



UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**A CRITICAL ANALYSIS OF COURT-ANNEXED MEDIATION IN
PROMOTING ACCESS TO JUSTICE IN KENYA**

**THESIS SUBMITTED IN FULFILMENT OF THE AWARD OF THE MASTER
OF LAWS (LL.M) DEGREE
COURSE: GPR 699-MASTERS THESIS**

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REG. NO. G62/35197/2019

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11TH NOVEMBER, 2021

DECLARATION

I, **JOSEPHINE NYATUGA MARAGIA** do declare that this is my original work submitted in partial fulfilment of the Masters of Laws (LLM) at the University of Nairobi. It has not been submitted in its entirety or part at any other institution of higher learning. All cited work is duly acknowledged.

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Approval

This study has been submitted with my approval as the University of Nairobi Supervisor.

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DEDICATION

To those engaged in the quest for justice through all dispute resolution mechanisms. To those who celebrate the use of Court Annexed Mediation in promoting access to justice in the Civil justice system.

ACKNOWLEDGEMENT

I thank the almighty God for blessing me with the opportunity to study. I also thank Him for the good health that I enjoyed during the perilous times of the Covid19 pandemic and always. All glory and honour to His name.

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LIST OF FIGURES

Figure 1: Table showing statistics on case backlog and CAM settlement rate

LIST OF CASES

Re Estate of the late Adam Chebelieny Kibosia (Deceased) (2021) eKLR

Re Estate of BM (Deceased) (2019) eKLR

Re Estate of Oyosi Oyoga (Deceased) (2021) eKLR

NKM vs. SMM & Another (2019) eKLR

LIST OF CONSTITUTIONS, STATUTES, BILLS & POLICY DOCUMENTS

Kenya

Constitution

The Constitution of Kenya, 2010

Acts of Parliament

The Advocates Act, CAP 16, Laws of Kenya

The Civil Procedure Act, CAP 21, Laws of Kenya

The ADR Bill, No. 34 of 2021

The Mediation Bill, No. 17 of 2020

The Advocates Remuneration Order, Legal Notice no 35 of 2014

The Practice Directions on Court Annexed Mediation, Gazette Notice No. 5214 of 2017

Foreign statutes

Lagos Multi-Door Courthouse Practice Directions Act, 2007, Nigeria.

LIST OF INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights

United Nations Convention on International Trade (UNCITRAL) model on conciliation and Mediation

United Nations on International Settlement agreements resulting from Mediation (Singapore Convention)

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
CAM	Court Annexed Mediation
COVID 19	Coronavirus Disease of 2019
DR	Deputy Registrar
ICT	Information Communication Technology
JTI	Judiciary Training institute
KLR	Kenya Law Reports
LMDC	Lagos Multi-Door Courthouse
MAC	Mediation Accreditation Committee
MDR	Mediation Deputy Registrar
SOJAR	State of the Judiciary Administrative and Annual Report.
UNCITRAL	United Nations Convention on International Trade

Abstract

Court annexed mediation, (CAM) is a method of dispute resolution with the potential of achieving better in the Kenya civil justice system. Its effects are, however, yet to be fully realized: Case backlog in Kenya continues to rise steadily, the mediation settlement rate remains average; case backlog shifts slowly from court to mediation. This study analyses the impact of CAM in the Kenya Civil justice system. The challenges hampering the smooth implementation of CAM are discussed. These range from institutional, attitudinal to procedural. A case study of Nigeria and Ghana is conducted while highlighting Possible lessons for Kenya while implementing CAM.

The study used qualitative research methodology in collecting data to analyse the impact of CAM, challenges hampering its smooth implementation as well as recommendations to ensure CAM achieves better results in terms of access to justice. Questionnaires were distributed to the following key respondents: judicial officers, advocates, mediators, mediation clerks as well as disputants who have interacted with CAM processes.

The study establishes that introduction of CAM into the civil justice system has lessened the period of resolving disputes, reduced dispute resolution costs, created flexibility in dispute resolution processes as well as improved unity and cohesiveness among disputants. The study further reveals the existence of challenges facing the implementation of CAM. Greater results will be achieved when the challenges are addressed.

It is recommended that CAM be supported by way of capacity building, resource mobilization and allocation, training and involvement of all stakeholders as well legislating laws and rules regulating its processes. Ratification of international instruments will go a long way in strengthening the legal framework for CAM in Kenya.

TABLE OF CONTENTS

SCHOOL OF LAW	1
THESIS SUBMITTED IN FULFILMENT OF THE AWARD OF THE MASTER OF LAWS (LL.M) DEGREE	1
DECLARATION	i
Approval.....	i
University of Nairobi	i
DEDICATION	ii
ACKNOWLEDGEMENT	iii
LIST OF CASES.....	v
LIST OF CONSTITUTIONS, STATUTES, BILLS & POLICY DOCUMENTS	vi
Acts of Parliament.....	vi
Foreign statutes	vi
LIST OF INTERNATIONAL INSTRUMENTS	vii
LIST OF ABBREVIATIONS	viii
Abstract.....	ix
CHAPTER ONE	1
1.0 Introduction	1
1.1 Problem Statement.....	4
1.2 Objectives.....	5
1.3 Research Questions	5
1.5 Justification of the study.....	6
1.6 Scope and Limitation of the Study	7
1.7Theoretical framework	7
1.8 Research Methodology.....	9
1.8.1 Research Design.....	9
1.8.2 Field Research	9

1.8.3 Field Sites	9
1.8.4 Data collected	9
1.9 Literature Review	10
1.9.1 Historical development of mediation	10
1.9.3 Challenges facing the implementation of CAM	14
1.10 Chapter Breakdown	17
CHAPTER TWO	19
2.0 THE IMPACT OF CAM ON CIVIL JUSTICE IN KENYA	19
2.2 Effect of CAM on The Legal Framework for Resolving Civil Disputes	19
2.2.1 International level	19
2.2.1.1 UNCITRAL model on Conciliation and Mediation	19
2.2.1.2 United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention)	19
2.2.2. National level	20
2.2.2.1 The Constitution	21
2.2.2.3 The Judiciary Mediation Manual, 2018	22
2.2.2.4 Practice Directions	22
2.2.2.6 ADR Bill, 2019	24
2.3 Notable Changes Brought by CAM in the Civil Justice System	24
2.3.1. Shorter period for resolving disputes	25
2.3.4 Finality of court process	28
2.3.5 Flexibility	29
2.3.6 Mending of broken relationships	29
2.3.7 Case backlog reduction	30
CHAPTER THREE	33
3.0 CHALLENGES FACING THE IMPLEMENTATION OF CAM IN KENYA	33
3.1 Introduction	33
3.2 Procedural Challenges	33
3.2.1 Referral of Cases to Mediation	33
3.2.2 Legal Representation	34
3.2.3 Poorly Drafted Mediation Settlement Agreements	35

3.2.4. Difficulties in the enforcement of mediation settlement agreements.....	36
3.3 Institutional challenges.....	36
3.3.1 Poor infrastructure.....	36
3.3.2 Lack of Adequate Human Resource and Capacity Building	37
3.4 Attitudinal Challenges.....	39
3.4.1 Advocates’ Reluctance towards CAM	39
3.4.2 Parties’ Unwillingness	39
CHAPTER FOUR	42
4. 0 CASE STUDIES FOR GHANA AND NIGERIA.....	42
4.1 Introduction	42
4.2. The Multi-Door Courthouse in Nigeria.	42
4.2.1 Early Neutral Evaluation	43
4.2.2 Mediation.....	43
4.2.3 Pertinent features of LMDC	44
4.2.5.8Lessons drawn from Nigeria for Kenya	47
4.4 Ghana.....	49
4.4.1 Lessons drawn from Ghana for Kenya	50
4.5 Conclusion.....	51
CHAPTER FIVE	52
5.0 CONCLUSION AND RECOMMENDATIONS.....	52
5.1 Conclusion.....	52
5.1.1 Study Findings	53
5.1.2 The Impact of CAM on the Civil Justice System	53
5.1.4 Lessons from Ghana and Nigeria	54
5.2 Recommendations	56
REFERENCES.....	59
BOOKS	59
ARTICLES	59
GOVERNMENT REPORTS.....	63
STATUTES	63
BILLS	63
REGULATIONS	63

APPENDIX A	INFORMED CONSENT	64
Researcher: Josephine NyatugaMaragia.....		64
APPENDIX B	QUESTIONNAIRE FOR JUDICIAL OFFICERS	65
APPENDIX C	QUESTIONNAIRE FOR JUDICIAL STAFF	69
APPENDIX D	QUESTIONNAIRE FOR ADVOCATES	72
APPENDIX E	QUESTIONNAIRE FOR MEDIATORS.....	75
APPENDIX F	QUESTIONNAIRE FOR LITIGANTS	78

CHAPTER ONE

1.0 Introduction

Access to justice is considered a human right under the Constitution of Kenya, 2010.¹ The state has to ensure access to justice to all persons and the court fees required, if any, must be reasonable so as not to impede justice.² Additionally, Courts in Kenya have a Constitutional mandate to promote alternative forms of dispute resolution (ADR).³ ADR methods include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.⁴ Clearly, the right of access to justice is not limited to courts but extends to other independent fora like mediation panels and tribunals.

Admittedly, access to justice is a wide concept. It touches on all aspects of the law. It encompasses much more than access to legal services or legal aid.⁵ It refers to the availability of competent and impartial judges, safe and accessible court facilities, basic dispute resolution services, affordable legal fees and technology now commonly used by courts and parties in presenting cases.⁶ Over the years, the concept of access to justice has developed to include access to social, economic and environmental justice.⁷ A discussion about access to justice will therefore cover a wide range of aspects including systems, institutions, laws and regulations, mechanisms and people involved in the dispute resolving process. For purposes of this study, a proposal is made that access to justice refers to resolving disputes by either means of litigation or some form of ADR in a fair, faster, just and cost-effective manner.

Across the world, access to justice, especially by the marginalized, poor, uneducated and underprivileged in the society is hindered by several factors. These include, high advocates' fees, lack of information, poor infrastructure, long distance to the courts, illiteracy and the long duration it takes to resolve disputes in courts.⁸ These challenges are associated with litigation as a mode of

¹ Article 48 of the Constitution of Kenya, 2010.

² Ibid

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

⁴ Ibid

⁵ William C. Vickrey, "Access to justice: A Broader Perspective" (2009) Loyola Law Review Journal. Available at <https://www.digitalcommons.lmu.edu/lr/Vol42/Iss4/10> accessed on 30th January 2020

⁶ Ibid

⁷ Olivier M, "The role of Court-annexed Mediation in providing access to justice in the resolution of Commercial disputes"(2018) . available at <http://repository.nwu.ac.za/bitstream/handle/10394/2133> accessed on 30th January 2020

⁸ MuiguaKariuki and Kariuki Francis , 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) sourced from <https://scholar.google.com>. Accessed on 30th November 2020

settling disputes. The court system in Kenya, like in many Commonwealth countries, is adversarial. It works in such a manner that the winner takes all.⁹ The Judge/Magistrate is not required to descend to the level of litigants to aid a “weaker” party. In the words of Roscoe Pound, “It is a system of the sporting theory of justice where civil litigation consists of private brawlers fighting things out with a judge serving as a referee.”¹⁰ This adversely affects access to justice. Some of the adverse effects include delays in determining court cases and high costs of litigation.¹¹ The case backlog in Kenya has been rising steadily. The average period for determining a civil cause is five years.¹² The judiciary has put in place mitigating mechanisms like employing more judicial officers and staff, improving the case management system, conducting service weeks, creating public awareness by having open days, automating court processes and opening new courts.¹³ There is also the amendment of key procedural laws like the Civil Procedure Act¹⁴, whereupon pre-trial conferences are introduced in civil matters as a way of expediting trial processes. These efforts, as observed by Mbote and Migai Akech, have not solved the problem of case backlog in the Judiciary.¹⁵ There are still cases that have been in court for over a decade.¹⁶ According to judiciary records, the case backlog as of June 30, 2019, stood at 341,056. A total of 39,781 cases had been pending in court for over five years. The courts with the highest case backlog were Magistrate Courts and the High

⁹ Sande L. Buhai., ‘Access to Justice for Unrepresented Litigants: A Comparative Perspective’(2009) Loyola of Los Angeles Law Review. Available at <https://digitalcommons.mu.edu/Ilr?Vol42/Iss4/5>

¹⁰ Ibid

¹¹ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buff L Rev 18 sourced from: <https://heinonline.org/HOL/License> accessed on 30.11.20

¹² The state of the Judiciary and Administrative Report (SOJAR) 8th edition, (2020) Nairobi: Judiciary of Kenya available at <https://online.flippingbook.com/view/1035011/> accessed on 30th November 2020.

¹³ Ibid

¹⁴ Order 11 of the Civil Procedure Act, Cap 21, Laws of Kenya

¹⁵ Patricia KameriMbote&MigaiAkech ‘Kenya: Justice Sector and the Rule of Law’ (2011) Johannesburg: Open Society Initiative for Eastern Africa. Available at <http://www.Ielrc.org/content/a1104.pdf> accessed on 28.11.2020

¹⁶ Ibid.

Court at 245,268 and 63,443 cases, respectively.¹⁷ These two courts handle the bulk of the civil cases within the country.

It is against this backdrop that the judiciary resorted to informal ways of settling disputes. Court annexed mediation (hereinafter referred to as CAM) is piloted as a flagship project in most parts of the country.¹⁸ This process commenced on 4th April 2016 at the Family, Commercial, and Admiralty Divisions of the High Court in Nairobi.¹⁵ CAM has been rolled out to 12 counties across the country.¹⁹ The counties include Kakamega, Nyeri, Kisii, Kisumu, Mombasa, Nakuru, Eldoret, Garissa, Machakos, Embu, Kilifi and Nyamira.²⁰

CAM takes place under the umbrella of the court.²¹ The Deputy Registrar, (DR) of the court or Magistrate selects cases of a civil nature that are already filed in court and refers them to mediation. The court then appoints a mediator whose role is to facilitate the process of mediation.²² A period of 60 days is given for the process. This can be extended once for ten days to enable parties to conclude the process. Consent of parties to the procedure is not obtained by the court.²³ However, once parties are referred, they are not coerced into reaching any settlement. In case of a settlement, it is filed in court for adoption and execution. Where disputants have not reached any settlement, the matter is taken back to court and proceeds from where it had reached before referral to mediation.²⁴

Mediation is a type of (ADR) mechanism that is perceived to be faster, participatory, voluntary, flexible and confidential. Besides, the nature of resolving disputes aid in mending broken

¹⁷ Supra, note 8

¹⁸ Ibid

¹⁵ Kariuki Muigua, PhD, FCI Arb, “Resolving conflicts through Mediation in Kenya” 2nd Edition, 2017, Nairobi: Glenwood Publishers Limited.

¹⁹ Supra, note 8

²⁰ Ibid p 9

²¹ Muigua Kariuki, ‘Court Sanctioned Mediation in Kenya - An Appraisal’ (2015) sourced from <https://scholar.google.com>. Accessed on 30th November 2020

²² Rule 1.3 of the Judiciary Mediation Manual (2019), sourced from: www.judiciary.go.ke accessed on 22nd November 2020.

