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FORMAL JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION ON LAND BASED CONFLICTS IN KENYA

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Abstract

This article highlights the use of formal justice and Alternative Dispute Resolution (ADRs) mechanisms in resolving land based conflicts in Kenya. The research employed a desk review method through the review of books, articles, documents, reports and internet information. Findings reveal that symbiotic relationship and equitable value of both the formal justice system and ADR are recognised by the Constitution of Kenya 2010. The court system in Kenya is established under the Constitution and various other Acts of Parliament land dispute suits matters are filed at the civil court registry of a lower or magistrates court or at the Environment and Land Court through its registry. On the other hand, the use of ADR mechanisms offers different advantages compared to the formal court system, including effective and efficient of resources such as time and money. It reduces the time it takes to resolve disputes, particularly in tribunals and traditional and alternative justice systems, and diminish the backlog of cases experienced by the courts. The article provides a better understanding of the two systems in terms of their merits and demerits and recommends that the Government of Kenya does more to build capacity by providing formal training at the local level in the different ADR methods to help disputants resolve conflict before it is channelled through the formal justice system. It also recommends that it create a public fund and a corresponding application process that would allow those who cannot afford to privately hire advocates to prosecute or defend their matters in Court through the said fund.

Keywords: Formal justice, Alternative Dispute Resolution, and land-based conflict.

1. Introduction

ADR mechanisms have been and are used in many parts of the world. In US, research confirms a symbiotic relationship and equitable value of both the formal justice system and ADR mechanisms. However, much dispute resolution activity in the US remains private and market based, as parties may choose contractually before, during or after a dispute has arisen, how to manage their disputes - through private negotiation and settlement, mediation, arbitration, fact-finding, neutral evaluation or a variety of newly hybridised forms of dispute resolution (Menkel-Meadow, 2013).

Research also confirms the use of the two justice mechanisms in Europe. Piers (2014) explains that over the past fifteen years, European lawmakers have displayed particular interest in extra-judicial dispute resolution methods as part of a broader effort to promote better access to justice. For example, Directive 2008/52 sets out a framework for the use of mediation in cross-border disputes on civil and commercial matters. The European Commission's influential Recommendations 98/257 and 2001/310,' which respectively deal with out-of-court dispute settlements and consensual dispute mechanisms, constitute a starting point for constructing a new approach to ADR (Piers, 2014).

In South Asia ADR has been promoted as a way of achieving lasting peace amongst disputants. The South Asian countries include Bangladesh, Pakistan and Maldives (Raha, 2021). India's focus on ADR has been driven by the inundation of the formal justice system with a backlog of cases. In the USA ADR has been institutionalized. This is because it is viewed as being beneficial to society; by being time saving, cost effective and contributing to reducing the courts' caseload. It also believed to improve public satisfaction, enhance harmony, and preserve relationships, while providing timely resolutions. Moreover, ADR mechanisms can be more accessible and eventually they create awareness that solutions can be found without violence or litigation (Nosyreva, 2010).

There has also been growing acceptance of ADR in Africa. In countries such as Nigeria, ADR have been traditionally embraced as the foremost method for settling disputes (Jegade, 2021). Litigation in a court is confrontational and judgment often leads to a win-lose situation. However, ADR is often not confrontational and seeks ways in which neutral and unbiased third parties are involved which may lead to win-win verdicts (Nwakasi, 2019). Similarly in 2003, the Ghanaian judicial reforms successfully used ADR to reduce case backlog and increase the dispensation of justice (Uwazie, *Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability*, 2011); and preference for ADR through indigenous processes was noted. Ethiopians showed similar interests as their Ghanaian counterparts in seeking out traditional ADR mechanisms; the traditional Shimangele (elder) for conciliation of most civil or family matters, including land.

Another 2009 survey in Liberia found that only 3 percent of criminal and civil disputes were taken to a formal court; while way over 40 percent used ADR South Africa has also embraced ADR to boost access to justice for all people; its nature and structure qualifying the underprivileged and unschooled to find justice (Ampeire, 2017). The ADR in South Africa demonstrates opportunity to supplement an ailing legal system with a more malleable and

accessible process for dispute resolution. Moreover, the Government has a programme, which sensitises populations on ADR. In addition, it has an Arbitration Act which empowers courts to determine cases which can be dealt with using ADR. Consequently, the caseload in courts has reduced considerably (Ampeire, 2017).

In Nigeria, the importance of both formal justice and ADR mechanisms was confirmed with the holding by the state of Lagos of its very first mediation week in November 2009. The mediation week aimed to elevate and expand the use of ADR as well as generate publicity and educate the legal profession (Abdulah and Adejuwon, 2009.). About 100 medium-scale commercial disputes were selected from the Lagos Island High Court docket with the consent of disputants, lawyers, and judges and scheduled for mediation over 5 days. Using lessons learned from earlier experiences, nearly 60 percent of the mediations resulted in agreement. Over 98 percent of disputants surveyed expressed satisfaction with the process, and nearly 70 percent said they preferred mediation to court litigation. Most of the participating lawyers also found the process satisfactory and indicated that they would recommend it to their clients (Abdulah and Adejuwon, 2009).

