges and prospects; convene stakeholders and practitioners in Alternative forms of dispute resolution mechanisms to map out and understand the prevalence of use mediation as an alternative dispute resolution mechanism and the progress made in entrenching it in the legal system; in conjunction with the Judiciary Training Institute (JTI) to benchmark existing models of Court Annexed Mediation and compare them with the processes adopted for the Kenyan Court Annexed Mediation Pilot Project with a view of gleaning best practices for development of a national model; suggest financial incentives for parties to attempt mediation; and develop a strategic plan for implementation of the Court Annexed Mediation.⁸⁹

At its inaugural meeting held on August 30, 2019, the Mediation taskforce formed four sub-committees to enable them execute their mandate. The Sub-committees are:⁹⁰

- a) Bench marking and Stakeholders Sub-committee
- b) Work Plan Sub-committee
- c) Finance Sub-Committee
- d) Legal Sub-Committee.

The mandates for the various sub-committees are: the legal sub-committee develops policies and proposals for amendment of the law relating to CAM. The Finance sub-committee looks into the financial, human resource and training aspects of CAM. The stakeholder sub-committee is tasked with engaging with the various stakeholders involved in CAM to ensure that there is support for the process and that the views of the stakeholders are taken into account in the roll out of

⁸⁹Taskforce on Alternative Dispute Resolution Mechanisms Used to Access Justice in Kenya-Court Annexed Mediation, Gazette Notice No. 6869 of 2017.

⁹⁰ Minutes of the Taskforce on Alternative Dispute Resolution Mechanisms: Court Annexed Mediation Inaugural Meeting held on August 30, 2017 at Board Room 340 Milimani Law Courts.

CAM.⁹¹The Taskforce, drawing lessons from the pilot phase of the project has rolled out CAM to ten (10) court stations in the Country.⁹²

As a result of the efforts of the Taskforce according to Judiciary records, two hundred and forty three cases whose total value is Kenya Shillings Three Billion Eight Hundred Million were settled in the quarter ending January 2019.⁹³ CAM has also been expanded to the other courts/divisions to include: the Environment and Land Court; Children's Court and Civil Court. In 2019, the uptake of CAM in the other divisions of the court (outside Nairobi) are as follows:⁹⁴

⁹¹ Mediation Taskforce Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21,2018, pg 9

⁹² The ten stations are: Kisumu;Nyeri;Kakamega;Eldoret;Nakuru;Mombasa;Kisii;Garissa;Machakos and Embu

⁹³ Business Daily, 'Expand cases Mediation to attract more business' 2019 available at <<https://www.businessdailyafrica.com/analysis/editorials/Expand-cases-mediation-to-attract-more-business/4259378-5104922-14m7pvz/index.html>>

⁹⁴ Judiciary, Case Monitoring Report as at April 10, 2019

	ITEM	COURT/DIVISION										TOTAL
		ELDORET	KISUMU	NAKURU	KAKAMEGA	MOMBASA	GARISSA	NYERI	KISII	MACHAKOS	EMBU	
1.	Total number of matters referred to mediation	80	71	71	71	209	41	136	80	40	-	799
2.	Total number of concluded matters	6	28	13	17	30	9	28	68	-	-	168
3.	Total number of matters with settlement agreements	3	18	8	13	5	8	26	24	-	-	97
4.	Full Settlements	1	16	5	13	1	8	19	24	-	-	79
5.	Partial Settlements	0	0	2	0	1	8	7	0	-	-	10
6.	Consents	2	2	1	0	4	0	0	0	-	-	9
7.	Total number of matters parties have failed to reach an agreement	0	6	3	4	0	1	0	13	-	-	27
8.	Non-Compliance	0	3	2	2	1	0	1	31	-	-	9
9.	Terminated	3	1	0	0	18	0	1	0	-	-	25
10.	Total Value of matters in mediation	605,741,171	64,955,804	227,619,456	15,510,000	-	-	146,007,815	-	-	-	1,039,834,247
11.	Total Value of matters in mediation with settlement agreements	-	2,255,293	380,000	1,300,000	-	-	225,229,047	-	-	-	229,164,340

3.1. Achievements of CAM

Since the adoption of CAM by the Judiciary, several gains have been made in the delivery of justice. While CAM was incorporated in the judicial process as part of the 2010 constitutional dispensation and due to the case backlog at the Judiciary, the benefits of CAM as an alternative dispute resolution mechanism have been felt outside the judiciary-in the commercial and political space. These benefits are as discussed below:

3.1.1. Ease of Doing Business

As a result of the adoption of CAM, there has been an improvement in the resolution of commercial disputes in the Country. This has led to a reduction in the amount of time utilized in Court during the rigorous processes, which has led to freeing the economic resources are tied up in Court. In ranking countries, the World Bank assesses among other things the country's enforcement of contract and resolution of insolvency. In 2016 the Kenya was ranked 92, in 2017, 80 and in 2018, 61.⁹⁵ This improvement coincided with the fact that mediation has been able to increase the amount of money that is released back to the economy upon successful resolution of disputes in mediation. In 2017 One Billion Nine hundred million was released back⁹⁶ while in the first quarter of 2019 alone Kenya Shillings Three Billion Eight Hundred million has been released back to the economy.⁹⁷

⁹⁵ Trading Economics, 'Ease of doing business in Kenya', available at < <https://tradingeconomics.com/kenya/ease-of-doing-business>>.

⁹⁶ Mediation Taskforce Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21,2018, P. 12

⁹⁷ Business Daily, 'Expand cases Mediation to attract more business' 2019 available at <<https://www.businessdailyafrica.com/analysis/editorials/Expand-cases-mediation-to-attract-more-business/4259378-5104922-14m7pivz/index.html>>

3.2.2. Improved Timelines

Mediation has enabled the Judiciary settle disputes within a shorter timeline especially at the Commercial & Tax and Family divisions. The timeline for conclusion of matters has been reduced from 50 months in the Commercial and Tax division and 43 months in the Family Division⁹⁸ to an average of 66 days⁹⁹.