²³ Ibid, Rule 1.4

²⁴ Ibid

relationships.²⁵ In the process of resolving the dispute, in most cases, parties are unified, thus creating cohesiveness.

The study carries out a critical analysis of CAM in Kenya. It also conducts case studies of two countries where court-connected mediation is practised to find lessons for Kenya. The countries studied are Nigeria and Ghana. They are identified because, like Kenya, they are African countries grappling with challenges of case backlog with limited resources. Secondly, they have entrenched court-connected mediation in the civil justice system for a longer period compared to Kenya. In Ghana, the process incorporates some aspects of traditional mediation, whereas, in Nigeria, the procedure is a multi-door courthouse whereby matters in court are not only referred to mediation but also other ADR methods.

1.1 Problem Statement

Court connected Mediation has been focused on in the legal system of many countries for its ability to resolve conflicts between disputants.²⁶ Evidence suggests that case backlog, as well as overall legal costs, are thereby reduced.²⁷ In exercising judicial authority, courts and tribunals in Kenya shall be guided by some principles which include alternative forms of dispute resolution (ADR).²⁸ ADR methods include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.²⁹ CAM is piloted by the judiciary in Kenya in most parts of the country.³⁰ Its effects, however, are yet to be fully realized in Kenya. Cases filed in courts have continued to rise. The case settlement rate for matters referred to mediation currently is on average.³¹ Besides, the uptake and acceptance of CAM in the Kenyan judiciary is mixed. For instance, in Kakamega County, out of the 2671 pending civil cases, only 88 got referred to mediation. Legal practitioners view CAM

²⁵ MuiguaKariuki, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (2018) sourced from <https://scholar.google.com>. Accessed on 30th November 2020

²⁶ WahabAlwi Abdi, 'Court-Annexed And Judge-Led Mediation In Civil Cases: The Malaysian Experience' (2013) sourced from <https://scholar.google.com>. Accessed on 30th November 2020

²⁷ Ibid

²⁸ Article 159 (2) of the Constitution of Kenya 2010

²⁹ Ibid

³⁰ Ibid

³¹ The state of the Judiciary and Administrative Report (SOJAR) for 2019-2020 available at <https://online.flippingbook.com/view/1035011/> accessed on 30th November 2020 reveals that the settlement rate for cases referred to mediation countrywide for the period between 2018 and 2019 was at 50%.

as a threat to their legal practice³². For some, this process leads to unnecessary delays and expenses.³³ It is also contended that the compulsory referral of cases to mediation goes against the voluntary nature of mediation.³⁴ Further, CAM limits disputants' right to access justice through the court system.³⁵ It is in this context that the research intends to find the place of CAM and how it impacts the civil justice system. The study will also seek to identify any challenges in implementing CAM with a view of proposing recommendations on how CAM can be improved to enhance the right of access to justice.

1.2 Objectives

The principal aim of the study is to establish the contribution of CAM on access to justice in Kenya.

Specific objectives of the study are as follows:

- (i) To assess the impact of CAM on the civil justice system in Kenya.
- (ii) To identify and discuss the challenges facing the implementation of CAM in Kenya.
- (iii) To learn lessons for CAM and propose possible remedies drawn from case studies of jurisdictions with the best practices.
- (iv) To make recommendations on how CAM can be improved to achieve desired goals.

1.3 Research Questions

The principal question is: To what extent does Court annexed mediation contribute to the promotion of access to justice in Kenya? The following specific questions are posed.

- (i) How has CAM impacted the civil justice system in Kenya?
- (ii) What are the challenges facing the implementation of CAM in the civil justice system in Kenya?
- (iii) What are the possible lessons drawn from other jurisdictions to mitigate the challenges facing the implementation of CAM?

³² MuiguaKariuki, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation' (2018) sourced from <https://scholar.google.com>. Accessed on 29th November 2020

³³ Vettori S, 'Mandatory Mediation: An Obstacle to Access to Justice?' (2015) African Human Rights Law Journal sourced from <https://scholar.google.com>. Accessed on 29th November 2020

³⁴ Ibid

³⁵ Ibid

- (iv) What are the recommendations that can be made to ensure that CAM achieves its desired goals?

1.4 Hypothesis

The adversarial nature of the court system in Kenya, like many Commonwealth countries, is riddled with many challenges. These range from high costs of litigation, undue delays, long distances covered to courts, congestion of court dockets, formalities and technicalities involved in court processes. Consequently, access to justice, especially for the indigent is greatly prejudiced. CAM, on the other hand, is characterized by speedy ways of dispute resolution, confidentiality, less costly compared to litigation, flexible and results in win-win solutions. These attributes make CAM impact positively on access to justice.

1.5 Justification of the study

Access to justice is now considered a critical part of international human rights³⁶. The adversarial nature of the justice system has not offered a favourable platform in enhancing this right.³⁷ Some forms of ADR, including mediation, have been considered as ways of dispensing justice in a manner that is faster and fairer to the parties since the members involved participate in the final decision-making.³⁸

In fulfilling the objectives of the study, the observations and conclusions made in the study will help institutions, law practitioners and the general public appreciate CAM in the following ways.

To begin with, CAM is relatively new in Kenya. The findings of the study may contribute to bridging the knowledge and information gap that exists about it among the members of the public.

Secondly, it is hoped that the study will aid the Judiciary in Kenya to reform and develop CAM while rolling it out to the other parts of the country.

³⁶ Article 8 and 10 of the Universal Declaration of Human Rights.

³⁷ Rickard Erika, 'The Agile Court: Improving State Courts In The Service Of Access To Justice And The Court User Experience' (2017) 39 Western New England Law Review 24 found at <http://digitalcommons.law.wne.edu/lawreview/vol39/iss2/2>

³⁸ Supra, note 27

1.6 Scope and Limitation of the Study

The scope of this study is civil cases in Kenyan courts. The reason is that CAM in Kenya covers civil cases only.

Following the advent of the Corona Virus Disease Pandemic (Covid19) which restricts physical human interactions and movements, face to face interviews was not possible. Data was collected online by use of questionnaires. Secondly, the confidentiality nature of CAM limited case studies. The few cases illustrated, are those matters where disputants moved the courts following the conclusion of the CAM process.

1.7 Theoretical framework

This study is based on John Rawls' theory of justice. This theory was developed initially in 1971 and revised in 1990. Its purpose was to address the issue of distributive justice in society through reliance on an alternative device of the social contract.³⁹ Rawls posited that justice is the first virtue of social institutions as truth is of the systems of thought.⁴⁰ Laws and institutions, must be just and efficient.⁴¹ Institutions are deemed to be just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantage of social life.⁴²

John Rawls' theory brings out three principles that have shaped the justice system. They include the principle of liberty, where he argues that one person's enjoyment of rights does not interfere with other people's rights; the principle of difference where, he argues that people are never the same or equal, but that, in terms of justice, the less disadvantaged need to be lifted to have a level playing ground with those that are advantaged; and lastly, the principle of fairness, where he posits that a decision is only fair if the process used to arrive at it was fair.³⁶

³⁹ DJ Bentley, John Rawls: 'A Theory of Justice' (1973) 121 University of Pennsylvania Law Review, 1070 sourced from: <https://heinonline.org/HOL/License> accessed on 29.11.2020

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

Rawls theory of justice of fairness helps in understanding both the social justice promise and critique of the field of dispute resolution.⁴³ Firstly, the promise, much of the enthusiasm for alternative dispute resolution arose out of popular dissatisfaction with the courts.⁴⁴ The costs of litigation and the long duration to resolve cases in court made public adjudication inaccessible to many people.⁴⁵ Some also questioned the legitimacy of the attorneys' and Judges dominance over the litigation process and their control over decision making.⁴⁶ Following these concerns, it may be argued that dispute resolution advocates perceived the courts as failing to operate in a manner that assured everyone an opportunity to exercise their basic liberties, in particular the right to expression, essential for the achievement of political and social justice.⁴⁷

The courts' embrace of mediation and other ADR mechanisms is an attempt to find other legitimate methods that would allow people to exercise their liberties, at least to an agreeable degree.⁴⁸

This theory proposes that elements of ADR, like mediation, work well in solving disputes between disputants when a neutral person reminds them of the possible outcomes. The theory is important to the proposed research as it advocates for solving disputes through peaceful means. Going by the theory, ADR is a suitable mechanism for accessing justice and would be useful in settling disputes.

1.7.1 Critique of the theory.

Hsieh has criticised this theory for the reason that if conflicting parties are at will to leave at any moment they deem fit, then they are likely to use their freedom to frustrate the process.⁴⁹ This weakness is also in the elements of ADR which may make it difficult to coerce parties to commit

⁴³ Welsh Nancy A, 'Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories', 54 J. Legal Edu.49 (2004) available at https://scholarship.law.tamu.edu/fac_scholar1964 accessed on

⁴⁴ Ibid

⁴⁵ Supra, note 39

⁴⁶ Ibid

⁴⁷ Supra, note 4

⁴⁸ Ibid

⁴⁹ Ngetich Racheal CB, 'Effectiveness of Alternative Dispute Resolution Mechanism (Adr) in Case Backlog Management in Kenyan Judicial System: Focus on Milimani High Court Commercial Division.' (2017)

to ADR processes till the final resolution is made.⁵⁰ Despite this weakness, the theory provides room for solving disputes without necessarily involving the courts.⁵¹

1.8 Research Methodology

1.8.1 Research Design

The study uses descriptive and analytical modes of research. It is based on primary and secondary data. There is a content analysis of secondary information that obtained from textbooks, journal articles, conference manuals as well as primary data from statutes, court cases, policy documents and government statistical reports.

1.8.2 Field Research

The study conducted interviews. The was by the use of semi-structured questionnaires. Key respondents were judicial officers and judicial staff, advocates, members of the public who have had cases resolved through CAM and mediators.

1.8.3 Field Sites

CAM is now being practised in most court stations within Kenya. The study randomly selected court stations where mediation is practised throughout the country. The study divided the country into 8 regions namely Western, Nyanza, Rift valley, Nairobi, Eastern, North Eastern, Coast and Central. Each region represents the former provincial administration of Kenya. Out of the eight regions, one court station was randomly selected. Kakamega station represents Western, Machakos station represents Eastern, Garrisa station for North Eastern, Kisumu for Nyanza, Eldoret for Rift valley, Nyeri for Central, Mombasa for Coast region and Milimani for Nairobi.

1.8.4 Data collected

The information obtained from books and journal articles aided in understanding terms and definitions on access to justice, the nature of the adversarial system, ADR processes in general, advantages of mediation, disadvantages as well as the experiences of CAM in other jurisdictions. The information from government statistical reports and court administrators provided data on

⁵⁰ Ngetich Racheal CB, 'Effectiveness of Alternative Dispute Resolution Mechanism (Adr) in Case Backlog Management in Kenyan Judicial System: Focus on Milimani High Court Commercial Division.' (2017)

⁵¹ Ibid

court cases referred to mediation, those successfully concluded and those where parties failed in reaching an agreement.

Policy documents, in particular, the Mediation Manual and Practice Directions provide information regarding CAM processes from the time a matter is referred to mediation up to the conclusion. Interviews with judicial officers provide information on the impact of CAM on access to justice from the perspective of the court, whereas advocates' interviews provide information on whether CAM fairly contributes to access to justice and if so, whether it is satisfactorily.

Mediators' interviews give an overview of CAM, challenges and successes from a mediator's perspective. In general, the interviewees' information helps in ascertaining whether CAM processes as designed are workable and understood by court users.

1.9 Literature Review

The literature on the status and role of CAM in Kenya concerning the right of access to justice is scarce. Researchers have not adequately ventured into the topic. However, lessons can be borrowed from the data displayed through common law jurisdictions in addition to the locally available literature. The literature reviewed is classified into four thematic areas in line with the research objectives. These areas are, historical background of mediation, nature and impact of mediation on the justice system, challenges facing implementation of CAM and lessons drawn from other jurisdictions.

1.9.1 Historical development of mediation

Before colonialism, African communities had their ways of dealing with disputes.⁵² Kariuki Muigua⁵³ gives an example of the Kalahari people in Namibia and Botswana where the bushmen lived for many years. Their land and food conflicts were resolved by calling members together from both sides to talk. Whenever emotions could rise, the elders could hide the disputants' poisoned hunting arrows to avert violence. In the event the dispute was not solved, the larger community was to be called where talks could be held until it is resolved.

⁵² Kariuki Muigua, "Effective justice for Kenyans: Is ADR Really Alternative?" (2014). Sourced from <https://scholar.google.com> accessed on 30.11.2020 ⁴⁵ Ibid ⁴⁶ Ajayi Adeyinka Theresa, "Traditional Aspects of Mediation" (2014) African Research Review, Vol 8 (2) Serial no.33.

⁵³ Ibid

Similarly, Ajayi Adenyika⁵⁴ argues that before the western model of mediation, the traditional societies had their ways of resolving disputes. He gives an example of the Yoruba people of Nigeria where, when resolving a dispute, the elders would sit under a tree and talk until they settle. Some kola nuts are broken and shared for everyone to eat plus a drink as a way of celebrating the resolution. The ultimate focus is to have a peaceful and harmonious society.

The mediation process is both new and old.⁵⁵ Bryan Clark observes that it is new in terms of its emergence in the legal arena and old in terms of its timeless universality.⁵⁶ He further observes that despite the general view of mediation as a modern, alternative to existing ADR mechanisms, it should not be forgotten that across many cultures, mediation has existed for many centuries. Mediation existed before the formation of legal systems. In other words, he argues that before the legal mechanisms posed by the modern justice mechanisms in the courts as a way of solving disputes, mediation existed.

Clark further notes that the modern ADR movement is traced back to the 1970s in the United States of America, (USA).⁵⁷ Primarily, it was from the national conference on the causes of popular dissatisfaction with administration justice in Minnesota in 1976.⁵⁸ In the conference, professor Sander coined the phrase, alternative dispute resolution, ADR. Around the same time, similar debates were taking place in Europe such as those promoted by the Florence access to justice project.⁵⁹ In the mid-1980s, many grassroots mediation activists advocated for the institutionalization of mediation within the courts because that is where disputants could be found.⁶⁰

⁵⁴ Ajayi Adeyinka Theresa, "Traditional Aspects of Mediation" (2014) African Research Review, Vol 8 (2) Serial no.33.

⁵⁵ Clark, Bryan "Lawyers and Mediation"(2012) Springer science and Business Media. Sourced from <https://scholar.google.com>. Accessed on 26.2.2021

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

Consequently, the practice of court-connected mediation is now practised through various legal jurisdictions.

1.9.2 Nature of Mediation and its impact on the justice system.

Muigua defines mediation as an informal process where a mediator, a third party, with no decision making authority facilitates conflicting parties together to resolve their dispute.⁶¹ He notes that there are certain attributes of mediation. They include voluntariness, confidentiality, flexibility, efficiency, cost-effectiveness, informality, party autonomy and fostering relations.

