

ALTERNATIVE DISPUTE RESOLUTION (ADR)

WHAT IS ADR?

Alternative Dispute Resolution (ADR) refers to any means of settling disputes outside of the courtroom. It refers to all the decision-making processes other than litigation (court cases). Globally alternative dispute resolution is a recognized form of disputes resolving mechanism. In Kenya, ADR can be used to resolve civil cases related to labour and employment, family issues such as succession and divorce. It can be used in matters to do with transferring of property.

TYPES OF ADR

In Kenya there are a number of recognized mechanisms used in Alternative Dispute Resolution.

They include but not limited to

- Negotiation,
- Mediation,
- Conciliation,
- Arbitration
- Traditional Dispute Resolution Mechanisms
- Ombudsman (Ombudsperson)
- Hybrid ADR

Negotiation

Negotiation involves the parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern. Negotiation is an informal process and one of the most fundamental methods of conflict resolution that offers parties maximum control over the process.

Mediation

In mediation, an impartial person called a "mediator" helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves. Mediation leaves control of the outcome with the parties.

Mediation may be particularly useful when parties have a relationship they want to preserve. When family members, neighbors, or business partners have a dispute, mediation may be the

ADR process to use. Mediation is also effective when emotions are getting in the way of resolution. An effective mediator can hear the parties out and help them communicate with each other in an effective and nondestructive manner

Conciliation

conciliation is a process in which a third party, called a *conciliator*, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions. Here the third party may or may not be totally neutral to the interests of the parties and is commonly used when parties are unwilling, unable, or unprepared to come to the bargaining table.

Arbitration

In arbitration, a neutral person called an "arbitrator" hears arguments and evidence from each side and then decides the outcome of the dispute. Arbitration is less formal than a trial, and the rules of evidence are often relaxed. Arbitration is much like a trial, in that the parties can call witnesses, present evidence, and argue the merits of their case to a neutral decision maker. Arbitration avoids the formality, time, and expense of a trial. It may also be appropriate for complex matters where the parties want a decision-maker who has training or experience in the subject matter of the dispute.

Traditional Dispute Resolution Mechanisms

These are mechanisms that have always existed amongst communities for the Management of conflicts. They include what is known today as mediation, negotiation, and other norms.

Ombudsman (Ombudsperson)

Ombudsman (Ombudsperson) is an organizationally designated person who confidentially receives, investigates, and facilitates resolution of complaints. The ombudsman may interview parties, review files, and make recommendations to disputants, but normally is not empowered to impose solutions. Ombudsmen often work as management advisors to identify and recommend solutions for systemic problems in addition to their focus on disputes from individual complainants

Mediation-Arbitration (Med-Arb)

Mediation Arbitration (Med-Arb) is a combination of mediation and arbitration. Initially, a neutral third party mediates a dispute until the parties reach an impasse. After the impasse, the neutral third party issues a binding or non-binding arbitration decision on the cause of the

impasse or any unresolved issues. The disputing parties agree in advance whether the same or a different neutral third party conducts both the mediation and arbitration processes.

Hybrid ADR

Hybrid ADR is any creative adaptation of ADR techniques for dispute resolution.

IMPORTANCE OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR is important in a number of ways,

- ADR is usually faster and less costly.
- The process takes less time hence the cost of the process is less. The time taken to resolve an issue in ADR can be days or a week, which brings down the costs that are incurred. This is in comparison to the court process which takes a long period of time hence the cost increases.
- The process of ADR is more flexible and responsive to the individual needs of the people involved. This is so because parties to any ADR process can decide where and when to meet and also the time. In litigation, parties can only go to the court and cannot place a venue elsewhere and can only be done at the specific day and time.
- The parties' involvement in the process creates greater commitment to the result so that compliance is more likely.
- Alternative Dispute Resolution is more likely to preserve goodwill or at least not escalate the conflict, which is especially important in situations where there is a continuing relationship. This enables the relationship that existed be it blood or business related to continue. Whereas in litigation the relationship is always broken.
- There is Increase Control over the process and the outcome in ADR parties play a stronger position in resolving the process and the outcome. In litigation, the judge or the magistrate is in full control of the process and here the evidence produced in court brings about the outcome of the result.
- In most ADR process, parties gain more opportunity to tell their complete side of the case compared to in a trial.
- Mediation allows the parties to create distinctive solutions that are not possible in a trial.
- Arbitration allows the parties to choose an expert in a specific field to decide the dispute whereas in litigation a judge or magistrate is appointed and the parties have no power to appoint any of them.