3.2.3 Restoring Broken Relationships

Mediation is intrinsically geared towards restoring relationships between parties who are involved in a dispute. This attribute has enabled judicial officers to restore disputes especially among family members. During the 2018 Mediation Settlement Week, a Child Matter dispute was resolved within an hour and a relationship which had been strained owing to a court battle was restored.¹⁰⁰

3.2.4 Increased level of client satisfaction

Unlike litigation, CAM seeks to identify a party's interests first then attempts to solve the dispute at hand. This enables CAM to take into consideration the party's' feelings. The flexible nature of mediation also allows parties to craft their own solution which is acceptable to them, this is of great significance during the enforcement of the contracts.¹⁰¹

3.2. Challenges facing CAM.

Despite the benefits outlined above, the implementation of CAM has not been a smooth ride. The challenges faced by the judiciary are both legal and institutional in nature. These challenges include:

⁹⁸ Judiciary's Case Audit and Institutional Capacity Survey 2015.

⁹⁹ Judiciary, 'Court Annexed Mediation: Case Monitoring Report', 2019.

¹⁰⁰ Mediation Taskforce Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21, 2018, P. 12

¹⁰¹ Mediation Taskforce Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21, 2018, P. 12

3.2.1. Funding.

The CAM pilot and national rollout has not achieved financial independence from normal dispute resolution mechanisms. At the pilot phase, no funds were specifically set aside for the project by the Judiciary, funds for: payment of mediators, infrastructure, and stationery and operational expensed were drawn out of the Registrar of High Court's budget. The Chief Registrar of the Judiciary also contributed towards payment of the mediators. The secretariat is funded jointly by the Judicial Performance Improvement Project and other partners such as the International Development Law Organization.¹⁰²

To rollout the CAM there has been lack of central funding for the various activities run at the mediation headquarters and at the various mediation stations. The mediation headquarter is located in Nairobi. It is headed by the Mediation Registrar and overseen by the Mediation Judge supported by a secretariat which has an administrative and judicial role in overseeing the implementation of CAM at the ten stations. The secretariat which manages and pays staff and caters for, funds and supervises development projects is not adequately funded. The ten mediation station which operate and maintain staff distinct from the hosting station are not provided with a budget separate from the hosting station budget to run their activities.¹⁰³

The entire Court Annexed Mediation process is threatened by the issue of the government austerity measures directives from the government issued from time to time. The government recently cut the Budgets of ministries, state corporations and semi-autonomous Government Agencies, as well as the Judiciary.

¹⁰²Mediation Taskforce Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21, 2018

¹⁰³Mediation Taskforce Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21, 2018

The Budget cuts for the Judiciary stand as a threat to the Court Annexed Mediation on the grounds that the Court Annexed Mediation program is fully funded by the Judiciary. Lack of funds will therefore imply lack of fees to be paid to the mediators hence posing a challenge to the sustainability of the Court Annexed program.¹⁰⁴

3.3.2. Poor Infrastructure

The CAM project has faced various challenges with regard to the support physical infrastructure at the Judiciary. These challenges include:¹⁰⁵

- a) Lack of a mediation registry and secretariat workspace. The work space used by the project secretariat belongs to the Office of the High Court Registrar. As the number of CAM cases increase this space is no longer adequate. As a result some mediators have resorted to having mediation at the offices of Nairobi Centre for International Arbitration, court rooms, High Court Board Rooms and advocate chambers. Also, the current space lacks a waiting room for mediators and functional washrooms. All these inadequacies affect the successful output of the cases.
- b) Lack of filing cabinets. There are strong rooms for the storage of files in mediation as a result the files are left in the open violating the confidentiality of the process and the security of the files.
- c) Inadequate office equipment. These equipment include laptops/computers, printers and office stationery.

¹⁰⁴Mediation Taskforce Initial Report Presented to the Chief Justice of the Republic of Kenya, March 21, 2018

¹⁰⁵ The Judiciary, 'Court Annexed Mediation Project Review Project'

- d) Lack of a case management system. A case management system is critical in tracking the progress of the mediation cases, reducing contact between the judiciary staff and the parties and facilities proper record keeping.

3.3.3. Training.

Currently, there is lack of standardized training for mediators involved in CAM. As a result, the mediators are handling disputes largely informed by their professional background. This leads to a varied approach towards dispute resolution. Skeptics of the mediators training programme are arguing that 40 hours are not enough to train mediators especially if they do not a dispute resolution background. Furthermore, there is need for professional training for judicial officers, judiciary staff and mediation secretariat. Since the staff form an essential component of the CAM project, they must be re-trained and be equipped with professional mediation skills. These staff members have various professional background hence their output is varied.

3.3.4 Appointment of mediators.

According to the Mediation Rules¹⁰⁶ the Mediation Deputy Registrar (MDR) is required to nominate three (3) qualified mediators from the register of mediators maintained by the MAC and he / she plays the role of notifying the parties of the nominated mediators. The parties shall then notify the MDR of their preferred mediator in order of their preference. The MDR shall then appoint a mediator based on the parties preference. This process takes a long time- a minimum of 14 days.

According to some participants of CAM, the longtime taken to appoint a mediator is not necessary as they are of the view that the court should responsible for appointing mediators. This is because

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they are of the opinion that the parties do know the mediators and believe the court has done some due diligence in appointing the mediators unto the mediator's register.¹⁰⁷

On the other hand, there are participants who believe that the parties should be given autonomy in the appointment of mediators provided that they are on the list of mediators maintained by the Judiciary.

3.3.5 Mandatory Referral to Mediation.

According to the Mediation Rules, every suit instituted in court shall be subject to mandatory screening by the MDR to determine suitability for mediation. The mandatory nature of CAM has rubbed some parties the wrong way. Mediation is ordinarily supposed to be a voluntary process which the parties consent to participate without coercion or under the direction of any authority.¹⁰⁸

Voluntariness in this case can be explained in two ways- the parties agree to enter into mediation and the parties agree to reach a settlement. This mandatory nature has been blamed for the failure of CAM to achieve higher settlement rates among the parties.¹⁰⁹ This is largely because the parties' interests have been ignored or disregarded when CAM is 'forced down their throats'.