Features of mediation are also summarized by Marube C. Getanda and others⁶² to include, promoting communication and cooperation between disputants, voluntary, informal, flexible, confidential, mends and improves relationships, settlement agreements are tailored to fit disputants' needs, less costly when compared to litigation and result into a win-win solution. These attributes of mediation arguably make it more appealing than majorly adversarial litigation.

Mediation models are discussed by Kariuki Muigua⁶³ to include: facilitative mediation where parties are encouraged to negotiate based on their needs and interests instead of their strict legal rights; settlement mediation, where disputants are encouraged to compromise to settle disputes between them; transformative mediation where the parties deal with underlying causes of their problems with a view of mending their relationship as the basis for settlement and evaluative mediation, where parties are encouraged to settle according to their rights and entitlements within the anticipated range of court remedies. CAM in Kenya uses the facilitative method of resolving disputes.

Muigua further argues that access to justice is more than the presence of formal courts.⁶⁴ Access to justice entails making formal systems and legal structures accessible to the disadvantaged groups

⁶¹ Supra, note 18

⁶² Marube C. Getanda et al, "Mediation – General Principles, An alternative to Litigation" (2017) Nairobi: Aura Publishers

⁶³ Kariuki Muigua, Making Mediation work for all: Understanding the Mediation Process." (2018) sourced from <https://scholar.google.com> accessed on 30.11.2020

⁶⁴ Muigua Kariuki, 'Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation' (2018) sourced from <https://scholar.google.com>. Accessed on 29th November 2020

in society.⁶⁵ This is achieved by the removal of all forms of barriers: legal; financial; and social by law and legal institutions. This shows that ADR methods contribute positively to access to justice as they open up formal systems and legal structures often associated with the adversarial court process. Therefore, he focuses on what mediation is in general, its benefits and its advantages. The study focuses on CAM which is relatively new in Kenya.

Effective access to justice is a basic social right in modern societies.⁶⁶ Garth and Cappelletti⁶⁷ discuss three waves of removal of barriers to access to justice. These waves are legal representation, legal aid and broader access to justice. While discussing the third wave, they argue that the broader approach of access to justice entails an exploration of a wide variety of reforms. These reforms include changes in the structure in forms of procedure, the structure of the courts and the use of the private/informal dispute resolution mechanisms. Their discussion regarding the 3rd wave will be of great relevance in highlighting that mediation is an informal way of achieving or promoting access to justice.

According to Justus Otiso⁶⁸, civil cases in Kenya take an average of 2 years to conclude. This is mainly because of scarcity of resources. On the other hand, the average time taken to settle a case through mediation is 66 days. Otiso further notes that whereas litigation is largely a public process, information shared during mediation sessions is confidential and cannot be admitted in court as evidence. Thirdly, he notes that no appeal lies following a settlement reached through mediation. Fourthly, whereas litigation is characterized by many rules of procedure, mediation is not bound by rules of litigation. This leads to creative ways of dispute resolution. This article is focusing on mediation in family law whereas the study herein is on the civil justice system. However, this work will greatly impact in highlighting the importance of mediation over litigation while resolving disputes.

Alwi Abdul Wahab⁶⁹ observes that courts everywhere are finding it almost impossible to cope with the ever-increasing number of cases. Mediation, when compared to traditional litigation is said to

⁶⁵ Ibid

⁶⁶ Supra, note 4

⁶⁷ Ibid

⁶⁸ Justus Otiso, "The Role of Court-annexed Mediation in Resolving Succession Dispute in Kenya: An appraisal" (2017) *journalofemsdvol* 1 (2)

⁶⁹ Supra, note 23

be cheaper, quicker, more informal and flexible, and can lead to creative and long-lasting solutions. Wahab also does a comparative analysis of legal systems between mandatory and voluntary CAM. On the premise of comparative studies, he recommends that effective use of mediation may need to include compulsory referral of matters by courts to mediation. The article differs from the study as it takes the approach that compulsory mediation guarantees access to justice. The study does not intend to support the view that either voluntary or compulsory mediation is viable. Instead, it conducts a critical analysis of CAM in Kenya with a view of discussing best practices to ensure that CAM enhances access to justice.

1.9.3 Challenges facing the implementation of CAM

Challenges facing the implementation of CAM are discussed by Kariuki Muigua.⁷⁰ Firstly, Compulsory referral of matters to mediation by the Kenyan courts vitiates the true nature of mediation. He argues that when disputants freely resolve their conflicts through mediation, they own the process and are more likely to abide by the decision. Secondly, informal mediators, who are always involved in the resolution of disputes are not members of the accreditation committee. This restricts local mediators without formal training but are experts in traditional mediation. Thirdly, the enforcement of a mediation outcome especially where an informal mediation is conducted is difficult. Fourthly, there is a need for a code of ethics and feedback evaluation forms to check the ethics of mediators. Lastly, court referral of matters to mediation happens when parties have already paid court filing fees. This may be perceived as an extra cost to litigants as there is a lack of reimbursement to the court fees already paid. This concept, however, fails to appreciate that even in litigation or arbitration, there is no reimbursement of court filing fees. Secondly, in terms of overall costs, mediation turns out to be less costly when compared to litigation.

Further challenges to mediation are discussed by Marube C. Getanda and others.⁷¹ They argue that sometimes, advocates discourage their disputing clients from taking mediation processes for fear of missing legal fees. Secondly, a mediator may be seen by parties as an outsider who may not appreciate the nature of the dispute, unlike a lawyer or judge. Thirdly, due to its voluntariness,

⁷⁰ Kariuki Muigua, "Alternative Dispute Resolution and access to Justice" (2015) Nairobi: Glenwood Publishers limited

⁷¹ Supra, note 9.

either party can withdraw at any stage thus prejudicing the process, it lacks procedural and statutory protection by the laws and not every dispute can be mediated.⁷²

A reflection on the challenges and prospects of the pilot project from a mediator's perspective is offered by Wilfred Mutubwa⁷³. He contends that mediation is promoted as an informal and flexible mode of settling disputes. However, CAM is subjected to formal rules of procedure and practice. For instance, a mediator can only be appointed once the parties file case summaries. He contends that formalities to CAM only serve to transfer case backlog from the court registry to the mediation registry, which defeats the whole purpose of CAM. His article will be of significance while discussing CAM from the mediators' perspective. However, the position of CAM in Mutubwa's study has now been changed. The requirement of filing case summaries is no longer mandatory.⁷⁴

The basis for CAM and its impact in promoting access to justice is articulated by Florence Karimi Shako⁷⁵. She argues that court sanctions for failing to comply with CAM may result into force thus undermining the nature of mediation. She suggests a refund of court fees to parties whose matters are referred to mediation as a way of reducing resistance to CAM. Her effort of finding a solution to the mandatory CAM is of great import. However, she fails to appreciate that the idea of refunding court fees may not be practicable as the money collected by courts as fees and termed as revenue to the state. The courts have no control over the use of the same. Secondly, the refund of court fees may lead to corruption within the court.

Vettori Stella defines access to justice as the ability to seek and obtain a remedy to a grievance through formal and informal institutions.⁷⁶ She argues that mediation, when not mandatory,

⁷² Ibid

⁷³ Mutubwa Wilfred A "Court Annexed Mediation in Kenya; A mediator's Reflections" (2017) sourced from <https://scholar.google.com>. Accessed on 29th November 2020

⁷⁴ The Judiciary Mediation Manual – The Judiciary of Kenya' <<https://www.judiciary.go.ke/download/thejudiciary-mediation-manual/>> accessed 16 July 2020

⁷⁵ Shako Karimi.Florence. "Mediation in the Courts 'Embrace 'Introduction of Court annexed Mediation into the justice system in Kenya' (2016) Ciarb-K_ journal-2 sourced from <https://scholar.google.com>. Accessed on 29th November 2020

⁷⁶ Supra, note 27

enhances access to justice. She contends that mediation by nature is voluntary. When the court refers parties to mediation without their consent, there is a likelihood that the parties enter into mediation unwillingly; thus, they may fail to agree and settle the dispute. If a settlement is reached, parties lack the commitment to satisfy its terms. This, according to her, is a waste of time and costs. In the circumstances, mediation becomes an extra step on the road to justice.

She also contends that in mediation, there are no judgements to be published like in the case of litigation. Consequently, there is no precedent in aid of building societal values and norms. Thus, mediation is not a public good. She, however, fails to appreciate the fact that even in the court system, not all judgements are published. In Kenya, for instance, decisions made by magistrates who determine the bulk of cases are never published. Secondly, when parties resolve their case through mediation, relationships are restored. This promotes cohesiveness in society following peace and stability.

1.9.4 CAM in other jurisdictions.

Jacqueline Nolan observes that in recent years, ADR mechanisms, specifically mediation, have been used by developing countries to promote access to justice.⁷⁷ She argues that ADR's informality and focus on non-adversarial justice capture the imagination of many African states that are concerned with high rates of litigation, backlogged court calendars and citizens who lack meaningful access to justice. Like Muigai, while using Ghana as a case study, she argues that mediation is better able to deliver authentic access to justice when it builds upon traditional dispute resolution systems and is adopted and promoted as a consensual process. This article is different from the study because it is argued in the context of a hybrid system where traditional aspects of mediation are ingrained in modern mediation. Secondly, it focuses on African countries while the focus in this study will be Kenya. Its importance, however, lies in the fact that it highlights the shortfalls of the adversarial system and the benefits of mediation in resolving disputes as well as the importance of including informal aspects of mediation into modern mediation.

In shading more light on ADR, Rhodes Vivour⁷⁸ argues that there is a need for courts to encourage the use of ADR to decongest the court system. He gives Nigeria as an example where parties walk

⁷⁷ Jacqueline Nolan-Haley , 'Mediation and Access to Justice in Africa: Perspectives from Ghana' (2015) 21Harv Negotiation Law Review 59 sourced from: <https://heinonline.org/HOL/License> accessed on 29.11.2020

⁷⁸ Rhodes Vivour, Mediation (a face saving device) the Nigerian perspective international bar association Legal Practice Division Mediation Committee Newsletter, Vol. 4, 2008

in and can access a variety of ADR mechanisms known as a multi-door courthouse to settle their dispute. Mediation is one of them. This enhances voluntariness and party autonomy in the resolution of disputes.

Further, Kariuki Muigua⁷⁹ discusses the *abunzi* (Rwanda local mediators) who settle disputes and crimes. He states that Rwanda Constitution provides for an establishment of a mediation committee in each sector. The committee is responsible for mediating between disputants to certain disputes before they are filed in courts. The mediation committee comprises 12 people. They are also persons of integrity and are recognized for their prowess in mediation. Members of the local government or judicial organs are excluded. Their period of service is two years which may be extended. The *abunzi* deal with civil and penal cases. Any party that is not satisfied with the settlement can refer the dispute to the court.

Whereas previous studies have delved into assessing the problems of litigation and the advantages of mediation, there is little information concerning the impact of CAM in managing case backlog towards the promotion of access to justice in Kenya. This is the gap the study intends to fill. CAM is relatively new in Kenya. There is a need for academic research that would assess its impact on the civil justice system in Kenya and give recommendations on what needs to be done to ensure that CAM achieves the desired goals.

1.10 Chapter Breakdown

The study comprises five chapters. The first chapter contains an introduction, problem statement, the significance of the study, justification, objectives of the research, research questions, sampling techniques, hypothesis and literature review.

Chapter two examines the impact of CAM on the civil justice system. In achieving this, it identifies the effect of mediation on the legal and policy framework, both local and international while discussing CAM processes. The changes brought by CAM on the civil justice system in Kenya are also discussed while assessing their impact on access to justice.

⁷⁹ Kariuki Muigua, "Alternative Dispute Resolution and access to Justice" (2015) Nairobi: Glenwood Publishers limited

Chapter three discusses the challenges encountered while implementing CAM as displayed in the practice in the courts. The challenges range from institutional, attitudinal to procedural. The gaps encountered while implementing CAM as displayed in the practice in the courts are also discussed.

Chapter four contains case studies of two countries: Nigeria and Ghana. The LMDC of Nigeria as well as traditional mediation in Ghana are discussed. Possible lessons drawn out for Kenya are also identified and discussed.

Chapter five contains a conclusion and recommendations on how CAM can be improved in Kenya's civil justice system to promote access to justice.

CHAPTER TWO

2.0 THE IMPACT OF CAM ON CIVIL JUSTICE IN KENYA

2.1 Introduction

This chapter examines the impact of CAM on the civil justice system by identifying effect of mediation on the legal and policy framework, both local and international while discussing CAM processes. The changes brought by CAM on the civil justice system in Kenya are also be discussed while assessing their impact on access to justice.

2.2 Effect of CAM on The Legal Framework for Resolving Civil Disputes

The advent of mediation in the legal arena has been marked with legislative and policy reforms to accommodate it as a way of resolving disputes. In the international arena, the UNCITRAL model on Conciliation⁸⁰ and mediation and the Singapore Convention on Mediation⁸¹ have been enacted.

2.2.1 International level

2.2.1.1 UNCITRAL model on Conciliation and Mediation

Article 5 of the model provides that the mediation process commences when disputing parties engage in the mediation proceedings. This is done by the facilitation by one mediator or more mediators as the case may be.⁸² The method of conducting the mediation process is determined by disputants. In the event they fail to agree, the mediator proceeds in a way he deems desirable.⁸³ Information relating to mediation proceedings is confidential and inadmissible in judicial proceedings.⁸⁴

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

This Convention was enacted by the General Assembly of the United Nations. It recognizes the value of international trade of mediation as a way of solving disputes where disputants request for

⁸⁰ Adopted in 2002 and amended in 2018 with the key amendment being replacing the word conciliation with mediation.

⁸¹ Adopted in Dec. 2018 and came into force in September 2020. ⁶⁹ Article 1 of the Singapore Convention.

⁸² Article 7 of the UNCITRAL model

⁸³ Ibid S

⁸⁴ Article 11 of the UNCITRAL model

a third party to assist in reaching an amicable settlement.⁸⁵ It applies to the international settlement agreement. Disputes relating to employment and family fall outside the scope of the convention.⁸⁶

The Singapore Convention also lays down certain requirements for reliance on settlement agreements.⁸⁷ For instance, a party relying on a settlement agreement must demonstrate that the settlement agreement signed by disputants;⁸⁸ proof that settlement agreement resulted from mediation like mediator's signature on settlement agreement;⁸⁹ a document signed by the mediator confirming the occurrence of mediation; attestation by the institution that administered the mediation.⁹⁰ In the absence of the above, any other evidence acceptable to the competent authority should be availed.⁹¹

Grounds upon which a relief sought concerning enforcement of agreement are set down in the Convention. They include where:⁹² a party to the settlement agreement was incapacitated; the settlement agreement being relied upon is null and void, not binding or is not final according to its terms or has been subsequently modified; obligations in the settlement agreement have not been performed or are unclear; granting relief will contradict the settlement agreement; the presence of a serious breach by a mediator of applicable standards like impartiality, independence among others.⁹³

2.2.2. National level

CAM in Kenya commenced through legislative and policy reforms to accommodate mediation in the formal court processes.⁹⁴ This included an amendment to Civil Procedure Act and Rules to

⁸⁵ Article 1 of the Singapore Convention.