In East Africa, both Uganda and Tanzania have shown growing interest and adoption of ADR mechanism in land dispute resolution. In Tanzania, most land disputes are resolved by community leaders. Where the Community leaders are not able to resolve these disputes, they refer them to the higher State organs like the Police or Courts of law. These Government institutions, also acknowledge ADR as effective in mediating over land disputes and make reference to the evidence presented by ADR experts to resolve referral cases (Kakooza, 2007). Meanwhile Uganda's Land Act allows for decentralised Land Tribunals at the district level. The role of Land Tribunals as stipulated in the law is to offer better user-friendly justice to landowners and users by presenting alternatives to the seemingly daunting, intricate, often costly, time consuming and estranging formal court procedures (Obaikol and Ogwapit, 2017).

In Kenya, the Constitution of Kenya guarantees the right to access justice for all. The Constitution establishes the jurisdiction and hierarchies of Courts, but there are also quasi-judicial bodies established through statute; these make up the formal justice system in Kenya. These judicial bodies are to exercise their authority with strict adherence to the principles enshrined in the constitution. Muiga (2015) highlights the constitutional provision requiring that justice be dispensed without undue regard to technicalities; and that the letter and spirit of the Constitution should be endorsed and safeguarded. The primary purpose to promote that justice above all prevails. Subsequently, all judicial fora dealing with land-based disputes have to exercise their authority in line with the above.

ADR is recognised in the Kenyan legal framework as an acceptable mode of dispute resolution mechanism and as such is institutionalised in Kenya in many areas to facilitate dispute resolutions and settlement including family disputes, civic disputes, commercial disputes, labour disputes among other areas (Nyamasege, Swazuri and Chavangi, 2017). Furthermore, the National Land Policy recommends negotiation, mediation and arbitration methods of ADR. Literature study and field research has revealed that ADRs applied on land disputes resolutions mainly favour mediation and arbitration. These forms of ADRs are mostly preferred in disputes that relate to communal land disputes. Negotiations and mediation have been classified to

operate well at family and individual level where common custom and beliefs may contain the emotive nature of land matters, which may render (Ministry of Lands, 2009). The Kenyan Constitution recognises the symbiotic and equitable value of both the formal justice system and these rich informal systems. For efficient and effective administration of justice in land based conflict cases, access to justice is crucial (International Development Law Organisation, 2018). Therefore, ADR processes make a huge contribution by enhancing this access; especially in this era where court cases have stalled for decades now (Nyamasege *et al.*, 2017).

2. Problem Statement

Land related disputes have far-reaching consequences in communities and the Kenyan society as a whole. The conflicts affect sustainable land management, economic growth and national unity. The effective and efficient resolution of these land conflicts is therefore paramount. The formal justice system as currently constituted ensures that people do not take the law into their own hands; however, it does not foster unity or cohesion among the disputants who in most instances are neighbours or even family members. Besides, the process is marked with high costs of claim adjudication, inordinate delay in the administration of justice and diminished party autonomy. Also, the erosion of the quality of proceedings, coupled with corruption invariably diminishes the quality of outcomes, making it even more difficult for the ordinary citizen to equally enjoy their right to land (Kibaya, 2012).

Recently, The Hague Institute for Innovation of Law and the World Bank conducted a survey on justice needs and satisfaction in Kenya. The research revealed that only 10 per cent of Kenyans chose to use formal courts for the redress of their legal issues; citing the cost coupled with unnecessary delays that dog the formal justice system. The majority of Kenyans preferred to use ADR (International Development Law Organisation, 2018). Article 159 of the Kenyan Constitution provides for the employment of ADR in resolving land based conflicts; as long as they do not contravene the Bill of Rights; are not repugnant to justice and morality; and do not breach the Kenyan law.

Thus, ADR mechanisms or processes are recognised and guided by the cardinal principles of justice to all and easy access within informal or formal systems of the administration of justice. Moreover, these mechanisms ensure that justice is not delayed but rather, it is administered without regard to unnecessary procedural barriers that are common in the court system. Their main objective is to resolve disputes in an expeditious manner (Yamasege *et al.*, 2017). Based on secondary data, this article sought to analyse the merits and demerits of both formal and informal mechanisms to resolve land-based conflicts in Kenya. It further attempts to provide necessary recommendations towards quick and sustainable resolution of land conflicts.

3. Research Objectives

The overall objective of the study is to assess the ways in which ADR may be used in resolution of land based in Kenya Specifically, the research seeks:

1. To assess the merits and demerits of using the formal justice system in resolving land based conflicts in Kenya.

2. To evaluate the merits and demerits of ADR mechanisms in resolving land based conflicts in Kenya.
3. To provide policy recommendations for challenges facing the judicial and ADR mechanisms for expeditious and fair resolution of land based conflicts in Kenya.

4. Methodology

The methodology used in this research consisted of desk research. For this reason, secondary data was used to assess the merits of both formal justice system and ADR mechanisms in addressing land based conflicts in the Mt. Elgon region. The method employed to collect data was the review of books, articles, documents, reports and internet information, while content was analysed to make inferences. The data source selection was based on its relevance in relation to the current study; this included previous studies and books on the subject as well. The findings of this research were based on review of publications and reports of studies conducted with relevant findings to the core objective of this study. The only challenge with this approach is that the findings are limited to scope of the source publications and/or reports.