On the other hand it is argued that the mandatory nature of the Mediation Rules is not in the need to reach an agreement rather in the choice of the forum. That is the Mediation Rules do not have mandatory provisions on parties settling matters through mediation. However, the parties must adopt CAM in the resolution of their dispute. As a result this does not in any way contribute to

¹⁰⁷ Acherebifuro, 'External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts', 2017

¹⁰⁸ Christopher Moore, 'Mediation Process: Practical Strategies to Resolving Conflict', 1986

¹⁰⁹ Roselle L. Wissler, 'The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Court', 33 *Williamette Law Review*, p58

‘denial of access of justice’ but only that it has been delayed until the determination of the dispute by mediation. The parties are therefore still free to determine the outcome of their dispute.¹¹⁰

According to the Judiciary, “the choice about mandatory referral is premised on the aim and objective of the Judiciary regarding the project. In this case, the Judiciary needs to clear the backlog of cases and improve case turnaround time and under such circumstances, adoption of voluntary referral to mediation would require detailed and far reaching sensitization efforts.”¹¹¹

3.3.6 Lack of Sensitization among Advocates

According to stakeholders of the CAM project, advocates have not been properly sensitized about the process, the advocates’ role and the benefits of CAM. This is opposition by advocates is largely based on the belief that CAM is threat to advocates’ income since they are the gatekeepers of the litigation process. Other advocates have raised their concern about the CAM process especially about: the constitutional backing of the project, the comprehensiveness of the mediator’s training, applicability of judicial review to mediation, guidelines for referral of cases to mediation and the Judiciary’s preparedness.¹¹²

3.3.7. Format of CAM Settlement Agreements

Under the Civil Procedure Act, once the parties to a CAM mediation process reach an agreement it is to be recorded in writing and filed in court. It shall be adopted by the court as if it was a judgment of the court.¹¹³ The Act does not provide any further details on the format that the settlement agreement shall take.

¹¹⁰Sander,Allen&Hensler, ‘Community Mediation: Progress and Problems in Massachusetts Association of Mediation Programs’1986

¹¹¹Acherelbifuro, ‘External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts’, 2017, P.12

¹¹²Acherelbifuro, ‘External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts’,2017, P 12

¹¹³ Section 59(B)(4), Civil Procedure Act.

As a result, in the pilot phase of the CAM it was observed that some of the agreement were written by hand while others were typed; that there were no standard settlement agreement clauses and some of the agreements were vague as they were poorly drafted.¹¹⁴

3.3.8 Payment of Mediators.

At the pilot phase of CAM, mediators were paid a standard fee of Kenya Shillings Twenty Thousand (KES 20,000). However, post the pilot phase, there have been several proposals regarding the manner of payment of the mediators. The proposals include: using scale fees; case by case basis; an hourly basis; complexity of the dispute and a lump sum with an hourly rate after three sessions. The determination of a formula on the most equitable manner of remuneration of mediators is essential to ensure the success of CAM.¹¹⁵

The other challenge as regards payment of mediators relate to mediators who ceased acting as such before the matters. In these cases, the Judiciary was at a cross road on how to remunerate the mediators. Proposals were also made on the development of a remuneration fees for the mediators.

3.3.9. Parties' Representation

According to feedback from the pilot phase of CAM, a large number of parties to CAM were not represented by people with the authority to settle. This challenge was especially common for state agencies represented by the Attorney General. This led to postponement of CAM sessions and eventual non-settlement.¹¹⁶

¹¹⁴ AchereIbifuro, 'External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts', 2017, P 14

¹¹⁵ AchereIbifuro, 'External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts', 2017, P. 14

¹¹⁶ AchereIbifuro, 'External Evaluation of the Court Annexed Mediation Pilot Project within the Family and Commercial Divisions of the Milimani Law Courts', 2017, P.14

3.3.10 Conclusion

This Chapter has examined whether Court Annexed Mediation has met the expected outcome/intention, The Chapter has considered the existing gaps within the Kenyan legal framework and it has identified the challenges and opportunities available, which ought to be considered in improving the entire CAM project. The primary challenge that CAM faces is funding. Although, the Judiciary has incurred a lot of expenses in the roll out of CAM it is yet to get additional funding from the Exchequer to enable it sustain the initiative. Lack of funding could jeopardize the entire CAM project.

CHAPTER FOUR: COMPARATIVE STUDY

4.1 Malaysia

4.1.1. Introduction

Mediation has been in use in Malaysia since the seventeenth century¹¹⁷. It has its roots in traditions and cultures of its people. According to Alwi Abdul¹¹⁸;

Disputes were brought to respected members of the community, usually the elders or the Penghulus (village heads) in the capacity of a 'middleman'. They were consulted due to their perceived wisdom, standing in society and experience as mediators. Normally, the village head handled community disputes and the Imam (a person who leads the Muslim prayer) was in charge of family related disputes. Although traditional-based mediators may have had no technical expertise, their status and persuasive presence gave them the authority to lead the disputants to an outcome consistent with the community norms.

The adoption of mediation in the formal judicial system begun back in the 1990s.¹¹⁹ However, the practice grew rapidly in the period starting 2005 onwards. The used of mediation by the judiciary was largely driven by its intention to reduce the backlog of cases that were choking the system. Mediation was seen as an appropriate dispute resolution mechanism.¹²⁰ In 2010 the Practice Direction No. 5 of 2010 (Practice Direction on Mediation) came into effect to lay down a framework for the implementation of mediation by the Judiciary.¹²¹

¹¹⁷ Hickling, RH 1987, Malaysian Law: An Introduction to the Concept of Law in Malaysia, Professional (Law) Books Publishers.

¹¹⁸ Alwi Abdul Wahab, 'Court-Annexed and Judge-Led Mediation in Civil Cases: The Malaysian Experience', A thesis submitted in total fulfilment of the requirements for the degree of doctor of philosophy.

¹¹⁹ Cecil Abraham, Alternative Dispute Resolution, 20 Asian Bus. L. Rev. (1998).

¹²⁰ Aniza Damis, Go Mediate! Mediation may be ordered to clear cases, NEW STRAITS TIMES MALAYSIA (Jun. 18, 2007), http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/go_mediate_media_tion_may_be_ordered_to_clear_cases.html.

¹²¹ Choong Yeow & Tie Hee, 'Court Annexed Mediation Practice in Malaysia: What the Future Holds', University of Bologna Law Review, Vol. 1, 2016.