⁸⁶ Muigua Kariuki, 'Enhancing the Court – Annexed Mediation Environment in Kenya (2020) sourced from <http://kmcu.co.ke/uploads/2020/03>> Accessed on 30th July 2021

⁸⁷ Ibid

⁸⁸ Article 4 (1) (b) (i) of the Singapore Convention

⁸⁹ Article 4 (1) (b) (ii) of the Singapore Convention

⁹⁰ Article 4 (1) (b) (iii) of the Singapore Convention

⁹¹ Article 4 (1) (b) (iv) of the Singapore Convention

⁹² Article 5 of the Singapore Convention

⁹³ Article 5 of the Singapore Convention.

⁹⁴ The state of the Judiciary and Administrative Report (SOJAR) 8th edition, (2020) Nairobi: Judiciary of Kenya available at <https://online.flippingbook.com/view/1035011/> accessed on 30th November 2020.

provide reference of cases to mediation.⁹⁵ This was followed by Mediation Practice Directions, 2018 and the Judiciary Mediation Manual to provide for mediation processes. Recently, two Bills have been enacted. These include the ADR Bill 2019 and Mediation Bill 2020.

2.2.2.1 The Constitution

Article 159 (2) (c) of the Constitution requires courts while exercising their judicial functions to promote the use of ADR in resolving disputes. The ADR methods enshrined in the Constitution include mediation. Any disputes that may arise between the county and the National government can be solved through ADR.⁹⁶ Equally, any dispute between the two houses of parliament shall be referred to a mediation committee comprising of members from both houses.⁷⁸

2.2.2.2. The Civil Procedure Act.

This Act recognizes mediation civil dispute resolution mechanism.⁹⁷ Mediation is defined under the Act 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.”⁹⁸

The court may refer a case to mediation when a party requests; where it is appropriate or where the law so requires.⁹⁹ Where parties reach settlement, a settlement agreement is adopted by the court, which shall enforce it as any of its judgement.¹⁰⁰ The decision cannot be appealed.¹⁰¹ Besides, agreements reached through private mediation with the assistance of qualified mediators can be enforced by the court.¹⁰²

⁹⁵ Section 59B of the Civil Procedure Act

⁹⁶ Article 189 (4) of the Constitution, laws of Kenya

⁷⁸ Article 113 of the Constitution, laws of Kenya.

⁹⁷ Section 59B of the civil Procedure Act, Laws of Kenya

⁹⁸ Section 2 of the Civil Procedure Act

⁹⁹ Section 59B of the Civil Procedure Act

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Section 59D of the Civil Procedure Act.

The Act establishes the Mediation Accreditation Committee (MAC).¹⁰³ The co-mandate of MAC is maintain a register of qualified mediators and enforce a code of ethics for mediators.¹⁰⁴

2.2.2.3 The Judiciary Mediation Manual, 2018

This manual is a second edition that came into effect in 2018 following the revision of the first edition, 2016. The manual was revised to enable effective implementation of the CAM to other courts.¹⁰⁵ It sets standards and offers the foundation for the implementation of CAM by the courts. It acts as a handbook to court users engaged in the mediation process by providing a guideline for mediation processes right from the time of referral to the conclusion.

2.2.2.4 Practice Directions

The practise directions issued by the honourable chief justice in 2015 were amended sometime in 2017.¹⁰⁶ The effect of the amendment is to increase the scope of CAM to cover civil suits filed at the high court and all courts of equal status, subordinate courts, Kadhis courts, and tribunals.

The rules provide for screening of cases for mediation, the kind of cases to be referred to mediation. All civil cases except matters of public interest, cases based on points of law, and cases concerning domestic violence and criminal acts can be referred to mediation. The mediation process should take 60 days which period can be extended once by 10 days.¹⁰⁷ The mediation process provided is summarised as follows:

2.2.2.4.1 Procedure of Court Annexed Mediation

CAM is a process conducted under the umbrella of the court.¹⁰⁸ The Deputy Registrar, Magistrate, or Kadhi considers all civil disputes filed in court to check the suitability of having them resolved through mediation. This process is commonly referred to as screening.⁸⁸ Civil and commercial disputes are screened at the close of pleadings whereas family disputes are screened once a plaint, petition, or originating summons is filed.¹⁰⁹ Affected parties are notified within 7 days of the screening to file case summaries.¹¹⁰ This, too, is to be filed within 7 days from the date of receipt

¹⁰³ Section 59A of the Civil Procedure Act.

¹⁰⁴ Section 59A of the Civil Procedure Act.

¹⁰⁵ The Judiciary Mediation manual.

¹⁰⁶ Kenya Gazette Notice no 7263 of 2017.

¹⁰⁷ Section 5 of the Mediation Practice directions, 2018.

¹⁰⁸ Judiciary, Court Annexed Mediation: Frequently asked questions

⁸⁸ Rule 2(a) of the Practice directions, 2018.

¹⁰⁹ Rule 2(b) of the Practice directions, 2018

¹¹⁰ Rule 3 of the practice directions,2018.

of the notice.¹¹¹ The Deputy Registrar (DR), Magistrate, or Kadhi appoints a mediator who must be registered by the Mediation accreditation committee (MAC). The appointed mediator conducts mediation proceedings for 60 days. This period can be extended once for 10 days.⁹¹

The mediator reads and explains the rules of engagement to the disputants at the commencement of the process. The parties, once they agree, sign and make a commitment to adhere to them.⁹² Disputants can attend the sessions alone or while accompanied by an advocate.¹¹² All communication relating to mediation is treated as confidential. The information thereto is inadmissible in any court proceedings.¹¹³ Only the settlement agreement, where applicable is subject to publication.¹¹⁴ A certificate of non-compliance is filed by the mediator where a party fails to comply with the mediator's directions or refuses to attend mediation sessions.⁹⁶ Upon receipt of the certificate of compliance, the court has three options: it may order for a further mediation on such terms it deems appropriate;¹¹⁵ strike out pleadings of the non-complying party;¹¹⁶ or order the defaulting party to pay costs.¹¹⁷

Once the process is over, the mediator files a mediation report with either the DR, Magistrate or Kadhi within 10 days.¹¹⁸ In the case of full or partial settlement, a settlement agreement is adopted by the court as its judgment or order and executed as such.¹¹⁹ No appeal lies against judgment arising from mediation.¹²⁰ As an incentive to embrace mediation, the judiciary facilitates the processes by paying the mediators.¹⁰¹ The same immunity granted to the judicial officers and judges in the course of judicial proceedings is extended to mediators.¹²¹

¹¹¹ The requirement to file case summary in practice is not mandatory

⁹¹ Rule 5 of the practice directions, 2018.

⁹² Rule 8 of the Practice directions, 2018

¹¹² Rule 7 of the Practice Directions, 2018.

¹¹³ Rule 10 of the Practice directions, 2018

¹¹⁴ Rule 10(f) of the Practice directions 2018

⁹⁶ Rule 9 (i) of the practice directions 2018

¹¹⁵ Rule 9(i) (a) of the Practice directions, 2018,

¹¹⁶ Rule 9(i) (b) of the Practice directions, 2018,

¹¹⁷ Rule 9 (ii) © of the Practice directions, 2018.

¹¹⁸ Rule 11 of the Practice directions, 2018.

¹¹⁹ Rule 12 of the Practice directions, 2018.

¹²⁰ Rule 13 of the Practice Directions, 2018

¹⁰¹ Rule 16 of the Practice directions, 2018.

¹²¹ Rule 15 of the practice directions, 2018.

¹⁰³ Section 34 (i) of the Mediation Bill 2020, No. 17 of 2020

2.2.2.5 Mediation Bill 2020.

CAM in Kenya is governed by policy documents as discussed above. Currently, the Mediation Bill is under discussion in parliament. The Bill, if passed into law will make provision for the settlement of civil disputes through mediation. Parties will be required to file a Mediation Certificate to confirm that they had made efforts to resolve the dispute through mediation.¹⁰³ A court may also refer a dispute to mediation any time before Judgement.¹⁰⁴ The referral will serve as a stay of the proceedings.¹²² Mediation expenses will be borne by the disputants.¹²³ Grounds upon which the court may refuse to adopt a settlement agreement include incapacitation, coercion, undue influence among others.¹²⁴

2.2.2.6 ADR Bill, 2019

This Bill if passed into law will provide a national framework for all forms of ADR for civil disputes.¹²⁵ The bill provides for traditional methods of dispute resolution alongside conciliation and mediation processes. It will be the first piece of legislation providing for traditional methods of resolving disputes. The provisions touching on mediation are more or less the same as those under the mediation bill. It may be prudent that the two bills be streamlined to avoid duplication and overlaps.

2.3 Notable Changes Brought by CAM in the Civil Justice System

The advent of CAM in the Kenya has changed ways in which civil disputes are either viewed or resolved. As already noted, the majority of legal disputes are resolved through litigation which faces many challenges. Proponents of mediation posit that mediation achieves better results compared to litigation. Joseph Grynbaum¹²⁶ made the following remarks, “*An ounce of mediation is worth a pound of arbitration and a ton of litigation.*” The impression is CAM achieves better results when compared to arbitration and litigation. Changes brought by CAM in Kenya are discussed as follows:

¹⁰⁴ Section 35 of the Mediation Bill, No. 17 of 2020

¹²² Section 37 of the Mediation Bill, No. 17 of 2020

¹²³ Section 42 of the Mediation Bill, No. 17 of 2020

¹²⁴ Section 39 of the Mediation Bill, No. 17 of 2020

¹²⁵ Section 4 of ADR Bill, 2020

¹²⁶ Joseph Grynbaum, PE “Mediating of a powerful dispute effectively: A case study.” (2002) 4 Asian Dis. Rev. 103. Sourced from <https://heinonline.org/HOL/License>. Accessed on 25th October 2021.

2.3.1. Shorter period for resolving disputes

World over, litigants engaged in court processes wait for at least two years to have their cases finalized.¹²⁷ In Kenya, the average period for determining a civil cause is five years.¹²⁸ In some situations, cases take decades to be resolved through the court process.¹²⁹ Judiciary in Kenya has set up mitigating factors that include: employing more judicial officers and staff, improving the case management system, conducting service weeks, creating public awareness by having open days, automation of court processes, and opening new courts.¹³⁰ There has also been an amendment of key procedural laws like the Civil Procedure Act,¹³¹ whereupon pre-trial conferences are introduced in civil matters as a way of expediting trial. These efforts, as observed by Mbote and Migai Aketch, have not solved the problem of case backlog in the Judiciary.¹³² Cases are still pending in court over the decades.¹³³ It is observed that the unreasonable long delays in resolving disputes devastating: ¹³³ parties' costs are increased and great pressure is put on the poor to abandon their claims or compromise for much less than that to which they deserve.¹³⁴

The mediation process, on the other hand, takes a maximum of 70 days. This period is considerably less than the period taken for courts to resolve disputes. This is advantageous to the disputants and the community at large. The amount of money that is locked up in litigation is released back to the

¹²⁷ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buff L Rev 18 sourced from: <https://heinonline.org/HOL/License> accessed on 30.11.2020

¹²⁸ The state of the Judiciary and Administrative Report (SOJAR) for 2019-2020 available at <https://online.flippingbook.com/view/1035011/> accessed on 30th November 2020.

¹²⁹ The standard Newspaper, (2021) "Siblings ordered to settle 30 year row out of court." Available at <https://www.standardmedia.co.ke/rift-valley/article/2001406262/judge-refers-to-mediation-a-30-year-old-property-case-pitting-siblings> accessed on 15th March 2021

¹³⁰ The state of the Judiciary and Administrative Report (SOJAR) for 2019-2020 available at <https://online.flippingbook.com/view/1035011/> accessed on 30th November 2020.

¹³¹ Order 11 of the Civil Procedure Act, 2010 Laws of Kenya

¹³² Patricia Kameri Mbote & Migai Akech 'Kenya: Justice Sector and the Rule of Law' (2011) Johannesburg: Open Society Initiative for Eastern Africa. Available at <http://www.IeIrc.org/content/a1104.pdf> accessed on 28.11.2020 see also Muigua Kariuki, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (2018) sourced from <https://scholar.google.com>. Accessed on 30th November 2020

¹³³ The state of the Judiciary and Administrative Report (SOJAR) for 2019-2020 available at <https://online.flippingbook.com/view/1035011/> accessed on 30th November 2020.

¹³⁴ Supra, note 39.

economy for circulation. This improves the economy of a country. For instance, in the financial year 2019/2020, a sum of about 11.5 billion Kenya Shillings was released back to the economy through CAM.¹³⁵

2.3.2 Confidentiality.

Decisions made through the court processes by superior courts are usually published in the Kenya law reports.¹³⁶ There is no privacy even when the issue in dispute touches on sensitive family issues. On the contrary, the mediation process is confidential. It is thus ideal for sensitive family issues like child maintenance and custody.

On the other hand, the confidentiality nature of CAM hampers the creation of case precedents.¹³⁷ This is unlike traditional litigation, where common law principles and doctrines have been developed over years by judges of superior courts. This is made possible by publicizing court decisions. Publication creates certainty and accountability in the process. In Mediation, it is difficult to set standard practices more particularly in related cases.

2.3.3 Reduction of costs of litigation.

Formal dispute resolution, particularly in the courts is very expensive in most modern societies.

¹³⁵ The state of the Judiciary and Administrative Report (SOJAR) for 2019-2020 available at <https://online.flippingbook.com/view/1035011/> accessed on 30th November 2020.