5. Theoretical Framework

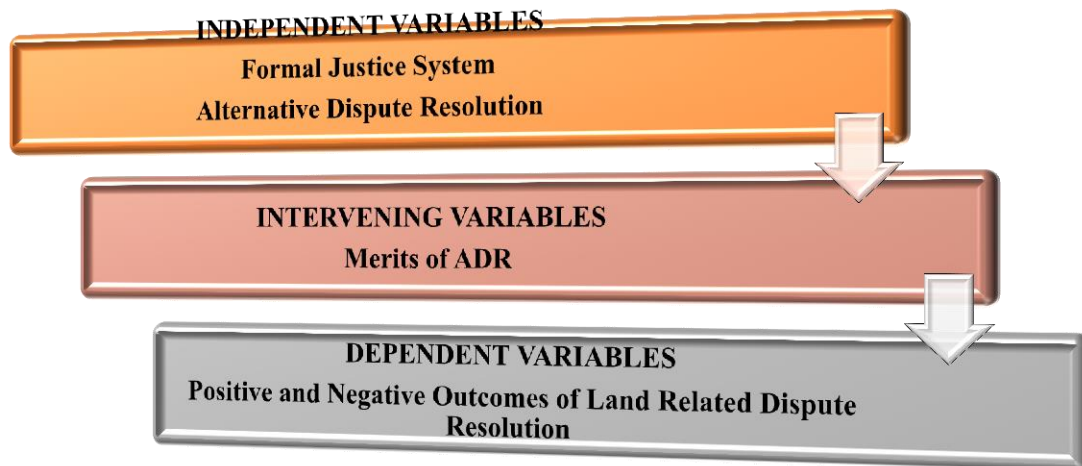
Social exclusion is ordinarily designated social divisions and inequality leading to poverty, deprivation and disadvantage. In the contemporary societies however, the term does not simply limit itself to the lack of material resources, but also to inadequate social participation, lack of cultural and educational capital, inadequate access to services and lack of power and so on (Muddiman, 2000). The theory of social exclusion therefore is understanding how deprivation of resources or opportunities leads to a lack of power in populations that are socially excluded

When individuals or a group are socially excluded from a community they belong to because of discrimination, they are unlikely to benefit from its resources such as land. This exclusion from fair distribution of land may lead to disputes or conflicts. When the ensuing land-related conflicts are not resolved in a timely and adequate way, the disputants are further excluded from meaningful participation in the community's activities. This is because they will be forced to use their time and other resources trying to find justice. On the other hand, ADR mechanisms may provide justice in ways that are more affordable than the formal justice system, removing to a large extent the social isolation land related conflict parties face.

This study has considered how social exclusion of marginalized communities may affect the manner in which land based disputes or conflicts are resolved when they arise. The principles of the justice theory are relevant to the study. This is because both the formal justice system and ADR are supposed to guarantee disputing parties their rights fairly without infringing on the rights of the others in the conflict. The justice systems are also meant to open up space for equality for access to justice in the social economic spheres as well.

6. Conceptual Framework of the Study

This research was guided by a conceptual framework made of three categories of variables and their relationships in the resolution of land related disputes in Kenya.



Conceptual Framework of the study (Research, 2020)

The study had two independent variables: the formal justice system and ADR. On the other hand, the dependent variables are the positive or negative outcomes of the dispute resolution, while the intervening variables include the merits of ADR and demerits of the formal justice system. Both the formal justice system and the ADR if used correctly can guarantee land related disputants the justice they seek, leading to fairness, access to land, participation, and community peace. ADR mechanisms can, however, do this in a less costly and more effective way in comparison to the formal justice system. When justice is not accessed though, the results are escalated conflict, frustration, poverty and inequality.

The conceptual framework is related to the theoretical framework. As is put forth in the social exclusion theory, lack of justice in land related conflicts that are occasioned by inaccessible formal justice can lead to social exclusion. The factors that render formal justice inaccessible include high cost, lengthy and technical processes and so on. On the other hand, ADR mechanisms are affordable, accessible, timely, simple, and effective among others; and can help avoid or remove social exclusion. On the other hand, the justice theory posits that justice ought to be granted to all who seek it as long as it does not take away another individual's justice. That is what ADR seeks; to grant fairness to a party in a land related conflict without taking it away from the other disputant.

7. Research Findings

This section responds to the research objectives. The research objectives aimed notably at assessing the merits and demerits of both formal justice system and ADR systems in resolving land conflicts.

7.1. Formal justice in resolution of land-based conflicts in Kenya

The first objective of the study was aimed at assessing the merits and demerits of the judicial system in resolving land based conflicts in Kenya. This study established that the Kenyan judicial system like many others globally has both merits and demerits.