In order to encourage parties to utilize mediation once they file their cases in court, the Malaysian Judiciary introduced a judge-led mediation mechanism-using judges as judges as mediators. At the pilot phase the judiciary was keen to develop trust among litigants in the mediation system by creating the perception that mediation was part of the formal judicial process that is why judges were used as the mediators and the Kuala Lumpur Court Mediation Centre (KLCMC), was located in the court premises.¹²² At the KLCMC, all cases referred to mediation from courts lower than the High Court were mediated by full-time mediators while those from the High Court were mediated by sitting High Court judges. At the KLCMC, the mediation process adopted was as follows¹²³;

a) **Referral to Mediation.**

The civil divisions of the Sessions Court and the High Court, on the request of the parties or on its own motion made an order to refer the dispute to KLCMC, provided that the dispute was found appropriate for mediation. All cases, except running down cases on claims for personal injuries and other damages due to road accidents¹²⁴, must be filed in court before they are referred to mediation at KLCMC.

b) **Mediation Agreement**

The mediation agreement set out in the Practice Directions is signed by the parties once they agree to mediate.

¹²² Choong Yeow & Tie Hee, 'Court Annexed Mediation Practice in Malaysia: What the Future Holds', University of Bologna Law Review, Vol. 1, 2016.

¹²³ Kuala Lumpur Mediation Centre, 'Court Annexed Mediation' available at <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjFiIP1y7nlAhWGQUEAHSt5A08QFjAAegQIBhAC&url=https%3A%2F%2Fwww.aseanlawassociation.org%2F11GAdocs%2Fworkshop5-malaysia.pdf&usg=AOvVaw1Lz8cS117tKT7vEEOVCSWv>>

¹²⁴ Practice Direction No. 2 of 2013 on 'Mediation Process for Road Accident Cases in Magistrate's Courts and Sessions Courts'

c) Scheduling

Not more than a month after the case is referred to KLCMC, the matter shall be set for a hearing before a mediator.

d) Attendance

All parties to the case or their representatives who have the authority to settle are required to attend the mediation.

e) Conduct of the mediation

There are no rules of procedure for the mediation process before the mediator. The parties are allowed to adopt a process that is specific to them and their needs. The mediators also have an open mandate on the conduct of the mediation process-they can choose to have break out session or not or a mixture of both break out session and joint sessions.

f) Duration

Mediation disputes must be settled within 3 months from the referral date. The court can extend this time.

g) Settlement Agreement

Once the parties reach a settlement agreement, the agreement is registered with the Court and enforced as a judgment of the court. If the parties do not reach an agreement, the court is informed whereupon it issues the appropriate orders.

4.1.2 Legal Framework

Although there is no express statutory provisions for Court Annexed Mediation in Malaysia, the framework guiding the adoption of CAM is as set out below:

4.1.1.1. Rules of Court 2012

Under the Rules, at a pre-trial case management¹²⁵;

“.....the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit.....”

Also, the rules require that in exercising the court’s discretion as to costs the court shall into account the “conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution”.¹²⁶

4.1.1.2 Practice Direction No. 5 of 2010

The objective of the Directions is to promote the use of mediation in place of the lengthy trial process. This way parties benefit from settlement by way of mediation which is more acceptable.¹²⁷ The Directions are a guideline for settlement. The Judge and Parties are free to adopt any settlement acceptable to the parties.¹²⁸

Under the Directions, the judge can ask parties to refer their dispute to CAM at any stage of the trial even at the appeal stage.¹²⁹ The dispute can be mediated by a Judge or by a mediator acceptable to both parties. If the parties adopt a judge-led mediation¹³⁰;

- a) Unless the parties agree, the trial judge should not be the mediator;
- b) The procedure should be determined by and acceptable to the parties;

¹²⁵ Order 34 rule 2(2)(a)

¹²⁶ Order 59 rule 8(c)

¹²⁷ Clause 2.1, Practice Direction on Mediation

¹²⁸ Clause 2.2, Practice Direction on Mediation

¹²⁹ Clause 3, Practice Direction on Mediation

¹³⁰ Annexure A, Practice Direction on Mediation

- c) The mediation shall be in the presence of the parties' legal counsel, unless the parties dispense with this requirement; and
- d) The judge shall record a consent judgment on the terms agreed by the parties.

If the parties' dispute is to be determined by a mediators who is not a judge¹³¹:

- a) The mediator (or mediators if the parties desire to appoint more than one) may be chosen by the parties from the list of certified mediators furnished by the Malaysian Mediation Center ("MMC") or any other mediator chosen by the parties. The mediator's role shall be to guide the parties towards finding a mutually acceptable solution to the dispute;
- b) Any mediator appointed shall be bound by the MMC's Code of Conduct and the MMC Mediation Rules;
- c) Upon the parties agreeing to be bound by the MMC Mediation Rules, the court shall direct that the MMC be notified of the fact; and
- d) Once the parties reach an agreement, the agreement shall be reduced in writing and filed in court.

4.1.1.3. Rules for Court Assisted Mediation

These Rules were introduced in 2011.¹³² These rules are not binding however, Judges are advised to comply with them to ensure that there is fairness and justice in the mediation process.

Under the Rules, judges and judicial officers are prohibited from mediating disputes before them in court. This is to prevent judges from being unfairly accused of attempting to avoid hearing

¹³¹ Annexure B, Practice Direction on Mediation

¹³² Rules for Court Assisted Mediation, available at https://judiciary.kehakiman.gov.my/portals/media/others/Rules_for_Court_Assisted_Mediation.pdf

certain cases¹³³. The Rules also require that Judges and judicial officers should automatically, unless object to by the parties at the onset of the proceedings, refer the following cases for mediation during case management hearings:

- a) Personal injury cases;
- b) Family cases; and
- c) Goods sold and delivered cases.

The Rules further provides for: the role of the mediator in the mediation process; the voluntary nature of the process; authority to settle; conflict of interest; confidentiality; presence of lawyers and the authority of the mediator.

4.1.1.1. Mediation Act,2012

This Act was enacted “to promote and encourage mediation as a method of alternative dispute resolution by providing the process of mediation, thereby facilitating the parties to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters.”¹³⁴ However, the Act is not applicable to mediation cases handled by judicial officers in respect of civil actions filed in court.¹³⁵

4.1.2. Challenges

Despite the growth of the use of mediation in Malaysia, the mediation process is still grappling with the following challenges;

¹³³ Clause 2.2, Rules for Court Assisted Mediation.

¹³⁴ Long Title, Mediation Act 2012

¹³⁵ Section 2, Mediation.