¹³⁶ The Judiciary, “Performance Management and Measurement Understandings Evaluation report, 2019/2020” (2021) Nairobi: Kenya, sourced from <https://www.judiciary.go.ke/judiciary.performance> accessed on 17th September 2021

¹³⁷ Vettori S, ‘Mandatory Mediation: An Obstacle to Access to Justice?’ (2015) African Human Rights Law Journal sourced from <https://scholar.google.com>. Accessed on 29th November 2020

While the government pays salaries for judicial officers and staff, there are other costs that must be met by litigants in settling disputes.¹³⁸ In some countries, like Great Britain, the plaintiffs has to post security for the adversary's expenses before filing a suit.¹²⁰ Advocates' costs are also expensive. For instance, in the United States and Canada, attorney hourly rates range from 25-300 US dollars and the Charge for a particular service may well exceed the hourly rate.¹³⁹ In developing countries like Kenya, the average minimum cost of opening a file upon retaining the services of an advocate is about Kshs60,000/= and upon completion of a simple matter the costs including advocates court filing fees add up to Kshs300,000/= on average.¹⁴⁰ The party and party costs in some cases like election petitions it too high. The advocates' Remuneration order, 2014 provides for a minimum cost of half a million where the matter is filed in a superior court.¹⁴¹ Further, the advocates' Act makes it an offence for charging legal fees below the scale.¹⁴²

These costs are too high for many Kenyans thus hindering access to the legal system. It is estimated that in Kenya, over 60% of the population live below the poverty line.¹⁴³

CAM reduces the costs of litigation significantly.¹⁴⁴ It is thought that the resolution of disputes through it reduces court attendances compared to litigation. A Mediation Deputy Registrar based

¹³⁸ Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective' (1978) 27 Buff L Rev 18 sourced from: <https://heinonline.org/HOL/License> accessed on 30.11.20
¹²⁰Ibid

¹³⁹ Ibid

¹⁴⁰ Muigua K, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' 26

¹⁴¹ Schedule 7 of the Advocates Remuneration Order 2014

¹⁴² Section 34 of the Advocates Act

¹⁴³ Muigua Kariuki, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya'(2018) sourced from <https://scholar.google.com>. Accessed on 30th November 2020

¹⁴⁴ Marube C. Getanda et al, "Mediation – General Principles, An alternative to Litigation" (2017) Nairobi: Aura Publishers

in Mombasa, when asked to comment about costs when a matter is resolved through CAM, had this to say,

*“Number of court attendances are reduced thus reducing related costs. Other costs remain constant.”*¹⁴⁵

It is also observed that CAM, unlike litigation disputants does not require a lawyer because the language used is not jargon; parties can express themselves in their language.¹²⁸ This has the effect of reducing legal costs. It may be argued that CAM in Kenya does not affect court costs. This is because, at the time of referring a case to mediation, court filing fees are already paid.¹²⁹ One of the leaders, the law society of Kenya based at Kakamega, on the question of costs, when a case is resolved through CAM, stated that there was no difference because cases are referred to mediation after payment of court fees.¹⁴⁶

CAM has the potential of reducing court costs significantly, more particularly when matters are referred before filing in court. This will shield litigants from incurring court fees in the event a matter is settled through CAM.

2.3.4 Finality of court process

The Civil Procedure Act guarantees the right to appeal against any court decision by a party who is dissatisfied. This right can be exercised till one exhausts all avenues for appeal. In CAM, however, there is no right of appeal. The rationale is that the solution is made by the parties. An advocate based at Kakamega had this to say when commenting on the impossibility of appealing against decisions reached through CAM, *“the decisions made through CAM are acceptable to all parties. In essence, everyone is a winner.”*¹⁴⁷

¹⁴⁵ Christine Ogwen, Questionnaire by JN Maragia, LLM student, University of Nairobi, 6th May 2021.

¹²⁸ Mercy Obai, Mediation registry Clerk, Questionnaire by JN Maragia, LLM student, University of Nairobi, 6th May 2021.

¹²⁹ Shako Karimi.Florence. “Mediation in the Courts ‘Embrace ‘Introduction of Court annexed Mediation into the justice system in Kenya’ (2016) Ciarb-K_ journal-2 sourced from <https://scholar.google.com>. Accessed on 29th November 2020

¹⁴⁶ Mulama F., Questionnaire by JN Maragia, LLM student, University of Nairobi, 29th April 2021.

¹⁴⁷ Akwala Daniel, Questionnaire by JN Maragia, LLM student, University of Nairobi, May 2021.

On the other hand, however, even in mediation, there is no level ground for participants. Inequalities in life are present in all dispute resolution mechanisms. A party that is less advantaged in the mediation process is denied an opportunity to seek justice in other forums. The process fails to appreciate that, even in mediation, there could be factors like undue influence, mediator's bias and prejudice, dishonesty, incapacity on the part of the parties, and nondisclosure of material facts.

2.3.5 Flexibility

The practice directions provide that in the mediation process, the mediator advises the time and place for mediation. Additionally, he sets rules of engagement that should be agreed upon by disputants. There is no requirement that mediation needs to be conducted within court premises. On the other hand, traditional litigation processes are rigid. The dispute has to be resolved in court following rules of procedure as set out in the Civil Procedure Rules. The legal processes are observed by the court. Failure to adhere to some of the procedures may cause one to lose a case. It does not matter whether the disputants are legally represented or appreciate the nature of the legal jargon. In terms of access to justice, the mediation process appeals especially where prose litigants are involved. This is because unrepresented litigants and indigent people are allowed to present their cases in their language. In addition, Parties can meet at their agreed time which includes weekends, agreed place which can even be under a tree.¹⁴⁸

2.3.6 Mending of broken relationships

The present adversarial court system results in win-lose solutions. This means, when one party is happy and satisfied, the opposite is true for the other. This creates feelings of resentment hence leading to more future conflicts between disputants. A senior resident magistrate, based at Eldoret had this to say when responding to the question regarding her experience with CAM,

“I have enjoyed seeing parties reunite despite their huge differences. I am very happy to be part of the process.”¹⁴⁹

Considering its nature, win-win solutions, there is no enmity between disputants. Friendship and family relationships are restored hence creating unity.

¹⁴⁸ Ogwen Christine and Grace Sitati, Mediation deputy Registrars at Mombasa and Eldoret respectively, Questionnaire by JN Maragia, LLM student, University of Nairobi, May 2021.

¹⁴⁹ Sitati Grace, Questionnaire by JN Maragia, LLM student, University of Nairobi, May 2021.

2.3.7 Case backlog reduction

The civil justice system in Kenya is often characterized by case backlogs.¹⁵⁰ The long duration taken to resolve disputes contributes to the case backlog. Other factors include poor infrastructure, inadequate resources in terms of human resources and finances. It is hoped that CAM will aid in case backlog reduction.¹⁵¹ Most of the respondents interviewed responded that CAM has helped reduce the case backlog in Kenya. A Senior Resident Magistrate in Eldoret when asked to comment on the impact of CAM on case backlog, had this to say,

“The same has a great impact on backlog reduction since as a station, we have matters over 20 years in court completed through mediation. Some matters are concluded within one session and some within one hour.”¹⁵²

Historically, mediation and other ADR methods were introduced into the civil justice system following the many shortfalls of the adversarial system which include undue delay in determining court disputes. When a matter has been fixed in court, litigants wait for an average period of 3 months to be heard in court. Data from the performance directorate indicate that most cases do not take off during the first time they are fixed for hearing.¹⁵³ A period of 60 days for mediation is much less than the period one waits to have his day in court.

A summary of the CAM report as of 30th June 2019 is as shown by the table below;¹⁵⁴

Figure 1

¹⁵⁰ Supra, note 44

¹⁵¹ The state of the Judiciary and Administrative Report (SOJAR) 8th edition, (2020) Nairobi: Judiciary of Kenya available at <https://online.flippingbook.com/view/1035011/> accessed on 30th November 2020.

¹⁵² Grace Sitati, Questionnaire by JN Maragia, LLM student, University of Nairobi, 7th May 2021.

¹⁵³ The Judiciary, “Performance Management and Measurement Understandings Evaluation report, /2020”(2021) Nairobi: Kenya, sourced from <https://www.judiciary.go.ke>judiciary.performance> accessed on 17th September 2021

¹⁵⁴ Ibid p 9

	Court stations in Nairobi(Milimani)	Replication stations combined	All court stations
Total number of cases referred	1,836	1681	3517
Total cases concluded	1508	1085	2593
Total no. of cases pending	328	596	924
No. of settlement agreements	708	571	1279
Settlement rate	47%	52.6%	50%
No. of non- settlements	563	253	816
Non- settlement rate	37.3%	23.3%	30.30%
No. of non-compliance certificate filed	148	162	310
Non- compliance rate	9.8%	14%	11.9%
No. of terminated cases	89	99	188
Termination rates	5.9%	9.1%	7.5%
Total value of matters in mediation	33,582,282,989	3,314,447,976.96	36,896,730,965.96
Total value of matters with settlement agreements	5,803,910,599	1,439,682,233.9	7,243,596,832.9

The national case settlement rate is on average. The termination rate is at 7.5%. This indicates that many disputants are submitting to CAM processes. Additionally, out of the 36 billion (approx.) locked up in litigation, about 7 billion were released back to the economy. This can be perceived as a positive feedback considering that CAM in Kenya is relatively new.

On the other hand, however, from the statistics above, it would appear that the case backlog that has bedevilled the adversarial litigation processes is swiftly shifting to mediation processes. Out of

the 3,517 cases referred to mediation, only 2,593 cases got processed. A total of 924 were pending. This is a huge number given that the mediation process should only take 60 days. Further, according to the State of the Judiciary Administrative report, within the same period, a total case backlog for civil matters stood at 320,595. A total of 39,781 cases had been pending in court for over five years. The courts with the highest case backlog were Magistrate Courts and the High Court at 209,303 and 68,119 cases, respectively.¹⁵⁵ These two courts handle the bulk of the civil cases within the country.

Even though a total of 320,595 cases were pending in court, only 3,517 got referred to mediation. This presents a percentage of 1.09% towards the uptake of matters filed and pending in court by CAM. There could be some other reasons like the fact that mediation is not yet introduced to all court stations, but the percentage is too little considering that CAM is practised in 12 counties within the country. There could be challenges hampering the effective implementation of CAM. The next chapter will seek to document and discuss the same.

2.4 Conclusion

The advent of court-connected mediation in the resolution of disputes has brought with it changes in the laws governing dispute resolution. This is both at the local and international levels. The civil justice system in Kenya has been affected by CAM in the following ways: a reduced period of dispute resolution, minimized costs, reduction of case backlog, confidentiality, flexibility and mending of broken relations. CAM is likely to achieve better results in terms of case backlog reduction when fully embraced by all justice stakeholders.

¹⁵⁵ Supra, note 113

CHAPTER THREE

3.0 CHALLENGES FACING THE IMPLEMENTATION OF CAM IN KENYA

3.1 Introduction

This chapter builds upon the preceding chapter. Despite the strides made through CAM in the civil justice system, some challenges are impeding the full realization of it. The challenges range from institutional, attitudinal to procedural. The chapter will discuss the challenges and gaps encountered while implementing CAM as displayed in the practice in the courts.

3.2 Procedural Challenges

These challenges are associated with the procedures laid down for CAM in Kenya. They include:

3.2.1 Referral of Cases to Mediation

The process of CAM in Kenya is that cases deemed suitable by the Mediation Deputy Registrar, (MDR) are referred to mediation.¹⁵⁶ The consent of the disputants is not obtained. The non-involvement of parties at this stage, coupled with sanctions for non-compliance creates an element of compulsion.¹⁵⁷ A Senior Resident Magistrate based at Kisumu law courts, on the question of challenges, had this to say, '*clients/disputants feel that they are being compelled to solve disputes through mediation.*'¹⁵⁸

Forcing parties into mediation may not achieve the desired ends; there is a likelihood that disputants will fail to honour the decision.¹⁵⁹ This goes against the voluntary nature of mediation.¹⁴⁴ When parties choose to freely solve their dispute through mediation, they own the process and are more likely to abide by the decision.¹⁶⁰

¹⁵⁶ Rule 2 (a) of the Practice directions, 2018

¹⁵⁷ Rule 9 (i) of the Practice directions, 2018 provide that, where a party chooses not to comply with mediation directions, the court may: order further mediation, strike out pleadings and order payment of costs

¹⁵⁸ Telewa Stella, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, June 2021.

¹⁵⁹ Ibid

¹⁶⁰ ¹⁴⁴Kariuki Muigua, "Alternative Dispute Resolution and access to Justice" (2015) Nairobi: Glenwood Publishers limited

On the question of challenges facing CAM, all respondents interviewed answered that majority of Kenyans are unaware of CAM processes. The involvement of disputants at the referral stage is important. It creates awareness considering that mediation is still new to many. This way, parties own the process thus minimizing resistance.

3.2.2 Legal Representation

The advocates that took part in the study observed that they are not well involved in CAM processes. In most cases, mediators fail to invite them to mediation sessions. They only learn about CAM when they are served with settlement agreements.¹⁶¹ Secondly, the criteria for payment for lawyers' fees in CAM processes is unknown.¹⁶²

An advocate of more than 10 years of practice experience, and a trained mediator observes: “*advocates' participation is still very low because most of them either lack understanding, have not been trained and even those trained are hardly brought on board, during the mediation process.*”¹⁶³

The role advocates play in mediation is a grey or controversial. Whereas some believe that legal representation is not necessary in mediation due to its informality, others consider that it is needed to overcome power imbalances.

Legal representation is a constitutional right in Kenya.¹⁶⁴ As such, the role of advocates in CAM is critical. Knowledge of legal rights is essential to parties in making an informed decision.¹⁶⁵ The advocates' role in CAM processes must be understood by all players. Equally, advocates need to

¹⁶¹ Ondieki Innocent, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁶² Mulama Flavian, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁶³ Akwala Daniel, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁶⁴ Article 50 of the Constitution of Kenya.

¹⁶⁵ Wahab Alwi Abdi, 'Court-Annexed And Judge-Led Mediation In Civil Cases: The Malaysian Experience' (2013) sourced from <https://scholar.google.com>. Accessed on 30th November 2020.

understand and appreciate that CAM is different from litigation.¹⁶⁶ The law society of Kenya needs to expand its scope in assessing lawyers' meritocracy. It should cover all dispute resolution mechanisms. The best lawyers are known for their prowess in handling litigation.¹⁶⁷ The award is given based on the number of cases won by an advocate at the apex courts.¹⁶⁸ Without this, CAM processes will likely be frustrated or sabotaged. In the same breath, the issue of lawyers' fees in the mediation process should be settled. The Advocates

Act and the Advocates Remuneration Order should provide for lawyers' fees for CAM and other ADR processes.

3.2.3 Poorly Drafted Mediation Settlement Agreements

Most respondents interviewed raised concern with the way mediation settlement agreements are drawn. Whereas the practice rules provide the mode of drafting a settlement agreement, most of them lack clarity. A senior judicial officer with vast experience in CAM observes that agreements done by non-lawyers tend to be exceedingly vague. They do not capture the spirit in the proceedings hence making extraction and execution of the decisions very difficult.¹⁶⁹ For instance, where a case concerns the distribution of the estate of the deceased, mediators will draft agreements that do not capture the interests of all beneficiaries.¹⁷⁰

The inconveniences caused by the ambiguous settlement agreement is illustrated in the case of *Re Estate of BM*¹⁷¹ where disputants got referred to mediation sometime in March 2018. In November, the same year, following an application by one of the parties, the court established that the mediator had misled it into thinking that the dispute was settled. What had been presented in court for adoption was a template to a mediation settlement agreement but not a mediation settlement agreement. Parties had agreed to use the template in the event of any settlement. This template was

¹⁶⁶ Lawyers have been trained to win cases in the adversarial court system. They have been taught mastery of legal rights and procedural technicalities. It is thus a challenge for them to switch off to non-adversarial systems without considerable training.

¹⁶⁷ Bukoka Faturoti, "Institutionalised ADR and Access to Justice: the changing faces of the Nigerian Judicial system. (2014) Journal of Comparative Law in Africa. Available at <https://openair.rgu.ac.uk> accessed on 30th June 2021

¹⁶⁸ Ibid

¹⁶⁹ Justice Musyoka W. Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁷⁰ Ibid

¹⁷¹ 2019 (eKLR)

interpreted by the mediator as a settlement agreement. Ambiguity in settlement agreements defeats the whole purpose of CAM. It is difficult to extract and execute such decisions.