7.1.1. Land Litigation in Kenya.

The court system in Kenya is established under the Constitution and various other Acts of Parliament. The court system has a hierarchy with both higher and lower courts. The legal system is adversarial in nature and therefore the judge is required to be neutral. The judge determines issues of both law and fact and arrives at a conclusion based on the evidence and arguments placed before him or her; juries do not take part in the proceedings.

Litigation is a formal judicial process that makes a determination on the legal issues presented before a judge or magistrate after parties have presented their case. The ruling or decree thereafter concludes the litigation and is enforceable; although aggrieved parties have a right to appeal to a superior court. Kenyan Courts are established under the Constitution and those with special jurisdictions further empowered by enabling statutes.

The Kenyan Court system is primarily divided into criminal and civil law. Land litigation is classified as civil law and due to the significance of land disputes in Kenyan communities generally, there is established a special Court that deals solely with matters touching on proprietary rights over land. It is called the Environment and Land Court and it is governed by the Environment and Land Act (Revised Edition) 2012.

Land litigation is a formal judicial proceeding allowing full examination and determination of all the issues between parties in dispute with each side presenting its case to either a magistrate or a judge. The decision is made by applying the facts of the case to the applicable law. A verdict or decision of the court (or tribunal) can conclude the litigation process and be enforceable. However, the loser can appeal the decision in a higher court. In some cases, the losing party may have to pay the costs of the lawsuit and may have to pay the other party's attorney fees (Oklahoma Bar Association, 2015).

In Kenya, land dispute suits matters are filed at the civil court registry of a lower or magistrates court or at the Environment and Land Court through its registry. The monetary value of the property in dispute is what will often determine in which court a suit is filed. The filed complaint or claim is simply a way of presenting a grievance to a court of law based on the facts of the claim. The plaintiff must reveal the legal cause of action and the help they need from the court against the offending party. Parties are however allowed and encouraged to settle matters out of Court before, during and at times even after the hearing and determination of a suit. If parties cannot agree then the matter must proceed for hearing. This is a very technical process, which has both advantages and disadvantages.

7.2. Merits and Demerits of the Court System in Resolving Land Dispute

This section looks at the merits and demerits of court system in resolving land based disputes in Kenya.

7.2.1. Merits of Land Litigation Process in Kenya

The use of law courts to resolve land related disputes has several merits. These include but are not limited to public record, collaboration, practice, proof, precedents and appeals.

Procedure and the practice of litigation

Land litigation has advantages such as public record, collaboration, practice, proof, petitions, charges and results. When conducted in a court of law, land litigation has the advantage of being a part of the public record. Hence, the judgment is clear for all to see and scrutinise. However, because litigation is between two or more disputing parties, a party can decide to frustrate the process by refusing to cooperate. The court can nonetheless help through deadlines and difficult to ignore requirements. In some instances, a court can use its powers to summarily dispose of a dispute. Also, a court can allow the joinder of third parties in cases where a dispute involves multi-parties.

Precedents and appeals.

The other advantage of law court litigation is that it forms precedents for others to follow later. As a former British Colony, the Kenyan legal system, and a subscriber of Common Law this forms a crucial part of jurisprudence. Disputing parties can therefore use previous rulings to argue for or determine similar disputes (Kenya Law). This can help in speeding up dispute resolution. Besides, Appeals are also another advantage of the formal justice system. They are available to parties who are dissatisfied or aggrieved by with a court's decision. Appeals can create an avenue for redress where a mistake has been made in a decision by a judicial or quasi-judicial officer, or the decision is excessive in law or causes undue hardship to a party.

Court-annexed mediation

Since 2016, the Kenyan judiciary allows for resolution of land related conflicts outside the courts through court-annexed mediation or through arbitration. The court-annexed mediation was officially rolled out in a pilot capacity in the central and busiest court station in the country; Milimani Law Courts. This mediation processes is initiated by the Court, which screens cases already filed and refers the ones that may be more straightforward or less complicated legally, to a mediator with the hope of parties settling. Parties are referred to an independent mediator who registered with Court. Although the procedures are not as formal as the court litigation system, parties are often given tight timelines, and this means that should there be an agreement, small claim matters and other cases fitting the referral criteria can be concluded within a year. Due to its novelty, it is still difficult to assess its successes thus far; but it has been welcomed as a suitable way to reduce a backlog of cases bogging down the judiciary. (Global Legal Group, 2021). Due to the structure of the formal justice system is structured a litigant may be forced to seek the services of an advocate, which together with the costs for filing documents in Court may make the process expensive for an average Kenyan.

Finally, one of the most obvious benefits of formal court litigation is that no matter long it takes, eventually there is a clear winner and a loser. If ADR fails to deliver a suitable settlement or one that is not applicable, litigation remains available, and it offers the most conclusive closure to a dispute. Therefore, according to Mwathane (2015) one should have in mind litigation experts who can come in handy for the resolution of a dispute. Mwathane (2020) goes on to add that formal justice offers more conclusive and lasting ways of resolving land disputes. Mwathane (2020) however, advocates for the use of ADR and only recommends courts of law where ADR has failed.