- a) Lack of a standard Practice Guideline for CAM and private mediation. As is, there is a variation in the mediation process and mediator qualification for CAM and private mediation especially as regards the lack of a standard code of ethics.
- b) The guidelines and rules guiding CAM are not adequate, too general and too discretionary in nature
- c) Judicial officers in Malaysia could mediate their own trial cases meaning the trial judge and the mediator could be the same person in the same case.
- d) Judicial officers when mediating are still seen as judges and deemed to have authority rather than facilitating the mediation.
- e) Having current sitting judges and judicial officers as part-time mediators rather than as full time mediators is posing challenges that judges can ‘switch off’ their authoritative nature to a facilitative nature as required in mediation.

4.2. SINGAPORE

4.2.1 Introduction

Singapore’s Journey towards CAM began in the 1990’s through the introduction of CAM in the judicial system. Around the same time, the Singapore Mediation Centre was established to provide private mediation for commercial disputes and the adoption of Community Mediation Centers (CMC) by the ministry of Law. CAM was introduced in the country’s subordinate court system through establishing the Court Mediation Centre (CMC) later renamed Primary Dispute Resolution Centre (PDRC). Judges, with training in mediation, are responsible for dispute resolution in the Centre. The mediation process is flexible with a mix of both joint sessions and private sessions. Originally, the PDRC handled disputes of civil nature.

However, the process has been extended to family disputes at the Family Court. Also, in the Family Court a more specialized mediation process was set up at the Maintenance Mediation Chambers to deal with disputes between couples/former couples on the maintenance of their children.¹³⁶

4.2.2 Mediation Process

a) Referral to mediation

A “presumption of Alternative Dispute Resolution” is applicable to all civil cases. Parties are therefore encouraged to consider the appropriate ADR processes prior to lodging disputes in Court.¹³⁷

Provided that a dispute has been filed at the State Court, a party may request that their dispute be referred to mediation. The party will need to ensure that all the parties are agreeable to the referral to mediation. If the parties do not request for mediation, a judge can refer the dispute to mediation at any stage of the proceeding. All parties making applications at the court have to file ADR forms before hearing which are reviewed by the judge and discussed with the lawyers involved. However, disputes involving less than USD 3,000 in a non-injury motor accident case, the disputes are instead heard by the Financial Industry Disputes Resolution Centre Ltd (FIDReC).¹³⁸

¹³⁶The Hwee Hwee, ‘Mediation Practice in ASEAN: The Singapore Experience

¹³⁷ Clause 35(9), State Courts Practice Directions < available at <https://www.statecourts.gov.sg/cws/Resources/Documents/Master%20PDs%20-%20effective%20PD%20of%202019.pdf>>

¹³⁸ State Courts Singapore, ‘Mediation Process’, available at <https://www.statecourts.gov.sg/cws/Mediation_ADR/Pages/The-Mediation-Process.aspx>

b) Attendance by parties

For cases referred to mediation, the attendance of the parties in the first session is compulsory. This is the case regardless of whether one is represented by a lawyer or not.¹³⁹

c) Mediators.

Disputes referred to mediation are handled by either a judge or a court volunteer mediator. Court Volunteer Mediators are legally trained mediators who have been approved to undertake mediation by the Singapore Mediation Centre and the State Courts. They handle disputes as volunteers. The mediators are required to comply with the standards of practice contained in the State Courts' Code of Ethics and Principles of Court Mediation.¹⁴⁰

d) Mediation Process

At the onset of the mediation process a preliminary meeting between the mediator and the lawyers is held. At the meeting the lawyers walk the mediator through the facts of the case and the issues that need to be discussed during mediation. After the preliminary meeting, the mediator will hold a joint meeting for all parties and their legal representatives, during which the parties will get to know each other and ventilate on the issues in contention under the guidance of the mediator. The mediator can, if they deem it necessary, hold separate meetings with the parties. This is to enable parties open up about their concerns about the mediation process. Issues discussed in these separate

¹³⁹ State Courts Singapore, 'Mediation Process', available at <https://www.statecourts.gov.sg/cws/Mediation_ADR/Pages/The-Mediation-Process.aspx>

¹⁴⁰ State Courts Singapore, 'Mediation Process', available at <https://www.statecourts.gov.sg/cws/Mediation_ADR/Pages/The-Mediation-Process.aspx>

meeting are confidential at the option of a party. Once the parties reach an agreement, the terms of the agreement shall be recorded before a judge after the parties have reviewed the terms of the agreement.¹⁴¹ Generally there mediation should be completed within three sessions.

e) Confidentiality

In case the parties do not reach an agreement, the information divulged during mediation shall be kept confidential.

4.1.2 Legal Framework

The legal framework supporting CAM in Singapore is as discussed below;

4.1.1.2 Supreme Court of Judicature Act (Rules of the Court)

CAM is undertaken by State Courts based on the following provisions of the Rules of the court;

a) Order 34A Rule 1 and Rule 1A which provides that

Notwithstanding anything in these Rules, the Court may, at any time after the commencement of any proceedings, of its own motion direct any party or parties to those proceedings to appear before it, in order that the Court may make such order or give such direction as it thinks fit, for the just, expeditious and economical disposal of the cause or matter.

(1A) Where the Court makes orders or gives directions under paragraph (1), it may take into account whether or not a party has complied with any relevant pre-action protocol or practice direction for the time being issued by the Registrar.

¹⁴¹ State Courts Singapore, 'Mediation Process', available at <https://www.statecourts.gov.sg/cws/Mediation_ADR/Pages/The-Mediation-Process.aspx>

- b) Order 108 Rule 3, which allows the court during a case management conference to assist the parties in considering and determining whether any Alternative Dispute Resolution process can be used to resolve the dispute between the parties.

4.1.1.2 State Courts Practice Directions

Part VI of the Direction provides for the use of ADR in conflict management. According to clause 35(2) of the Direction, “The Court Dispute Resolution (CDR) process and other appropriate Alternative Dispute Resolution (ADR) processes should be considered at the earliest possible stage. The judge-driven CDR process gives the parties the opportunity to resolve their disputes faster and more economically compared to determination at trial. Mediation, conciliation and neutral evaluation are undertaken as part of the CDR process and, subject to the exception stated in paragraph (7), are provided by the Court without additional charges imposed”

4.3. NIGERIA

4.3.1. Introduction – Multi Door Court House

In Nigeria, CAM is practiced as part of the Multi-door courthouse framework. Multi-door courthouses are court annexed alternative dispute resolution centers which provides for dispute resolution mechanisms to complement the litigation procedures by creating additional doors for dispute resolution. The centers though linked to specific courts are independently run and managed.¹⁴² The centers are spread across the several states of the country.