3.2.4. Difficulties in the enforcement of mediation settlement agreements

The rules provide that once a mediation settlement agreement is adopted by the court, it becomes enforceable as Judgement or order of the court.¹⁷² From practice, however the mediation settlement agreement is treated as a contractual agreement enforced as such.¹⁷³ In the case of *NKM vs SMM and Another*¹⁷⁴, parties went through the CAM process which resulted in a settlement agreement. The same was adopted by the court. Later, one of the disputants sought to have the mediation settlement agreement set aside. The court held that the applicant had failed to prove that there existed insufficient material facts, or ignorance of such facts or in general for a reason which would enable the court to review the consent judgement. Although the court declined to set aside the settlement agreement, its wording, particularly the reference of the outcome of mediation as an agreement or consent judgement portrays CAM as an inferior method of dispute resolution. This is when compared to litigation and arbitration where the outcomes are known as judgement and an award respectively. This then makes it difficult to enforce CAM outcomes as disputants think that the outcome can be challenged the same way a contract is.

3.3 Institutional challenges

These are challenges associated with institutions tasked to implement CAM. Quite a number of them exist. They include:

3.3.1 Poor infrastructure

The study sought data from 8 court stations across the country. These stations are all involved in CAM. All respondents, when identifying the challenges impeding the implementation of CAM, stated that there was a lack of office space, mediation rooms and office equipment. MDR based in Nyeri had this to say about infrastructure:

“Our station lacks the requisite infrastructure to hold sessions in terms of rooms and computers”

¹⁷² Rule 12 (b) of the Practice directions.

¹⁷³ Kariuki Muigua on Enhancing CAM environment in Kenya

¹⁷⁴ (2019) e KLR

Where mediation rooms are made available, they are not furnished for mediation. Mediation takes place in the courtrooms, waiting for bays and car parks.¹⁷⁵ This, prejudices the CAM process as parties fear the court. Secondly, confidentiality in mediation is likely to be compromised especially where open places are used.

Regarding office equipment, all respondents cited the challenge of lack of furniture and computers for CAM. Computers are necessary for data storage and virtual mediations following the Covid19 pandemic which restricts social physical contacts. Whereas it is commendable that some court stations have made use of virtual CAM, most courts are ill-prepared for such.¹⁷⁶ This is due to poor internet connectivity, lack of ICT knowledge by some litigants and lack of ICT equipment.¹⁷⁷

An MDR based in Eldoret, while commenting on virtual mediation reported that the station depends on a laptop given by local donors.¹⁷⁸ The judiciary should consider putting ICT resources in CAM like it is the case in other court processes. This is because the covid19 pandemic as advised by health professionals will affect normal activities for a considerable period.

3.3.2 Lack of Adequate Human Resource and Capacity Building

Across the country, most mediation registries are manned by at least two and at most three court clerks. The court officers are also involved in other court processes which prejudice the process.¹⁷⁹ Additionally, as observed by some respondents, court officers that are charged with the responsibility of manning mediation registries are ill-trained. An advocate based in Nairobi with six-year experience in mediation had this to say when commenting on courts' preparedness towards CAM: *"The mediation registry support staff have largely failed to appreciate their role in the process. It would have been best to pick some staff from trained mediators for better services."*¹⁸⁰

¹⁷⁵ Mediation Deputy Registrar, based at Eldoret, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁷⁶ Matata Getrude and Orano Rasmus, mediators practicing in Nairobi and Kakamega respectively. Questionnaires by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁷⁷ Ibid

¹⁷⁸ Sitati Grace, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁷⁹ Mediation registry Clerk, based at Kakamega, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁸⁰ Matata Getrude, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

3.3.3 Lack of Standardized Training for Mediators.

The Judiciary Training Institute, (JTI) a body charged with the responsibility of training employees for the judiciary does not offer training services for mediators.¹⁸¹ Instead, mediators are trained by various institutions. At the moment, there is an expanding number of commercial and voluntary organisations offering mediation training services.¹⁸² There is no quality control and uniformity of practice.¹⁸³ For instance, some mediation courses are offered in three days while others take five days.

Non-uniformity in the training of mediators leads to ethical issues among mediators. Some disputants interviewed raised concern on non-ethical practices by some of the mediators.¹⁸⁴

There is a need to subject the mediators who get involved in CAM to continuous training by the JTI. This will enable them to understand their mandate within the confines of the court.

3.3.4 Delayed and Non-Structured Payment of Mediators' Fees.

Most mediators that took part in this study were not content with the system of payment of their fees by the courts. Most of the interviewed judicial officers and judicial staff also identified payment of the mediator's fee as part of the challenges hampering the smooth implementation of CAM. It was observed that at most times, payment of mediators is delayed.¹⁸⁵ Secondly, it is made

¹⁸¹ The state of the Judiciary and Administrative Report (SOJAR) 8th edition, (2020) Nairobi: Judiciary of Kenya available at <https://online.flippingbook.com/view/1035011/> accessed on 30th November 2020.

¹⁸² Kariuki Muigua, "Alternative Dispute Resolution and access to Justice" (2015) Nairobi: Glenwood Publishers limited

¹⁸³ Supra, note 167

¹⁸⁴ A litigant based at Kakamega Court station, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁸⁵ Mwani Raphael, a mediator based at Kakamega, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

at a flat rate of Kshs20,000.00/= per file. This, according to the mediators is unfair as some cases are complex while others are simple.¹⁸⁶

3.4 Attitudinal Challenges

These challenges are simply posed by the attitudes of stakeholders involved in the implementation processes. They include:

3.4.1 Advocates' Reluctance towards CAM

Most respondents interviewed, when asked to comment on lawyers' reaction towards CAM stated that lawyers were either unfriendly, resistant or reluctant towards CAM. Some attributed this to arise from the fear amongst advocates that CAM adversely affects their legal business.¹⁸⁷ Abraham Lincoln, while advising his law students, stated that promoting of ADR mechanisms would not result in loss of business in the following quote,

*"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser in fees, expenses and waste of time. As a peace-maker, the lawyer has a superior opportunity of being a good man. There will still be business enough."*¹⁸⁸

A litigant who had a case determined through CAM had this to say when asked how CAM processes can be made better: *"chase away lawyers."*¹⁸⁹ The lawyer's role in advising clients on the mode of dispute resolution is critical. This includes advising parties to submit to a given dispute resolution mechanism. It may be impossible for mediation to take place successfully when lawyers have advised clients against it.

3.4.2 Parties' Unwillingness.

The field study established that some litigants were unwilling to undertake mediation processes. A very senior judicial officer had this to say when discussing the challenges hampering

¹⁸⁶ Kariithi Kennedy, a mediator based at central Kenya, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁸⁷ MDR Nyeri, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁸⁸ Abbasi Sara, "Confuting objections to Mandatory Mediation" (2017) Available at SSRN: <https://ssrn.com/abstract=3202920> accessed on 25th October 2021.

¹⁸⁹ Nasisti Anangwe Josephat, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

implementation of CAM: “*unwillingness of parties, the feeling that the matter is in court and that courts should deal with it.*”¹⁹⁰

Most litigants, expect to see a Judge or a Magistrate when they file a dispute in court. A referral to other ADR options, makes them feel that their expectation in the justice system is unmet.¹⁹¹ This is premised on the fact that the adversarial system has been in practice for a long time. This makes most people believe that it is only the courts that can solve their problems. There are incidences whereby, even after a successful CAM process, parties will still go back to court. *In Re Estate of Oyosi Ongoya*¹⁹² and *Re Estate of late Adam Chebelieny Kibosia*¹⁹³, disputants who submitted and participated in CAM processes that led to full settlement of the cases still went back to court seeking to set aside the mediation settlement agreements. There is a need for continuous public sensitization of CAM and other ADR processes.

3.4.3 Reluctance by Judicial Officers and Staff.

The study established that in as much as CAM is used to tackle the challenge of case backlog, not every judicial officer and staff has embraced it. A judicial officer based in Mombasa observed as follows when asked about the court’s preparedness towards mediation: “*a judicial officer who has been trained and also exposed to CAM programmes is more likely to embrace mediation.*”¹⁹⁴

A Senior Principal Magistrate based in Kakamega observes that for CAM to succeed, all judicial officers must embrace it.¹⁹⁵ Some judicial staff feel that the CAM process is extra work yet it has no bearing on their performance. The judiciary case tracking system and performance directorate have not established a tool to measure work conducted through CAM.¹⁹⁶

¹⁹⁰ Justice Musyoka W. Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁹¹ Heather Scheiwe Kulp, “Increasing Referrals to Small claims Mediation Programmes: Models to Improve access to justice”(2013) 14 *Cardozo J Conflict Resol* 361. Found at <https://heinonline.org/HOL/Licence>

¹⁹² (2021) eKLR

¹⁹³ (2020) eKLR

¹⁹⁴ Ogweno Christine, MDR, Mombasa Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁹⁵ Wandere Hazel, Questionnaire by J.N. Maragia, LLM student, University of Nairobi, May 2021.

¹⁹⁶ The Judiciary, “Performance Management and Measurement Understandings Evaluation report, 2020”(2021) Nairobi: Kenya, sourced from <https://www.judiciary.go.ke>judiciary.performance> accessed on 4th September 2021

While some judicial staff may find CAM to be relieving, in terms of case backlog, others fear that a reduction in caseload would render them redundant.¹⁹⁷

3.5 Conclusion

Challenges facing CAM have been discussed in three thematic areas: procedural, institutional as well attitudinal. Procedural challenges include compulsory referral of cases to mediation, legal representation as well as difficulties in drafting and execution of mediation settlement agreements. Institutional challenges majorly revolve around poor infrastructure, lack of capacity building and scarcity of resources. It is observed that these challenges delay CAM processes. Attitudinal challenges mainly affect Lawyers. This is attributed to the nature of their training which focuses on the adversarial system of dissolving disputes. More training and sensitization is needed.

¹⁹⁷ Supra, note 22

CHAPTER FOUR

4.0 CASE STUDIES FOR GHANA AND NIGERIA

4.1 Introduction

It is commendable that despite the challenges in implementation, the CAM process in Kenya has achieved some success. The case settlement rate for matters referred to as mediation is on average.¹⁹⁸ CAM has the potential to post higher results and improve access to justice if the challenges discussed in chapter three are addressed.

This chapter will seek to find out lessons that can be drawn from jurisdictions outside Kenya. To achieve this, a discussion on court-connected mediation in two countries, Nigeria and Ghana will be made. Like Kenya, they are African countries grappling with challenges of case backlog with limited resources. Secondly, they have entrenched ADR mechanisms to enhance access to justice for a period longer than Kenya. In Ghana, the process incorporates some aspects of traditional mediation, whereas, in Nigeria, the procedure is a multi-door courthouse whereby matters in court are not only referred to mediation but also other ADR methods.

4.2. The Multi-Door Courthouse in Nigeria.

Nigeria is a West African country divided into many states. Each state has incorporated ADR in dispute resolution. This study will focus on the Lagos Multi-Door Courthouse, (referred to hereinafter as LMDC). Lagos state is preferred because its ADR methods are backed with legislation and operate within the confines of the Court.¹⁹⁹

LMDC was established in June 200 to serve as a public-private partnership between the High court of justice, Lagos state and the negotiation and conflict management group which is a non-profit private organisation.²⁰⁰ LMDC is regulated by an Act of parliament passed in 2007.²⁰¹ It is

¹⁹⁸ The state of the Judiciary and Administrative Report (SOJAR) 8th edition, (2020) Nairobi: Judiciary of Kenya available at <https://online.flippingbook.com/view/1035011/> accessed on 30th November 2020.

¹⁹⁹ Akeredolu A and Hons LB, 'A Comparative Appraisal Of The Practice And Procedure Of Court- Connected Alternative Dispute Resolution In Nigeria, United States Of America And United Kingdom' 248 (2013) Sourced from <https://googlescholar> accessed on 30th May 2021

²⁰⁰ Supra, note 180

²⁰¹ ibid

a central point for the promotion of ADR promoting effectiveness of the justice system through ADR methods.²⁰²

For effective functioning within the justice sector, LMDC collaborates with other organisations and stakeholders. For instance, the LMDC-NBA forum inaugurated in 2007 promote ADR within the legal community and creates awareness among lawyers.²⁰³

As the name suggests, LMDC refers to alternative doors for handling of disputes. They include mediation, arbitration, early neutral evaluation and the hybrid process.²⁰⁴ At entry-level, LMDC diagnoses each dispute and refers it to the appropriate mechanism best suited to offer a solution.²⁰⁵

4.2.1 Early Neutral Evaluation

This refers to preliminary assessment of facts, evidence or legal merits by a neutral person who may be an experienced lawyer or retired Judge. The person can also be one with the requisite background and an expert in a given field of education.²⁰⁶ The assessment made is not binding. However, it provides a neutral evaluation of the dispute and offers guidance as to the possible outcome if the case were to be heard in court.²⁰⁷ This helps parties to decide on how they would wish to have their case decided.

At this stage, there is no requirement for a lawyer. However, if parties so desire, nothing prevents them from acquiring legal representation.²⁰⁸

4.2.2 Mediation

A neutral 3rd party helps disputants reach a mutually acceptable agreement by guiding them through the process. When an agreement is reached, it is reduced into writing. The same becomes binding and enforceable contract.¹⁹³

Mediation may be initiated by walk-ins, court referrals and direct intervention. For walk-in, parties do not file any legal action in court. Legal representation is not a must. Once terms of the mediation

²⁰² *ibid*

²⁰³ *ibid*

²⁰⁴ *Ibid*

²⁰⁵ *Ibid*

²⁰⁶ *ibid*

²⁰⁷ *ibid*

²⁰⁸ *ibid*

settlement are reached, the court endorses it as an order of the court.²⁰⁹ Besides walk-ins, cases can also be referred to mediation following a court order for cases already filed in court. Parties are invited to a multi-door courthouse.²¹⁰ Matters can also be referred to mediation following a request by parties²¹¹ or through direct intervention; ADR Judge appointed by the chief justice in the relevant state can refer matters to the LMDC.¹⁹⁷

Other ADR methods under LMDC include arbitration where simplified means of trial without technicalities associated with litigation are employed. The dispute is forwarded to an arbitral tribunal for resolution. The tribunal gives a binding award enforceable in a court of law;²¹² Hybrid door where a mixture of various ADR mechanisms particularly the ones discussed above. The aim is to get the best settlement method for each case. For instance, arbitration and mediation (arb-med), mediation and arbitration (med-arb)

4.2.3 Pertinent features of LMDC

As mentioned, LMDC is governed by an Act of parliament. Its key features are:

4.2.3.1. Screening of cases and Referral

The screening and referral process is different from the one in Kenya. The disputants submit a statement of issues to the dispute resolution officer/ ADR registrar who in turn shares the same with the other parties.²¹³ The disputants are invited by the ADR registrar to the screening conference.²¹⁴ During the screening, disputes are assessed in an attempt to find a solution. The screening conference focuses on information exchange with a goal of problem-solving.²¹⁵ This is different from the trial conference where parties maintain their positions.²¹⁶ Confidentiality is guaranteed thus parties have a candid discussion.²⁰¹

²⁰⁹ LMDC Practice direction on Mediation article 2 (a)

²¹⁰ Ibid article 2 (c)

²¹¹ Practice direction on Mediation 2007, LMDC article 3 ¹⁹⁷ Ibid article 2(d)

²¹² Supra

²¹³ Ibid

²¹⁴ Ojo Gbenga, "Alternative Dispute Resolution in Nigeria: An assessment of Lagos Multidoor Court House."(2019) sourced from <https://www.academia.edu>> accessed on 30th August 2021.