7.2.2. Demerits of Land Litigation Process in Kenya

Although litigation of land related disputes in the formal court system has its benefits such as allowing an aggrieved party to appeal a decision that has left them aggrieved. Nonetheless, there are also certain challenges unique to it which make ADR more suitable; and in the rural and remote areas, ADR will often be the first dispute-resolution mechanism employed. Despite its merits, land litigation presents a number of disadvantages that make people seeking the resolution of land related disputes to choose ADR over it. This section discusses various demerits of land litigation procedures.

Delays in Courts Processes

Another land related dispute court litigation demerit in Kenya is the delays in court processes. In addition to the recognition by the legal profession and the courts that some disputes are better settled out of court, the long delays pose real barriers to justice thus delaying and indeed denying the very justice sought (Law Reform Commission, 2010). According to a *Newsplex* assessment of the 2016/2017 Judiciary annual report the Kenyan wheels of justice turn very slowly. Many cases (one in six of 52,352) had been in the court system for over 10 years. A fifth of 66,214 cases remained unsettled for five to ten years, one third of 113,766 matters were unsettled for two to five years and while one quarter of 83,046 cases had flagged in the justice system for one to two years. Findings indicate that 28 per cent of adults who needed legal help to resolve their problems in the four years under review had lost hope in finding a solution through the court system. While an equal number were still seeking justice through the legal process, about 46 per cent had found partial or complete solutions to their disputes.

According to Wanzala (2017) the inefficiency of Kenya's legal system and its inability to deliver speedy and affordable justice remains in the spotlight notwithstanding reforms going on in the judiciary. In a country like Kenya where there is a backlog of court cases against a few magistrates, chances of getting justice fast is usually not guaranteed. Additionally, in an UNDP 2017 survey, only four out of every 10 respondents showed confidence in the Kenyan judicial system. One of the reasons cited was the backlog of cases which led to delays in the administration of justice. Furthermore, inadequate access to legal services (67 per cent), complicated procedures (34 per cent), long distances (29 per cent), unaffordable costs (28 per cent) and corruption (23 per cent) were mentioned as the major challenges faced when seeking justice from the courts of law.

Corrupt Practices

The judiciary in Kenya is viewed as not being autonomous from the Executive and therefore a defender of state power rather than a protector of citizens' rights. From 1963 to 2002, the Executive and political class had an alarming hold on judiciary. This fact is indicated in the Kwach Committee, Ringera Committee, and the Panel of the Eminent Commonwealth Judicial Experts reports. Further, a study by the Ethics and Anti-Corruption Commission on Corruption and Ethics in the Judicial Sector in 2014 showed that judicial officers acknowledged the practice of payment of bribes to hide files (35%), abuse of office(24%), bribing the judges, prosecutors, and clerks for favourable judgment (19%) as forms of corruption encountered in the Kenyan judiciary. On the other hand, 41% of the court users cited absenteeism as a form of corruption

encountered followed by bribery in order to hide files (36%) and favouritism (34%) (Kimanthi, 2017). The study shows that before the promulgation of the Constitution of the Republic of Kenya, 2010 the main causes of corruption within the judiciary were political interference, cultural and social tolerance, lack of a proper administrative and legal framework and lack of proper enforcement mechanisms. The Constitution brought with it new reforms which overhauled the structure, legal and administrative framework of the judiciary.

These reasons are cited by the many people who do not have trust in the judiciary to resolve their dispute, hence their resort to ADR mechanisms. Any of these factors that would make a section of the population feel locked out of the formal justice system is likely to result in the deprivation of the opportunities for those people to have their legal rights enforced through appropriate channels.

7.3. Merits and Demerits of ADR Mechanisms in Kenya

The second objective of the study was to evaluate the merits and demerits of ADR mechanisms in resolving land based conflicts in Kenya. This section discusses about ADR mechanisms, examine different types of ADR mechanisms and present their merits and demerits in regards to resolving land conflict.

7.3.1. Land Based Conflict Resolution through ADR in Kenya

To speed up justice, alternative mechanisms for resolving disputes including mediation, arbitration, reconciliation, conciliation, negotiation, have been recognised by the Constitution. These systems are referred to as Alternative Dispute Resolution (ADR)... Kenyan law recognises negotiation, conciliation, mediation and arbitration as acceptable forms of ADR (Omondi, 2016).

In the Kenyan context, Alternative Dispute Resolutions (ADRs) refers to mechanisms or techniques used to settle disputes in a non-adversarial way and operate outside of the courtroom. Article 159 (2) (c) of the Constitution of Kenya defines ADR as reconciliation, mediation, arbitration and Traditional Dispute Resolution (TDR) mechanisms.

The concept of ADR is based on the hypothesis that disputing parties wish to achieve the best result by resolving disputes themselves. The essence of ADR procedures is voluntary access by the parties to a process with a neutral third party (e.g. mediator etc.), who conducts the proceedings, and ensures confidentiality. The major goal of all ADR processes ultimately is the same as litigation, and that is conflict resolution. The important distinction is that ADR focuses on the interests of the parties rather than their legal rights, and in this way, the aim is to resolve the dispute so that the full interests of each party are satisfied. The complexity and technical obscurity of the legislation may make access to justice for citizens more difficult. Societies have, therefore, started to identify alternative dispute solutions and ADR has gained widespread acceptance among both the general public and the legal profession in recent years (European Network of Councils of the Judiciary, 2017).