¹⁴²Ezeanya Ann Ugonna, ‘The Legal Framework of Multi-door Courthouse in Nigeria and Juxtaposing The Rules of Professional Conduct and High Court Rules Provisions With Respect to Alternative Dispute Resolution’

The first Multi-door Courthouse was set up in Lagos on 11th June, 2002, as a public-private partnership arrangement between the Lagos Courts, the United States Embassy, the Negotiation and Conflict Management Group and a non-profit private organization.¹⁴³

The centers are seized of matters in three ways:-

- a) Referral by Courts. Once cases are filed in court, the judge can refer the dispute to ADR if they find suitable to. Upon the parties the dispute reaching an agreement, the case is referred to court for the adoption of the settlement agreement;
- b) Parties own volition. If the parties opt to mediate their dispute, they can apply to the center directly. There is no requirement for them to first file a case in court. If the parties reach an agreement it is endorsed by an ADR Judge (a High Court judge appointed to oversee all matters filed at the multi-door courthouse), thereafter the settlement agreement can be enforced as a court order. The parties need not have legal representation during the mediation process ;
- c) Workers of the Multi-Door Court House of the Negotiation and Conflict Management Group (NCMG) intervene.

4.3.2. The Legal Framework

Due to the federal nature of the states in Nigeria, the several multi-door courthouse centers are established under the several state legislations. For example in Lagos, pursuant to the provisions of section 274 of the Nigerian Constitution, the Lagos Practice Directions were enacted. Under the Directions, Lagos multi-door courthouse mediation process are guided by the Lagos Multi-door Mediation Procedure Rules.

¹⁴³ Akeredolu Alero, 'Enforceability of Alternative Dispute Resolution Agreements: What is New under the Lagos Multi-Door Courthouse Law?', 6 Nigerian Bar Journal 1 (2010) 202.

The Mediation Procedure Rules provide for : request for Mediation; submission to Mediation; the Mediation Agreement ;appointment of the Mediator; the Mediator's Qualification; role of the Mediator; role of Counsel; role of the Parties Default of Appearance ;role of the Courts ;Date, Time and Place of Mediation ; representation of Parties and attendance at Meetings and the Mediation Process.¹⁴⁴ Further, under the state Civil Procedure Rules¹⁴⁵, provides for the promotion of amicable settlement of cases or adoption of ADR. The state's High Court Laws¹⁴⁶ also require that in any action, the court may encourage the parties to adopt more amicable dispute resolution mechanism which includes ADR at the multi-door courthouse.

4.3.3 Aspects of CAM¹⁴⁷.

- a) Qualification of mediators- To ensure that mediators have the necessary skills to handle mediation disputes, prospective mediators are required to practice in an area that matches their academic qualification.
- b) Mediation Standards- The several Centers have enacted a code of ethics to guide mediators during mediation with provisions on confidentiality, impartiality, Competence, conflict of interest among others. Mediators who fail to adhere to the Code of Ethics are removed from the list of accredited mediators.
- c) Subject matter of mediation- The scope of disputes handled in mediation varies in accordance with the subject matter which may include financial transactions disputes, Labour related cases, Divorce, Copyright Infringement among others. ,

¹⁴⁴ Table of Contents, Lagos State Multi-door Court Practice Directions on Mediation

¹⁴⁵ Order 25 Rule 9(1)(2)(c), High Court (Civil Procedure) Rules of Lagos State,2012

¹⁴⁶ Section 24, High Court Laws of Lagos State, 2003.

¹⁴⁷ Kehinde Aina, 'Court Annexed Mediation: Successes, Challenges and Possibilities, Lessons from Africa Session (Nigeria)', available at <<https://www.conflictdynamics.co.za/Files/217/Mediation--lessons-form-Nigeria--MANDELA-INSTITUTE-PRESENTATION.pdf>>

- d) Mediation fees- For cases referred from court, the only fees payable are filing fees. For parties who submit their disputes to mediation at the centers, they are liable to pay fees and costs based on the complexity of the matter in dispute.
- e) Legal Representation- Lawyers are allowed to participate in the mediation process. This is essential especially in cases that involve complex legal matters

4.3.4. Challenges

According to a case study¹⁴⁸ on the Lagos multi-door courthouse center, a large number of cases referred to mediation were unresolved, discontinued or withdrawn by the parties. The challenges below point out some of the causes of the poor success rate of the mediation process.

- a) Unwillingness by parties- the main cause of the parties unwillingness to participate in the mediation process, especially in cases referred by the court, is the lack of their consent. The lack of consent affect the party's ability to mediate with the other parties in good faith in the interest of reaching an amicable solution. Another reason associated with this reluctance is the lack of awareness about mediation by the lawyers and parties.
- b) Lack of adequate time- at times it takes parties a long time to discover their interests in a dispute before they can fully participate in the mediation process. This requires that parties are given adequate time to ventilate their issues before reaching an agreement. Considering the timelines the process is required to comply with, this is no happening.
- c) Lack of local training among mediators- parties to disputes perceive the mediators as lacking the ability to take the disputes before them in a local context. This is largely attributed to the fact that most mediators are trained abroad.

¹⁴⁸ Emilia Onyema, 'The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC' available at <<https://pdfs.semanticscholar.org/f08d/556ce29ea91d759dccc6fa70ee527aa44b5c9.pdf>>

4.4. SOUTH AFRICA

4.4.1. Introduction

The story behind CAM in South Africa was birthed through the Access to Justice Conference in 2011, wherein the participants explored the adoption of mechanisms outside the litigation framework of the court for dispute resolution. Shortly after the Voluntary Court- Annexed Mediation Rules of The Magistrates' Courts were promulgated.¹⁴⁹ Once the Rules were passed the government set up an advisory body whose principal function was to assist in the implementation of the mediation rules by consulting and coming up with standards and a code of practice for mediators and the accreditation of mediators to enable empanelment as required by the Mediation Rules.¹⁵⁰ The advisory body also consulted academic institutions in order to develop a training curricula for the mediators to be appointed. Based on the advice of the advisory body a list of mediators were gazetted to assist the Magistrate's Courts during the pilot phase in in Gauteng and the North West Provinces.¹⁵¹

4.4.2 Legal Framework

South Africa lacks an overarching legal framework to govern the application of mediation.