- Parties come in time of a flexible nature in ADR whereas in litigation the process only takes place on specific days of the week and never on the weekend.
- ADR can assure win-win outcomes and accomplish real goals while in litigation there is only a win-lose outcome situation. In litigation, the party who loses must bear the cost of the whole litigation.
- The parties involved may finally be "satisfied" with both dispute resolutions process and the result.
- Privacy is kept as each case is held in confidentiality and an improvement of relationships is kept between client and attorney as attorneys can be seen as resolving solutions rather than a combatant.

ADR mechanisms are important in making access to justice easier, lowering costs, resolving conflicts expeditiously, retaining party autonomy, maintaining the parties' relationships and arriving at amicable solutions that ensure co-existence between the parties. ADR is usually less formal, less expensive, and less time-consuming than a trial. ADR can also give people more opportunity to determine when and how their dispute will be resolved.

DISADVANTAGES OF (ALTERNATIVE DISPUTE RESOLUTION) ADR

- Power imbalances in mediation may cause one party to dominate the process with the result that the outcome largely reflects that party's needs and interest and may also affect the legitimacy of the process itself.
- ADR may not be effective if it takes place prior to the parties having enough facts to resolve the dispute.
- *If dispute is not successful then parties may have to put money into an additional lawsuit including the existing ADR*
- Less opportunity to search the other side's case compared to litigation.
- The neutral may charge a fee for service rendered.

CHALLENGES FACING USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

- Lack of capacity in terms of insufficient personnel who can handle disputes using ADR mechanisms
- Lack of understanding on the working of some ADR mechanisms such as mediation as opposed to litigation which has a lot of people with the experience and who are qualified to litigate.

- The public have not been fully made aware of ADR methods of conflict management and their usefulness
- Lack of a reimbursement system for legal fees and other expenses is likely to make litigants resistant to mediation as it implies extra costs to the litigants and there is no provision of taxation of costs even where a mediated agreement is reached. Whereas in litigation the legal fees are set and one can be charged of an offence if they undercharge or overcharge.

LAWS OF KENYA GOVERNING ALTERNATIVE DISPUTE RESOLUTION (ADR)

In Kenya ADR is recognized in law as way of resolving disputes and this is seen in a number of provisions in the laws of Kenya:

Article 159 Constitution of Kenya 2010,

It is provided that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted as long as they do not contravene the Bill of Rights and is not inconsistent with the Constitution or any written law.

Section 47 of the Employment Act

Provides for complaints of summary dismissal or unfair termination.

It is provided under that; *“A labour officer who is presented with a claim under this section shall, after affording every opportunity to the employee and the employer to state their case, recommend to the parties what in his opinion would be the best means of settling the dispute in accordance with the provisions of section.”*

Section 12 (9) of the Labour Institutions Act

Provides that; *“The Industrial Court may refuse to determine any dispute before it, other than an appeal or review, if the Industrial Court is not satisfied that an attempt has been made to resolve the dispute through conciliation.”*

Section 58 of the Labour Relations Act

Provides that;

An employer, group of employers or employers' organization and a trade union may conclude a collective agreement providing for-

- The conciliation of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties; and

- The arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator appointed by the agreement between the parties

CONCLUSION

There is now in place a comprehensive legal framework governing ADR in Kenya. Under article 159 of the Constitution, it is provided that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall all be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law. This makes it acceptable in Kenyan legal system and obligates the government to ensure that the general public is made aware of the same. Most Kenyans are not aware of the ADR mechanism especially in the rural areas and those who are aware of the mechanisms, have no trust on them. This results to ADR not being effectively used in Kenya.

Awareness of ADR can be done through public forums and campaigns which should be set in every area of the country especially in the rural areas so as the public can be self-aware. In the awareness campaigns the public should be advised on the advantages and disadvantages of ADR, and to which issues the ADR system is best.

ADR mechanisms should be effectively applied in resolving a wide range of disputes thus easing access to justice. It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of Rights as enshrined in the constitution must at all times be kept in mind and upheld. This will help in lowering the number of backlog cases in our judicial system.

The future of Alternative Dispute Resolution in Kenya is bright and really promising in bringing about a society where disputes are disposed of more expeditiously and at lower costs, without having to resort to court settlements.