The formal judicial process in Kenya is very expensive and technical (Kariuki, 2018). This means that the poor who are already vulnerable cannot easily afford it. Moreover, cases may drag on for a long time not only increasing the legal costs but also delaying justice. Thus, ADR offers an alternative through which the poor can access justice. Consequently, ADR has become

a viable tool in the resolution of land based conflicts and disputes. It has increasingly become an option that facilitates justice and access to land for utilization and ownership in Kenya. The use of these alternative forms of justice administration provides the general population with speedy, cost effective and less formal resolutions to land based conflicts. It is against this background that ADR has increasingly become an acceptable form of land dispute resolution in Kenya. Hence, it has been institutionalised in many areas in the Country to enhance dispute resolution and settlement of conflicts (*Enhancing access to justice through alternative dispute resolution in Kenya*, 2018). According to Yamesege et al. (2017) ADR is also utilized for family, civic, commercial, and labour disputes resolution; reducing the time and costs spent in formal courts. Besides, ADR mechanisms are effective in managing conflicts because they are speedy, effective and closer to the people involved in a dispute (Yamasege et al., 2017).

7.3.2. ADR Mechanisms in Kenya

The Kenyan Constitution refers to ADR as reconciliation, mediation, arbitration, and Traditional Dispute Resolution (TDR) mechanisms. Kenya's constitutional order recognizes the symbiotic characteristic and equal value of both the formal justice system and the wealth of traditional systems that have been operating in Kenya at the community level for hundreds of years (International Development Law Organisation, 2018). Article 159(2) of the 2010 Constitution provides that, in exercising judicial authority, the court and tribunals should promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms will be promoted. In the Kenyan context, ADR refers to mechanisms or techniques used to settle disputes in a non-confrontational way and usually operates outside the courtrooms. These approaches range from negotiations between affected parties, multiparty negotiations, mediation, consensus building, to arbitration and adjudication. Traditional Dispute Resolutions (TDRs) focuses on communities resolving conflicts amongst disputants (Nyamasege, Swazuri, M. & Chavangi, 2017).

ADR is now being recognized in the Kenyan legal framework as an important means of dispute resolution mechanism and has been institutionalized in Kenya in various sectors and facilitates dispute resolution in family, civic, commercial, and labour disputes among other areas. This is very encouraging, especially in this era where court cases have stalled for decades now (Nyamasege *et al*, 2017). Furthermore, the National Land Policy recommends negotiation, mediation and arbitration methods of ADR.

However, literature study and field research has revealed that forms of ADR applied on land disputes resolutions mainly favour mediation and arbitration. These types of ADR are mostly preferred in communal land disputes. Negotiations and mediation are considered effective at family and individual levels since common customs and beliefs may contain the emotive nature of land matters, which may render (Ministry of Lands, 2009).

The Constitution of the Republic of Kenya in Article 159 consents to the utilization of alternative forms of dispute resolution including reconciliation, mediation, arbitration and TDR; as long as they do not contravene the Bill of Rights and are not repugnant to justice and morality or inconsistent with any written law. Sub-article (1) of the same Article states that judicial authority is derived from the people and is vested in and shall be exercised by the courts and tribunals

established by or under the Constitution of Kenya. In exercise of that authority, the courts and tribunals are to ensure that justice is done without delay and administered without undue regard to procedural technicalities. The recognition of ADR in Kenya is meant to enhance access to justice; strengthening the rule of law. Both avenues provide justice to the aggrieved persons. However, ADR remains an imperative strategy that ensures that all the persons enjoy their rights and freedoms enshrined in the Constitution of Kenya (Husain, 2015; Muigua and Kariuki, 2015).

This section examines some of the mechanisms employed in ADR including conciliation, negotiations, mediation and arbitration. Although conciliation is often considered interchangeable with mediation (Kishenyi, 2017) a conciliator may play a more engaging role in achieving an agreement between the disputing parties.

Mediation

Mediation is a process of dispute resolution where the parties to the dispute reach a settlement with the help of a neutral third party. Mediation is voluntary and seeks to encourage parties to find solutions that are agreeable to all of them and as such, yields a win for all parties and preserves the relationship between parties. The salient features of mediation are that it emphasises interests rather than (legal) rights and it is cost-effective, informal, private, flexible and easily accessible to parties to conflicts (Kishenyi, 2017). Mediation is a voluntary, non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated settlement, which, when reduced into writing and signed by all the parties, becomes binding.

In Kenya, Mediation is the most common form of ADR used in courts, which has been made part of the civil procedure and practiced as court-annexed mediation with Judges and Magistrates as Mediators. Besides mediation is used in land disputes settlement where it is the function of the village land council to mediate and assist parties to arrive at a mutually acceptable settlement. The Ward Tribunals also use mediation in resolving land disputes (Kariuki, 2011).