²¹⁵ Ibid

²¹⁶ Ibid

Disputants are educated on different ADR processes available at LMDC. They are also taught how to participate in the process. Upon gathering all information relating to the facts of the case, the ADR registrar matches the matter with the suitable ADR mechanism and appoints an expert in the subject matter of the case.²¹⁷ Referral of cases involves parties being assigned a screener who assists them in choosing the type of ADR appropriate in resolving their case. After parties have agreed on the suitable ADR process, a date is set to select an expert who must be approved by all disputants.²¹⁸

4.2.3.2. Mediation Process

The mediator conducts separate and joint sessions with the parties within thirty days.²¹⁹ The sessions are held within LMDC.²²⁰ The date fixed for mediation does not exceed ten days from the last session. Parties are encouraged to settle within three mediation sessions.²²¹ Where disputants fail to reach an agreement, they are free to request the mediator to prepare nonbinding recommendations on terms of a settlement.²²²

4.2.5.3 Legal Representation

Advocates are required to ensure that their clients attend mediation sessions.²²³ The other role they play is advisory and allowing their clients to take the lead in the mediation process.²²⁴ It is of great importance that parties attend the mediation sessions to make proper use of the process.²²⁵ The attendance of parties is so crucial that it cannot be dispensed with by the attendance of their lawyers.²²⁶ It is thus clear that the role that the advocate plays is advisory. The lawyer does not take the position of a client, making decisions as if he were the disputant. CAM in Kenya appears to have experienced this challenge where lawyers are the ones that decide whether a matter should

²¹⁷ Onyema Emilia, “the Multi-door Courthouse scheme in Nigeria: A case study of Lagos MDC, Apogee journal of Business”(2016) Vol.2, pp 96-130

²¹⁸ Ibid

²¹⁹ practice direction on Mediation, LMDC article 14(a)

²²⁰ Ibid, article 12 (c)

²²¹ Ibid

²²² Ibid

²²³ Ibid, article 9

²²⁴ Ibid

²²⁵ Ojo Gbenga, “Alternative Dispute Resolution in Nigeria: An assessment of Lagos Multidoor Court House.”(2019) sourced from <https://www.academia.edu>> accessed on 30th August 2021.

²²⁶ Ibid

be finalized through CAM or not. A clear definition of the mandate of lawyers in mediation in Kenya will enable parties to make proper use of CAM.

Another aspect of legal representation is that parties attending mediation on behalf of others must have written authority to make binding decisions.²²⁷ This requirement aids disputants in making proper use of CAM. Where representatives lack such authority, it becomes difficult to make any meaningful decision. Further, even where decisions are made, it is difficult to have them enforced.

4.2.5.4 Limitation Period

The limitation period is suspended whenever a dispute is referred to mediation.²²⁸ The suspension helps in not barring parties from taking their dispute to court or any other ADR method. CAM in Kenya has no such a clause. There is a possibility of fear amongst disputants that they may not have another forum to resolve their dispute should they fail to settle through CAM. Among the criticisms that have been levelled against court-connected mediation, is that it is an extra step on the road of access to justice when it does not result in a settlement.²²⁹

4.2.5.5 Mediator's fees

The LMDC determines the mediator's fees.²³⁰ Factors to be considered include the amount in dispute, complexity of issues and circumstances of each case.²¹² This promotes fairness among mediators. It would be unfair to have a standard rate for payment for all cases as some cases may be complex, consuming much time as compared to others. This promotes a standard of service anchored in Professionalism, quality and independence.²³¹ The sustainability of the process is also assured. CAM in Kenya is largely funded by donors. This includes the mediators' fees. Mediators thus have no certainty as to when their fee is paid.

²²⁷ Ibid

²²⁸ Ibid, article 22

²²⁹ Supra, note 27

²³⁰ Ibid article 20

²³¹ Supra, note 192.

4.2.5.6 Mediation Expenses

The fee is payable in two stages: administrative fee which is usually non-refundable is paid by all parties subject to ADR processes. Parties are required to pay a non-refundable fee once they submit a statement of issues or as directed by LMDC as per the fee schedule.²³² This amount is meant to cater for logistics and administrative services;²³³ a session fee is paid depending on the categorization of each case.²³⁴ It is normally paid before commencing the mediation process.²³⁵ Additionally, indigent disputants are granted pro-bono services which include waiver of session fees and subsidised rates.²³⁶

Mediation expenses are met in a structured, fair and efficient manner. This promotes equity, quality and professionalism among mediators and everybody engaged in the process. It also makes disputants take the processes with utmost respect and seriousness. The provision for indigent persons makes ADR accessible to everybody while guaranteeing the sustainability of the process.

4.2.5.8 Lessons drawn from Nigeria for Kenya

Whereas the LMDC system of appointing a mediator may cause a delay due to the parties' preferences, there are lessons that Kenya can learn from Nigeria. To begin with, the screening of cases for mediation in Kenya does not involve parties. This contributes to the resistance towards CAM by disputants and some lawyers. The involvement of parties through the screening process will make parties feel part of the process, understand how it works and what they are likely to expect at the end. Consequently, they will voluntarily take part in the process and even abide by the outcome.

Secondly, the neutral evaluation of each case at the time of commencement of a legal action illumines the mind of a disputant. This helps in the reduction of costs and expenses as they are advised on the best suitable ADR process in their case.

Thirdly, the mediation Process in LMDC has four entry points; walk-ins, a referral from the court, request by parties and direct intervention. The many entry points increase the uptake of mediation.

²³² Ibid, article 19 (a)

²³³ Supra, note 192

²³⁴ Ibid

²³⁵ Ibid, article 19 (b)

²³⁶ Ibid

Kenya needs to include walk-ins in the CAM processes as many people may desire to resolve conflicts without necessarily filing suits in court.

Fourthly, the role of a lawyer is clearly defined in their laws to be that of advisory. The lawyer also ensures that parties attend mediation. A clear definition of the advocates' role in CAM will yield a successful mediation process.

Fifthly, payment of mediator's fee in Nigeria is structured as opposed to Kenya where a standard rate is applied. All the mediators who took part in this study were not satisfied with the mode of payment. Some felt that it was unfair to pay a lump sum of Kshs20,000/= per case without taking into consideration the complexities and circumstances of each case. Kenya can borrow a leaf from Nigeria and have in place a schedule for the mediator's fee commensurate to the work done.

Sixth, on mediation expenses, the procedure in Kenya is that parties do not pay any fee. This is meant to encourage them to submit to mediation. Most of the challenges identified in chapter three above, particularly the institutional ones are a result of underfunding. CAM in Kenya largely depends on donor funding. This does not guarantee the sustainability of the process. The practice in LMDC of making parties pay for administration and mediation fees will come in handy to ensure the sustainability of the process. However, care should be taken not to design amounts that are too high to discourage disputants. In addition, most screening and referral should take place at the time of commencement of a legal action to minimize costs.

Next, the success of LMDC in Nigeria is partly due to coordination with other justice players and continuous sensitization. CAM in Kenya can be better if all justice players are brought on board particularly the lawyers. Advocates play critical roles in advising clients to choose the most suitable dispute resolution process.

Lastly, like Nigeria, Kenya should consider suspending the limitation period once a matter is referred to mediation. This will allow litigants the opportunity to explore other avenues like litigation in the event mediation fails.

4.4 Ghana.

Ghana provides a useful model for developing countries in Africa that still wish to maintain traditional values.²³⁷ Her legal system is dual as it includes informal dispute resolution and the formal legal regime.²³⁸ The incorporation of traditional aspects in modern ADR may be linked to the historical aspects. It is noted that traditional mediation was practised among many communities before colonialism. The adversarial court system was alien and it did not take into account the customs of the user. Equally, modern ADR in African states focuses on individualism as opposed to communalism. This may not be the best mode of enhancing access to justice among African states like Kenya.

The passing of the Courts Act of 1993 in Ghana promoted the use of ADR in the courts.²³⁹ Subsequent amendments of arbitration and labour laws followed. Eventually, in 2010, the Alternative Dispute Resolution Act was passed.²⁴⁰ The Act is comprehensive as it includes arbitration, conciliation, mediation and negotiation.²⁴¹ It incorporates customary mediation and arbitration into legislation thus expanding the processes into the formal civil justice system.²⁴²

Resolution of disputes through traditional method is consensual.²⁴³ It is anchored in the values of consent and reconciliation.²⁴⁴ The key actors are family heads, chiefs, elders and queen mothers.²⁴⁵ It operates within the framework of a community depending on the customs and norms of a given

²³⁷ Jacqueline Nolan-Haley , ‘Mediation and Access to Justice in Africa: Perspectives from Ghana’ (2015) 21Harv Negotiation Law Review 59 sourced from: <https://heinonline.org/HOL/License> accessed on 29.11.2020

²³⁸ Ibid

²³⁹ Catherine Price, “Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution?” (2018) 18 Pepp. Disp. Resol. L.J. 393. Available at: <https://digitalcommons.pepperdie.edu/drlj/vol18/iss3/2> accessed on 30th May 2021

²⁴⁰ Ibid

²⁴¹ Ibid

²⁴² Ibid

²⁴³ Jacqueline Nolan-Haley , ‘Mediation and Access to Justice in Africa: Perspectives from Ghana’ (2015) 21Harv Negotiation Law Review 59 sourced from: <https://heinonline.org/HOL/License> accessed on 29.11.2020

²⁴⁴ Ibid

²⁴⁵ Ibid

region.²⁴⁶ Although the officiating chiefs or elders have the authority to make decisions, the consent of the parties involved is vital. The goal of customary dispute resolution is to achieve tailor-made needs of all and can be observed by all.²⁴⁷

Chiefs continue to occupy positions of power and are recognized as the first port of call.²⁴⁸ They are charged with the responsibility of resolving disputes.²⁴⁹ In some cases, awards obtained through the informal systems are enforced by the court.²⁵⁰ There are however six challenges associated with traditional ADR processes:²⁵¹ unfairness, costs, exclusion of some cases from the traditional processes such as murder and rape, biasness, difficulties when enforcing awards, negative attitudes by the bench and the bar towards traditional processes.²⁵²

4.4.1 Lessons drawn from Ghana for Kenya.

Despite the challenges, the traditional systems of justice are still preferable as they make use of inquisitorial and restorative methods of dispute resolution compared to litigation that is adversarial in nature.²⁵³ The incorporation of traditional mediation into modern mediation can be borrowed by Kenya to encourage parties to submit to ADR procedures. Although Kenya may not have well-established structures and frameworks for traditional dispute resolution, there is a lot of informal mediation conducted at the grass-root by local administrators.²⁵⁴ These local mediators, though not recognized by CAM laws and procedures play a critical role in dispute resolution. For instance, disputes that have cultural aspects like community land are well resolved by them as they possess vast experience and knowledge.²⁵⁵

²⁴⁶ Jacqueline Nolan-Haley , ‘Mediation and Access to Justice in Africa: Perspectives from Ghana’ (2015) 21Harv Negotiation Law Review 59 sourced from: <https://heinonline.org/HOL/License> accessed on 29.11.2020

²⁴⁷ Ibid

²⁴⁸ Ibid

²⁴⁹ ibid

²⁵⁰ Ibid

²⁵¹ Ibid

²⁵² Ibid

²⁵³ ibid

²⁵⁴Kariuki Muigua, “Alternative Dispute Resolution and access to Justice” (2015) Nairobi: Glenwood Publishers limited

²⁵⁵ Supra, note 225

The current Kenya Constitution provides for settling of community land disputes through recognised local community initiatives consistent with the Constitution.²⁵⁶ In the event a dispute of such nature is filed in court and referred to CAM, it is not clear on the criteria to be employed to resolve it.²⁵⁷ Article 159(2) ²⁵⁸ presents a scenario whereby all ADR methods should be promoted to settle disputes. This includes traditional methods of dispute resolution. It may be important for Kenya, to include informal mediators in the CAM processes. The informal mediators will handle matters with a cultural aspect like burial disputes and community land.

4.5 Conclusion

Lessons can be drawn from Nigeria and Ghana to make CAM in Kenya better. The screening process in LMDC is structured in a way that involves parties in deciding as to whether a case should be referred to mediation. Early neutral evaluation processes aid parties to identify the best method of resolving their dispute. Consequently, costs will be minimized. Nigeria also establishes a system that is self-sustaining by providing for payment schedule for ADR methods in general and mediation in particular. Parties who have no cases in court have the opportunity to make use of the LMDC and have their decision adopted and enforced by the court. The incorporation of traditional mediation into modern mediation like in the case of Ghana will promote informal mediation in desired cases and encourage parties to submit to ADR procedures.

²⁵⁶ Constitution of Kenya, 2010 article 60 and 67.

²⁵⁷ Kariuki Muigua, "Alternative Dispute Resolution and access to Justice" (2015) Nairobi: Glenwood Publishers limited

²⁵⁸ Of the Constitution of Kenya 2010

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The purpose of the research was to assess how CAM contributes to access to justice, identify challenges associated with its implementation and propose recommendations to ensure that CAM in Kenya achieves desired goals.

Primary data was collected from Kakamega, Kisumu, Machakos, Nyeri, Garissa, Eldoret, Nairobi and Mombasa court stations. This was made by use of questionnaires. Key respondents were judicial officers, judicial staff, mediators, advocates and litigants who have participated in CAM. Secondary data was obtained from scholarly writings and articles.

The overall objective was to examine the extent to which CAM contributes to the promotion of access to justice in Kenya. Specific objectives were:

- (i) To assess the impact of CAM on the civil justice system in Kenya.
- (ii) To identify and discuss the challenges facing the implementation of CAM in Kenya.
- (iii) To learn the best practices for CAM and propose possible remedies drawn from case studies of jurisdictions with the best practices and measures to mitigate the challenges facing the implementation of CAM.
- (iv) To make recommendations to ensure that CAM achieves its desired goals

In realizing the objectives of the research, the study was guided by the following research questions:

- (i) How has CAM impacted the civil justice system in Kenya?
- (ii) What are the challenges facing the implementation of CAM in the civil justice system in Kenya?
- (iii) What are the possible remedies/lessons drawn from other jurisdictions to mitigate the challenges facing the implementation of CAM?

- (iv) What are the recommendations to be made to ensure that CAM achieves its desired goals?

5.1.1 Study Findings

CAM processes in Kenya were analysed through different themes: identifying the impact of CAM on the civil legal justice system; challenges facing the implementation of CAM in Kenya; lessons from the study of Nigeria and Ghana and lastly the recommendations. The themes were structured in a manner to discuss each study objective.