However, the Rules of Voluntary Court-Annexed Mediation governs CAM.

According to the Mediation Rules, a dispute can be referred to mediation by:-

- a) Before the commencement of litigation;
- b) After commencement of litigation, subject to Court approval;

¹⁴⁹ Department of Justice, Republic of South Africa, "Amendment of rules regulating the conduct of the proceedings of the Magistrates' courts of South Africa", available at http://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf

¹⁵⁰ Department of Justice, Republic of South Africa, "Court Annexed Mediation. Question and Answers", available at <<http://www.justice.gov.za/media-tion/mediation.html>>

¹⁵¹ Rules Board for Court of Law Act, GN 854 of 31 October 2014 (Government Gazette 38163).

c) If there is a good reason to do so, by any judicial officer after commencement of litigation.¹⁵²

Once the dispute has been referred to mediation, the mediator facilitates the process by observing impartiality and by facilitating discussions between parties so as to resolve the dispute. The Proceedings of the mediation process are confidential and inadmissible as evidence in court unless parties elect to have the proceedings recorded in a settlement agreement and signed by the parties¹⁵³,

If the parties reach a settlement, the mediator must help the parties draft a settlement agreement.

If the settlement agreement regards a disputes that was not being litigated by the parties it if filed in court. If the settlement agreement involves a dispute that was being litigated by the parties, the dispute resolution officer shall place the settlement agreement before a Magistrate for endorsement as an order of the court.¹⁵⁴ Any aspect of the dispute not settled in mediation shall be referred back to court for litigation.¹⁵⁵

The Mediation Rules prescribe the fees payable to the mediator, which is borne equally between the parties.¹⁵⁶ Parties to mediation proceedings must attend such proceedings in person or for legal entities, duly authorized representatives and may be represented by legal representatives.¹⁵⁷ The Minister must determine the qualification and standards of fitness of mediators to conduct mediation referred to in the Mediation Rules.¹⁵⁸

¹⁵² Rule 3, Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts.

¹⁵³ Rule 8, Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts.

¹⁵⁴ Rule 10, Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts.

¹⁵⁵ Rule 11, Voluntary Court-Annexed Mediation Rules of the Magistrates' Courts.

¹⁵⁶ Rule 12

¹⁵⁷ Rule 13

¹⁵⁸ Rule 14

4.4.3. Challenges

The main challenge that plagues the mediation process in South Africa regards the applicability of the mediation rules in place for mediation undertaken by other courts such as the High Court. The Mediation Rules apply to the “voluntary submission to mediation of disputes prior to litigation in the Subordinate Court. This locks out the application of CAM in other court in the Country. While it is understandable that most dispute emanate from this court, it is worth appreciating that having the Mediation Rules as a standalone guideline would enable the wide spread application of CAM.

4.5. UGANDA

In Uganda, CAM is underpinned by the following pieces of legislations and rules: The Constitution of the Republic of Uganda; The Civil Procedure (Amended Rules) 1998; The Judicature Act; The Arbitration and Conciliation Act; Magistrate Court Act; Tax Appeals Tribunal Act; Judicature Act (Mediation Rules). Under the Constitution, the Court in settling disputes should be guided by the principle that reconciliation between parties should be promoted.¹⁵⁹ It is on this background that court have implemented CAM to ensure that the least damage is done to the relationship between parties. To specifically implement CAM, Judicature Act (Mediation Rules) 2013 were put in place.

Under the Mediation Rules, all disputes of a civil nature are directed to mediation by the court in an attempt to get the parties to settle the dispute in a more amicable manner. Parties who fail to attend mediation processes once they have been directed by the Court are liable to payment of costs. The costs are payable unless the party can provide sufficient reason for not attending the sessions.¹⁶⁰ Once the matter has been to mediation, the parties in consultation with their lawyer is required to appoint a mediator from the pool of mediators provided by the court. The mediators can be a judge, a magistrate, a registrar of the court, a mediator approved by the court or any person

¹⁵⁹ Article 126, Constitution of the Republic of Uganda.

¹⁶⁰ Rule 14(2), Mediation Rules 2013.

with the relevant experience and qualifications in mediation appointed by the parties. The Rules also provide for the attendance of the mediation sessions by the party's advocates. The role of the registrar is to: refer civil actions to mediation; set dates for mediation; assign cases to mediation; receive mediation report from mediation; submit mediation report to court; endorsing settlement agreements to be filed in court; receive complaints against mediators and ensure that mediators adhere to the mediation guidelines.

According to the Mediation Rules, the mediation proceedings shall be completed within 30 days from the date of the referral unless the registrar extends the time upon proper cause being shown. If parties reach an agreement during mediation, the agreement is signed by the parties and submitted in court as a consent judgment. The case shall be referred back to court if there is no agreement. All information disclosed during the mediation process is kept confidential and shall not be disclosed regardless of the outcome of the process.

CONCLUSION

One of the key objectives of this paper is to review the best practices for Court Annexed Mediation and to make proposals drawn from the comparative study. Consequently, the above chapter has made a comparative study among Malaysia, Singapore, South Africa, Nigeria and Uganda. The paper has made recommendations on the identified Gaps in Kenya so as to facilitate amendments where they are necessary

CHAPTER FIVE:

CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

This study sought to examine CAM in Kenya by identifying the legal and institutional challenges faced the Judiciary in the implementation of CAM. Chapters 2 examined the Legal and Institutional Framework for CAM in Kenya noting that there was in place an adequate legal framework in national law and even though Kenya is not a party to any of the international law on Mediation they offer a benchmark for Kenya on the international practice on mediation. Chapter 3, explored the status of the implementation of CAM in Kenya by analyzing the data from CAM stations across the country. The settlement rate of 55% is impressive though there is potential to raise the figure. The Chapter also noted the achievements of CAM and its challenges. Chapter 4 undertook a comparison of the CAM legal framework in other countries to identify the shortfalls in the Kenyan CAM structure. Overall, it was noted that CAM has been successfully initiated by the Judiciary in Kenya. This is by setting up a legal framework to support the adopt CAM at the pilot phase and during the national rollout phase. The Judiciary has also accredited a group of mediators who have been instrumental in the facilitation of the mediation process and the attainment of the high settlement rate. However, there are several challenges that have been identified which have hindered the achievement of 100% settlement rate or at least create a very conducive environment for CAM to thrive.