Traditional Dispute Resolution Mechanisms

Traditional Dispute Resolutions (TDR) refers to indigenous or community-based dispute resolution mechanisms conducted through councils of elders, peace committees, clan elders and other indigenously recognized sources of authority (Maigua, 2017). Negotiations between affected parties, multiparty negotiations, mediation, building consensus, conciliation and reconciliation may be utilized with the focus being on members of communities' ability to resolve conflicts amongst themselves (Nyamasege, Swazuri, M. & Chavangi, 2017). TDR is a long-standing form of ADR in Kenya employed even in colonial times therefore techniques vary from one community or group to another.

The non-confrontational out-of-court mechanisms or techniques used to settle disputes or TDR mechanisms covered in this section comprise negotiations and conciliation. Negotiation is a process in which the parties to the dispute directly discuss with each other with a view to resolving the dispute. They make proposals and counterproposals until they reach agreeable terms without the involvement of a third party. Failure to find a compromise or reach a settlement will then result in litigation (Kishenyi, 2017).

Conciliation

Conciliation can be a difficult word to define (Kishenyi, 2017). Many authors treat conciliation as being synonymous with mediation, but that can exclude some distinguishing features. Newman¹⁰ discusses conciliation and notes that the conciliator is usually more interventionist than a mediator but still endeavors to bring disputing parties together and assist them in forming proposals on key issues. The author further notes that “given the looseness of the ADR terminology the terms ‘mediator’ and ‘conciliator’ are often used interchangeably.”

Conciliation is a common practice in resolution of labour disputes as it bears the advantage of extending the negotiation process and extends to restoration of a working relationship between the parties. Conciliation mainly and heavily features in employment laws in Kenya and has gained impetus by dint of Article 159 of the Kenya Constitution, 2010 as will be highlighted herein (Nyakundi, 2015).

Conflict Resolution through Negotiation

Negotiation is a process through which parties to a dispute directly engage each other with a view to resolve the dispute. There is no intervention of a third party as an adjudicator or facilitator. Negotiation is the pre-eminent mode of dispute resolution and has the advantage of the parties dialoguing between or amongst themselves with a view to resolve the dispute or work out a compromise. It is the quickest way of resolving disputes, whether commercial or private. Sometimes disputes end after the parties negotiate a settlement. Where a settlement cannot be reached by negotiation, other methods of dispute resolution, including litigation can be deployed (Kishenyi, 2017).

Arbitration in Kenya

In arbitration unlike other ADR forms such as negotiation and mediation, the final decision is not by the parties but by arbitrator. This decision is binding on the parties much like a court’s decision. Arbitration in Kenya is governed by the Constitution of Kenya 2010, and the Arbitration Act, 1995. The Nairobi Centre for International Arbitration Act 2013 is also a significant player in this sector. The Arbitration Act applies to both domestic and international arbitration, governing proceedings and enforcement of the awards. The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) governs the enforcement of international arbitral awards and is incorporated into the Arbitration Act. The Arbitration Act 1995 (as amended in 2010) is based entirely on the UNCITRAL Model Law. Initially, it was a mirror copy of the Model Law, but with the 2010 amendments, the Act now encompasses recent developments in arbitration practice and procedure, including in particular:

A recent survey on justice needs and satisfaction in Kenya conducted by the judiciary, HiiL and the World Bank indicated that only 10 per cent of Kenyans chose the courts as a way of solving

their legal problems. It can be costly to engage with the formal justice system, a majority prefer other modes of dispute resolution, including traditional mechanisms, mediation, and arbitration (International Development Law Organisation, 2018). In another survey carried out in 2016 by UNDP (2017), findings showed how Kenya prefer ADR mechanisms to formal justice system. According to the findings, Nakuru, with 84 per cent, recorded the highest figure of respondents who reported disputes to third party. It was followed in sequence by Tana River (75 per cent), Laikipia (66 per cent) and Marsabit (65 per cent). On the other hand, nearly all respondents who had a dispute in Lamu (100 per cent) and Turkana (91 per cent) resolved them among themselves. The latter indicates high level of community involvement in resolving their own disputes.

This process is often utilised in contract disputes as most commercial and professional contracts contain an arbitration clause or an arbitration agreement. Parties often agree on a selection of an arbitrator from the Chartered Institute of Arbitrators, Kenyan Chapter and thereafter present their case as they would in a court of law. Under Kenyan law, the arbitrator's decision is binding and therefore cannot be appealed against on any other grounds other than the fact that a party was denied a fair hearing. This differs greatly from a usual court case where an aggrieved party has a right to appeal the decision of the Court even though the appeal may not be successful. Arbitration nonetheless has its unique benefits because parties may engage an arbitrator who has considerable knowledge and skills in certain areas from which disputes arise. These specialised skills or exposure may not be readily available in a judge or magistrate.

7.3.3. Merits of ADR mechanisms to resolve land based disputes in Kenya

The use of ADR mechanisms offers different advantages compared to the formal court system, including effective and efficient of resources such as time and money, among others.

Effective and Efficient use of Resources

The use of ADR can reduce the time it takes to resolve disputes, particularly in tribunals and traditional and alternative justice systems, and diminish the backlog of cases experienced by the courts. In the same survey carried out by UNDP (2017) a majority (58 per cent) of the respondents who reported their disputes to a third party indicated that their dispute took less than a month to resolve. Another 23 per cent said their dispute took one to three months to resolve while 19 per cent indicated their case took more than a year.