5.1.2 The Impact of CAM on the Civil Justice System

The advent of court-connected mediation in the resolution of disputes has brought with it changes in the laws governing dispute resolution as well as methods of resolving disputes in the civil justice system.

Internationally, laws/covenants have been designed to provide for mediation procedures. For instance, the UNCITRAL model on Conciliation and Mediation as well as the Singapore Convention provide for the mediation process. The latter focuses on international trade disputes. It also fills the gaps left by the former by providing criteria for adopting settlement agreements. Further, grounds upon which a mediation settlement agreement can be rejected are provided.

At the national level, other than the constitution, no statute has been enacted for mediation. CAM processes are governed by policy documents. These include the Mediation manual 2018 and Practice directions. The Civil Procedure Act is also amended to incorporate ADR in general and mediation in particular in dispute resolution.²⁵⁹ The ADR bill and Mediation Bill pending approval of parliament if both passed into law, will be the first statutes that provide for ADR processes in Kenya.

It was established that CAM has brought the following changes to the civil justice system in Kenya: a reduced period of dispute resolution, minimized costs; reduction of case backlog, confidentiality, flexibility and mending of broken relations.

5.1.3 Challenges facing the implementation of CAM Kenya.

²⁵⁹ Section 59B of the Civil Procedure Act

This discussion was divided into three thematic areas: procedural, institutional as well attitudinal. Procedural challenges included the compulsory referral of cases to mediation as well as imposing sanctions for parties who fail to submit to CAM processes. The challenge posed by these sanctions is that mediation is not voluntary. Parties may fail to agree and even where they settle, there is no commitment to honour the terms of the settlement.

Other procedural challenges included ambiguous settlement agreements and a lack of guidelines on legal representation. Courts find it difficult to enforce such ambiguous settlement agreements. Further, the role of advocates in CAM processes is uncertain; whereas some feel that lawyers are not necessary for CAM processes, others hold the view that the presence of advocates in the CAM process is important. The study established that the role of advocates in CAM processes cannot be wished off. Advocates are needed to advise their clients to undergo CAM processes. However, their role in the Mediation process should be spelt out. Their remuneration also needs to be defined.

Institutional challenges majorly revolved on poor infrastructure, lack of capacity building and scarcity of resources. It was established that CAM in Kenya largely depended on donor funding to execute its mandate. This caused delayed and non-structured systems of payment of mediators fees. Additionally, the non-availability of sufficient office equipment and untrained staff delay CAM processes.

Challenges attributed to societal attitudes were also discussed. It was established that some officers with legal training like judges, magistrates and advocates find it difficult to embrace mediation. This is attributed to the nature of their training which focuses on the adversarial system of dissolving disputes. More training and sensitization need to be carried out to change legal and societal perceptions that affect the smooth implementation of CAM.

5.1.4 Lessons from Ghana and Nigeria

This discussion focused on the Lagos Multi-Door Courthouse in Nigeria²⁶⁰ as well as court-connected mediation in Ghana. The study established that Kenya can learn more from the two

²⁶⁰ Ojo Gbenga, "Alternative Dispute Resolution in Nigeria: An assessment of Lagos Multidoor Court House."(2019) sourced from <https://www.academia.edu>> accessed on 30th August 2021.

countries. The LMDC in Nigeria operates in such a manner that provides more avenues to dispute resolution, unlike Kenya.

The screening process is structured in a way that involves parties in deciding as to whether a case should be referred to mediation. Early neutral evaluation processes aid parties to identify the best method of resolving their dispute. Consequently, costs are minimized. Nigeria also establishes a system that is self-sustaining by providing for payment schedule for ADR methods in general and mediation in particular. Parties who have no cases in court have the opportunity to make use of the LMDC and have their decision adopted and enforced by the court.

Suspension of limitation period when a matter is referred to mediation safeguards the right of parties to still present their case in court should mediation fail. Further, the definition of the role of an advocate in the mediation process helps in reducing conflicts between mediators and lawyers which may eventually affect the mediation process adversely.

Ghana's legal system incorporates customary dispute resolution into formal legal regime.²⁶¹ Customary dispute resolution is consensual. It is anchored in the values of consent and reconciliation.²⁶² The key actors are heads of family, chiefs, queen mothers and elders.²⁶³ It operates within a communitarian framework with variations depending on the customs and norms of a given region.²⁶⁴ Although the officiating chiefs or elders have the authority to make decisions, the consent of the parties involved is vital.²⁶⁵ Customary dispute resolution is key achieving tailor-made needs of all and can be observed by all.²⁶⁶

²⁶¹ *ibid*

²⁶² Jacqueline Nolan-Haley, 'Mediation and Access to Justice in Africa: Perspectives from Ghana' (2015) 21 *Harv Negotiation Law Review* 59 sourced from: <https://heinonline.org/HOL/License> accessed on 29.11.2020

²⁶³ *ibid*

²⁶⁴ *ibid*

²⁶⁵ *Ibid*

²⁶⁶ *Ibid* ²³⁷Kariuki Muigua, "Alternative Dispute Resolution and access to Justice" (2015) Nairobi: Glenwood Publishers limited

The study found out that incorporation of traditional mediation into modern mediation can be borrowed by Kenya. This will encourage parties to submit to ADR procedures. Although Kenya may not have well-established structures and frameworks for traditional dispute resolution, there is a lot of informal mediation conducted at the grass-root by local administrators.²³⁷ These local mediators, though not recognized by CAM laws and procedures play a critical role in dispute resolution. For instance, disputes that have cultural aspects like community land are well resolved by them as they possess vast experience and knowledge.²⁶⁷

It is concluded that CAM in Kenya has the potential to enhance access to justice. However, it has not fully realized its goals because of the many challenges that range from institutional to societal attitudes. When challenges facing the implementation of CAM are addressed, greater results in the promotion of access to justice will be achieved.

5.2 Recommendations

To ensure that CAM in Kenya achieves its desired goals, the following recommendations are made:

5.2.1 Legislative

- (i) Kenya needs to enact laws that govern mediation processes and other ADR methods. The pending ADR and Mediation Bills need to be fast-tracked and enacted into Acts of Parliament.
- (ii) International instruments that provide a guideline for mediation like the Singapore Convention need to be ratified. This will provide an international framework for Kenya and set standards for mediation in the country.

5.2.2. Institutional

- (i) There is a need for the government to allocate funds for CAM processes. Funds may be obtained from the National government, set aside by the judiciary or from parties pay like the case for Nigeria. Adequate funding will ensure a sufficient and motivated workforce for mediation processes.
- (ii) The courts need to identify/ set aside physical office space for mediation processes. The space should be furnished to include a mediation registry, mediation rooms, client care centre as well as mediators' lounge.

²⁶⁷ Ibid

- (iii) On Capacity building, all agencies involved in CAM need to continuously train all their staff on CAM. For instance, the current training in the judiciary only focuses on the employees dealing with CAM. There is a need for training everyone working in the organization.
- (iv) The training of mediators needs to be standardized. Continuous sensitization will also help in sharpening their skills.
- (v) Members of the public need continuous sensitization through all public forums. This may also include rolling out mediation to all parts of the country.
- (vi) To make the mediator's pay commensurate with the work done, a schedule for payment of the mediators' fees should be designed.
- (vii) Courts should subject all civil disputes to early neutral evaluation and increase the entry points of mediation like the case for Nigeria. This will help parties avoid unnecessary costs.
- (viii) Incorporation aspects of traditional mediation where cultural aspects like burial disputes and community land are involved.
- (ix) The Law Society of Kenya as well as Law schools should design programmes that offer training to lawyers on how to represent clients in ADR processes. Continuous sensitization of advocates on CAM processes should be conducted by the Judiciary and other professional bodies.
- (x) The Chief justice should initiate amendments to the Advocates' Act as well as the Advocates Remuneration order to provide for advocates fees in mediation processes.
- (xi) The judiciary should consider widening the scope of ADR to include other methods of resolving disputes like conciliation, negotiation and traditional methods of resolving disputes.
- (xii) The Judiciary should have CAM included in the assessment of the employee performance. The study established that the employees in the judiciary do not consider CAM as part of their duty because there is no performance appraisal on it. Its inclusion in performance assessment as well as the setting of targets will encourage them to embrace mediation.

5.2.3 Procedural

- (i) Courts should include parties in the screening process. A screening conference should be conducted by MDR in the presence of the disputants. This will make disputants understand and appreciate the process hence willingly submit to CAM.
- (ii) The role of the advocate in CAM should be clearly be defined. For instance, in the case of Nigeria, a lawyer's role is advisory. Kenya may adopt this to improve the uptake of CAM.
- (iii) Suspending Limitation period when a matter is referred to mediation. This will enable parties to explore other methods of dispute resolution in the event mediation fails.
- (iv) Parties should be allowed to make use of mediation processes without necessarily filing a legal action. Once a decision is reached, the same should be adopted and made enforceable by the court.
- (v) Sanctions for failing to take part in the mediation process should be removed until such time that all stakeholders understand and appreciate CAM processes.

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APPENDIX B

QUESTIONNAIRE FOR JUDICIAL OFFICERS

Serial No.----- Court

station-----

Gender

(a)Male----- (b) Female-----

1. What has been your experience with Court annexed mediation?

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2. How has Court annexed mediation affected the civil justice system in terms of the period taken to conclude cases?

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3. Comment on the flexibility of the Court annexed Mediation process.

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4. What can you say about costs when a matter is resolved through court-annexed mediation?

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5. How has Court annexed mediation impacted on case backlog?

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6. Decisions made through court-annexed mediation are not subject to appeal. How does this affect the justice system?

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7. What are your views regarding the clarity/precision of mediation settlement agreements?

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8. Comment on the preparedness of the court in handling court-annexed mediation cases?

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9. Following the outbreak of the Covid19 pandemic, some court-annexed processes are conducted online. Comment on the effectiveness of online mediation?

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10. Comment on advocates' reaction towards court-annexed mediation processes.

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11. Please discuss any other challenge experienced by your station in implementing Court annexed mediation?

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12. How can the challenge of ambiguity about mediation settlement agreements be addressed?

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13. Suggest ways in which advocates' reactions can improve court-annexed mediation?

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14. How can the court's preparedness towards court-annexed mediation processes be enhanced?

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15. What other suggestions towards better implementation of court-annexed mediation can you give?

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APPENDIX C QUESTIONNAIRE FOR JUDICIAL STAFF

Serial No.-----

Court station-----

Gender

(a)Male----- (b) Female-----

1. How many years of experience do you have working for the judiciary?
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2. How has Court annexed mediation affected the civil justice system in terms of time taken for a case to be finalized?
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3. Comment on the flexibility of the Court annexed Mediation process.
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4. What can you say about costs when a matter is resolved through court-annexed mediation?
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5. How has Court annexed mediation impacted on case backlog?
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6. How is the court-annexed mediation process different from litigation in dispute resolution?
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7. How is your court station prepared to handle disputes through mediation in terms of mediation rooms or suites?

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8. Comment on the preparedness of the court in handling court-annexed mediation cases?

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9. How is the mediation process prejudiced when conducted in a courtroom?

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10. Comment on advocates' resistance towards Court annexed mediation processes.

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11. Please discuss other challenges your station has experienced while implementing Court annexed mediation.

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12. How can the challenge of office space for court-annexed mediation be addressed?

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13. Suggest ways in which advocates' resistance towards mediation can be minimized?

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14. How can the court's preparedness towards court-annexed mediation processes be enhanced?

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15. Are there other suggestions towards better implementation of court-annexed mediation?

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APPENDIX D QUESTIONNAIRE FOR ADVOCATES

Serial No.-----

Practice region-----

Gender

(a)Male----- (b) Female-----

- 1. How long have you been involved in court-annexed mediation processes?
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- 2. How has Court annexed mediation affected the civil justice system in terms of legal representation?
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- 3. Comment on the flexibility of the Court annexed Mediation process.
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- 4. What can you say about court costs when a matter is resolved through court-annexed mediation?
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- 5. Decisions made through court-annexed mediation are not subject to appeal. How does this affect the justice system?
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6. How has Court annexed mediation impacted on case backlog?

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7. What is your view regarding advocates' remuneration when representing clients in court-annexed mediation processes?

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8. How are the advocates trained to represent clients through a court-annexed mediation process?

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9. What are your concerns regarding courts' preparedness in handling court-annexed mediation cases?

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10. Comment on the enforcement of decisions reached through the court-annexed mediation process by the courts?

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11. Comment on advocates' participation in representation of clients through court-annexed mediation processes

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12. Please discuss any other challenge experienced by advocates concerning court-annexed mediation processes.

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13. How can the challenge of enforcement of decisions reached through court-annexed mediation be addressed?

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14. Suggest ways in which advocates' participation in mediation processes can be enhanced?

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15. How can the preparedness by courts towards court-annexed mediation processes be enhanced?

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16. What are other suggestions towards better implementation of court-annexed mediation?

APPENDIX E QUESTIONNAIRE FOR MEDIATORS

Serial No.-----

Area of coverage-----

Gender

(a)Male----- (b) Female-----

1. How long have you worked as a mediator within the courts?

2. How has the Court annexed mediation changed the civil justice system in terms of the time taken to conclude a case?
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3. Comment on the flexibility of the Court annexed Mediation process.
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4. What can you say about the relationship of parties after taking part in court-annexed mediation?
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5. Comment on confidentiality of cases resolved through court-annexed mediation.
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6. What has been your experience concerning online mediation processes following the covid19 pandemic?

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7. Comment on courts' preparedness in handling disputes through court-annexed mediation process?

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8. Give your comments regarding payment of mediators fees.

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9. Comment on the reaction of advocates towards court-annexed mediation processes.

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10. Please discuss any other challenge you have experienced with Court annexed mediation?

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11. How can payment for mediators' fees be improved?

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12. Suggest ways in which advocates' involvement in the mediation process can be improved?

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13. How can the court's preparedness towards court-annexed mediation processes be improved?

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14. Suggest ways in which online mediation processes can be enhanced?

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15. What other suggestions can you give towards better implementation of court-annexed mediation?

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APPENDIX F QUESTIONNAIRE FOR LITIGANTS

Gender

(a) Male----- (b) Female-----

1. What has been your experience with Court annexed mediation?

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2. How has Court annexed mediation changed the civil justice system in terms of time taken to conclude a case?

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3. Comment on the flexibility of the Court annexed Mediation process.

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4. What can you say about the relationship of parties who have gone through court-annexed mediation?

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5. Comment on confidentiality of cases resolved through court-annexed mediation.

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6. What are your views regarding the fairness of the court-annexed mediation process?

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7. Comment on courts' preparedness in handling disputes through court-annexed mediation process?

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8. Give your comments regarding the process of appointing a mediator?

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9. What are your views regarding courts 'referral of cases to Court annexed mediation?

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10. Please discuss any other challenge you experienced with Court annexed mediation?

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11. What can be done to ensure that disputants have equal chances when solving cases through court-annexed mediation processes?

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12. Suggest ways in which referral of cases to court-annexed mediation can be improved?

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13. What can be done to improve the court's preparedness towards court-annexed mediation processes?

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14. What other suggestions can you give towards better implementation of court-annexed mediation?

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