5.2. Recommendations.

The recommendation listed below consist of the possible ways that the challenges highlighted in chapter 3 can be solved.

5.2.1. Funding

As currently set up the CAM project relies on the budget allocated to other organs of the Judiciary such as that of the Registrar of the High Court. To fully fund the operations of the project both the recurrent and development budget funds need to be set aside for the project. Given the potential that CAM has for reducing the backlog of cases in the courts, an argument could be made that instead of hiring more judges the funds should be diverted to CAM. The funds could be sourced directly from the National Treasury or be aside from the funds allocated to the Judiciary. Other alternatives that can be used to sustain the project include:-

- (a) Parties of disputes referred to mediation should be allowed to select private mediators who are accredited with private institutions and for a requirement for the disputing parties to pay mediation fee. These fees could cater for the costs incurred in the day to day operation of the CAM project. The mediation should be equal to or less than the filing fees paid to lodge disputes in court.
- (b) Parties to cater for the mediators' fee. The Judiciary incurs a lot of costs paying the mediators' fees on behalf the parts. While this may be sustainable at the pilot phase and at the controlled national rollout phase, these costs will grow exponentially once the project goes national. In other courts, as discussed in the previous chapter, the parties equally bear the mediators' professional fees.
- (c) Working with the Law Society of Kenya and other professional bodies to get mediators to offer their services pro-bono. To entice the mediators' the pro-bono services could

be considered part of the Continuous Professional Development and CPD point awarded to the mediators.

- (d) Seeking funding from Development Partners. Donors such as the World Bank and International Development Law Organization (IDLO) have played a critical role in the rollout phase of the CAM project. This dedication can also be seen for example in Lagos where Development Partners have provided funds to the Judiciary to ensure that CAM succeeds.

5.2.2. Infrastructure

Physical resources such as stationery, computer devices and software, offices and files are essential for the success of CAM. The Judiciary needs to identify a physical space dedicated for the conduct of CAM especially at the Nairobi Station. This space should be equipped with enough mediation rooms, break-out rooms, mediators' chamber and client care Centre. In some Jurisdictions a separate mediation center is set up in the court house dedicated to mediation. This helps create a separate environment from the hostile and confrontational court corridors.

For the safety and proper storage of mediation case files a mediation registry should be established. The registry should be adequately equipped and staffed. This will enable the timely and efficient filing of mediation documents in court.

5.2.3. Training

The success of the CAM lies in the hands of people running the project. As a result, to ensure that the growth and the achievement of the project's goals becomes a reality, training of the officers and staff involved is fundamental. The mediators need to be trained on drafting of settlement agreements, code of conduct and ethics, the mediation process and proper case management. Judges need to be sensitized on their role in the mediation process.

To undertake the training a comprehensive curriculum should be developed for training at the Judicial Training Institute. The training should be continuous to ensure that mediation officers are apprised of developments in the mediation practice. Professional bodies should also train their members on the mediation process and their role in the process. The Mediation Accreditation Committee should be on the forefront to ensure that the requirements to be listed as a mediator is constantly updated to ensure that mediators pursue trainings to increase their knowledge base. The officers would also benefit immensely from trainings and exchange programs with other jurisdictions.

5.2.4. Mediators

The role of appointing mediators should be undertaken by the Judiciary. This is because to the parties, the mediators are just names on a list. The Mediation Registrar is best placed to know which would be best suited for which dispute due to their ability to access background information like the mediator's academic training and interests and their track record in the resolution of the various disputes.

5.2.5. Mandatory nature of mediation

While some parties have objected to the adoption of CAM on the grounds that contrary to the nature of mediations, it imposes the use of mediation on the parties. The Judiciary has clarified that while this might be true it is necessary to ensure that the objective of reducing the backlog of cases is achieved. To ensure that the public is aware of this, a thorough public sensitization program is needed. The public must appreciate and understand the Judiciary's position so that there is a warmer reception to CAM.

5.2.6. Sensitization among advocates.

The CAM program has been opposed by advocates due to a lack of understanding of the process. This is based on the misconception that CAM leaves out advocates out of the dispute resolution game. The Judiciary and the Law Society of Kenya need to undertake a sensitization training among advocates. The advocates should be trained on their role in the mediation process. Once the cooperation of advocates is achieved, they will be at the forefront directing their clients towards and taking them through the mediation process.

5.2.7. Political Will

The Judiciary should engage members of the legislature and executive regarding the concept of CAM, its potential and benefits for the country in order to secure their support. The Judiciary can exploit this political goodwill to increase budgetary allocation from the legislature to fund CAM.

5.3. Conclusion

The Constitution of Kenya mandates the Judiciary to promote ADR in the administrative of Justice and Mediation is one of the ADR Mechanisms.

“Mediation has significant potential not merely for reducing the burden of case backlog in Courts, but more fundamentally for bringing about a qualitative change in the focus of the legal system from adjudication to the settlement of disputes in Kenya”.¹⁶¹ Noting the potential that CAM beholds for Access to Justice, this study sought to examine the: legal and institutional framework, the challenges and opportunities for CAM and CAM framework in other countries. Chapters 2 examined the Legal and Institutional Framework for CAM in Kenya noting that there was in place an adequate legal framework in national law and even though Kenya is not a party to any of the international law on Mediation they offer a benchmark for Kenya on the international practice on

¹⁶¹The Judiciary, ‘Submission on Mediation Bill (National Assembly Bill No. 17 of 2020).

mediation. Chapter 3 explored the status of the implementation of CAM in Kenya by analyzing the data from CAM stations across the country. The settlement rate of 55% is impressive though there is potential to raise the figure. The Chapter also noted the achievements of CAM and its challenges. Chapter 4 undertook a comparison of the CAM legal framework in other countries to identify the shortfalls in the Kenyan CAM structure.

The huge backlog of cases at the Judiciary poses a threat to this constitutional right. As a result, the Judiciary has a duty to provide parties with varied and alternative ways that their disputes can be resolved. CAM presents an efficient and effective tool for dispute resolution. The Judiciary has undertaken several steps to ensure that CAM is adopted nationally as a tool for dispute resolution. Once the challenges highlighted herein are solved, CAM will without help dispose of a large number of disputes choking the Judiciary.

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