The use ADR as alternative options to court system reduces complainant emotions, reduces process costs and time. Ultimately, the results will enjoy better support and ownership by the affected individuals and families and are hence less likely to precipitate acrimony and violence afterwards. It is mainly within the informal justice mechanisms where disputes take less than a month to resolve. This is consistent with the general feeling that ADR processes achieve accessible and affordable justice to ordinary people than the formal justice system, and that it dispense justice fairly, speedily and without Discrimination (United Nations Development Programme, 2017).An undoubted advantage of mediation and conciliation is the ability to get speedy access to a process that may produce a satisfactory outcome for the parties in a short space of time. Research on the efficiency of ADR processes indicates that mediation and

conciliation processes often provide a speedy resolution to a specific dispute (Law Reform Commission, 2010).

Other benefits

Alternative dispute resolution can also have indirect benefits. It can increase the effectiveness of courts by reducing bottlenecks. In addition, it can improve trust in the legal system, which may increase foreign investment (Inessa, 2011). Furthermore, as many of these mechanisms do away with formal procedure disputants can have a better sense of being heard by being able to express what they believe are the issue that led to conflict in the first place. It also offers a flexibility that may not be available in a court of law or a quasi-judicial body which may make disputants more willing to abide by the outcome. However, despite these and other benefits ADR is not free from its own shortcomings, and though lauded is not a guarantee of a perfect process; as outlined below.

7.3.4. Demerits of ADR Processes

ADR can be costly. Dissatisfied parties will end up in a court of law anyway. It is also worth noting that the same rule applies to speed. While you would expect ADR to be quicker, this is not guaranteed (Mwathane, 2020). Despite their benefits and people option to resort to them rather formal justice system, ADR processes are not without challenges in their application. These include among others lack awareness in the public about of their availability and uses: making Kenyans not to embrace as an this option (Wanzala, 2017).

Another demerit of ADR is related to the many appeal cases in courts after ADR settlements. “This has sometimes caused lack of confidence by Kenyans in alternative dispute resolution and loss of money and time. One cannot get a ruling on their legal rights, including in discrimination and human rights cases. The issues can still be resolved, but no legal decision will be made on whether or not the law has been broken (Doyle, 2012). In many cases, decisions from a mediation or negotiation may not be complied with by one party, leading the other party seeking a lasting solution through litigation.

In summary, ADR processes are widely and undeniably considered as tool to boost the formal system of justice. Despite their demerits, many people prefer them to the formal justice system. The government should do more than just recognizing them. There is need for the government of Kenya to consider them as a priority in terms not only recognizing their role to peace and justice but also enforce the legal framework for their running and linkage with the formal legal system in terms of structure, and implementation of ruling.

7.4. Conclusions and Recommendations

The formal and informal systems of resolving land related disputes in Kenya have both merits and demerits. The study aimed at providing policy recommendations for challenges facing the judicial and ADR mechanisms for expeditious and fair resolution of land based conflicts in Kenya. In making conclusions and making recommendations, this section answers the study questions.

The decisions of the court are binding, and a litigant can appeal if they are dissatisfied with the court's decision. Secondly, the decision of a court can be used to set precedent for other subsequent cases. Besides, the other advantages of the formal justice system are such as public record, collaboration, practice, proof, petitions, charges, and results.

The demerits of the judicial system in resolving land related disputes include lack of trust in the law court system, delays in courts processes and corrupt practices. Corruption entailed payment of bribes to hide files, abuse of office, bribing magistrates, judges, prosecutors and clerks for favourable judgment paired with absenteeism. These practices also comprised bribery in order to hide files, favouritism, political interference, cultural and social tolerance, lack of a proper administrative and legal framework and lack of proper enforcement mechanisms.

The use of ADR can reduce the time it takes to resolve disputes, particularly in tribunals and traditional and alternative justice systems, and diminish the backlog of cases experienced by the courts. The use ADR as alternative options to court system reduces complainant emotions, process costs and time. Ultimately, the results will enjoy better support and ownership by the affected individuals and families and are hence less likely to precipitate acrimony and violence afterwards. Alternative dispute resolution can also have indirect benefits. It can increase the effectiveness of courts by reducing bottlenecks. In addition, it can improve trust in the legal system, which may increase foreign investment.

On the other hand, ADR can be costly. Dissatisfied parties will end up in a court of law anyway. It is also worth noting that there is lack of awareness in the public about of their availability and uses. Another demerit of ADR is related to the many appeal cases in courts after disputants are dissatisfied with ADR settlements. This in the long run may increase the total cost and time. This study makes the following recommendations in order to enhance the efficiency and effectiveness of the resolution of land related disputes in Kenya:

1. That the Government does more to build capacity by providing formal training at the local level in the different ADR methods to help disputants resolve conflict before it is channelled through the formal justice system.
2. Create a public fund and a corresponding application process that would allow those who cannot afford to privately hire advocates to prosecute or defend their matters in Court through the said fund.

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