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SCHOOL OF LAW

**A RESEARCH PROJECT PAPER SUBMITTED IN FULFILMENT OF THE
REQUIREMENTS FOR THE AWARD OF THE MASTER OF LAWS (LL.M) DEGREE**

**A CASE STUDY ON THE APPLICATION OF ALTERNATIVE DISPUTE
RESOLUTION MECHANISMS IN THE NANDI-LUO COMMUNITIES' BORDER
CONFLICT**

BETTY ASUNAH

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SUPERVISOR: DR. KARIUKI MUIGUA

23RD NOVEMBER, 2020

DECLARATION

I hereby declare that this thesis is my original work submitted in partial fulfillment of the Master of Laws (LL.M) at the University of Nairobi; and has not been submitted in its entirety or in part at any other University for a degree. All citations have been duly acknowledged.

Signature.....

Date.....

BETTY ASUNAH

(G62/ 12201/2018)

Approval

This Study has been submitted with my approval as the University of Nairobi

Supervisor



DR. KARIUKI MUIGUA

Senior Lecturer,

School of Law, University of Nairobi

23rd November, 2020

DEDICATION

I dedicate this work to all the Nandi and Luo communities and to all believers of the use of Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms in conflict resolution.

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I acknowledge with much appreciation my supervisor, Dr. Kariuki Muigua, for his patience and his tireless, speedy and dedicated guidance. I extend my sincere gratitude to Mr. Okech Owiti for his invaluable time and energy in ensuring this paper got off to a good start. Special thanks to Dr. Scholastica Omondi, Associate Dean, UoN Kisumu campus, and all my LLM lecturers for their encouragement and support during my study. Finally, I thank my family which has been the beacon of light and hope throughout the time I was working on this Paper.

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The Kenyan Constitution 2010

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National Cohesion and Integration Act

Protection of Traditional Knowledge and Cultural Expression Act

List of Abbreviations

ADR	Alternative Dispute Resolution
TDRM	Traditional Dispute Resolution Mechanisms
COVID 19	Corona Virus Disease 2019

Abstract

The study explores the use of Alternative Dispute Resolution (ADR) mechanisms in the Nandi-Luo communities' conflict. The study identified that the application of ADR mechanisms has not yielded a permanent solution between the two communities. The study therefore examined the manner in which ADR has been previously applied with the aim of identifying the gaps and make recommendations as to how ADR could be used effectively.

In discussing the statement problem, data was collected from both field work and desk review. The data collected was then analysed and extracted in order to fulfil the objectives and answer the questions of the study. The research made a justification that the findings of the study would go a long way in helping the development of law and policy in ensuring that the application of ADR resulted into plausible and permanent solution to the conflict. The study was informed by the sociological school of thought and African jurisprudence in discussing the theoretical framework and conceptualization of ADR in conflict resolution.

In analysing the data collected, the study made an argument for the conceptualization of ADR in solving conflicts. The study placed the application of ADR as an entitlement provided under the Constitution of Kenya, 2010 which seeks to enable access to justice; promote restorative justice; enhance social cohesion and provide an avenue for enjoyment of communal rights.

The study found that the application of ADR in the Nandi-Luo communities' border conflict is marked with inconsistency and uncertainty on procedures to be followed. Notable challenges involved lack of policy and legal procedures on how ADR mechanisms like traditional dispute resolution mechanisms would be documented to serve as a reference ground on future discussion. Others findings include the uncertainty involved in language barrier between the two communities and high levels of illiteracy which affect desired understanding.

The study made short and long term recommendations on how the use of ADR could be fostered so as to achieve the desired results. Short term recommendations provide for measures which should facilitate community participation and ownership of the processes while long term recommendations explore how legislative assemblies and executives could design laws and bodies which should record and oversee the implementation of resolutions.

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CHAPTER I

1.0 Background

Alternative Dispute Resolution (ADR) is described as all those decision making processes other than litigation which include negotiation, enquiry, mediation, conciliation and arbitration.¹ Article 159 of the Constitution of Kenya 2010, includes traditional dispute resolution mechanisms as a means of ADR. The practical application of ADR is reflected in conflicts such as border disputes over natural or artificial resources globally.² In Kenya, border disputes have witnessed chaotic co-existence among communities.³

The conflict in the Nandi-Luo border involves two counties: Kisumu and Nandi. It is centred in fighting over boundaries and natural resources in the disputed territory. Further, according to Centre for Community Dialogue and Development,⁴ other causes of the conflict revolve around political incitement in the election years, a decision by the Provincial Administration and Ministry of Special Programmes to repossess idle land, especially from Asian families, cattle theft, poverty, prejudices held by one community against the other, and decision by the government to privatize the sugar companies and the issue of absentee landlords.⁵

Although the Nandi-Luo communities border conflict has been shown to manifest itself over the years, and especially, during the election years (1992, 1997, 2002, 2012 and 2017), there exists little writings on why efforts to resolve it have not yielded a lasting solution.

¹ Fenn, P, "Introduction to Civil and Commercial Mediation in Chartered institute of Arbitrators, (2002) workbook on mediation, CIIArb, London, p 50-522

² Larry Bakken, 'International Joint Commission: Water Conflicts and Dispute Resolution' (2008) 31 Hamline L Rev 593

³ Abra Lyman and Darren Kew, 'An African Dilemma: Resolving Indigenous Conflicts in Kenya' (2010) 11 Geo J Int'l Aff 37

⁴ Center for Community Dialogue and Development, 'Mitigating, potential conflict along the Luo- Kalenjin border', P 7

⁵ibid

The National Cohesion and Integration Commission (NCIC) has applied the use of ADR in the resolution of violent conflict along the common border of Nandi and Kisumu counties since 2013.⁶ This has led to the setting up of a thirty (30)-member cross-border peace committee to ensure continued peace.⁷ The committee has facilitated the signing of peace pacts like the Chemelil Declaration in 2015 which was witnessed and endorsed by the Commission. Since then, there have been several measures put in place in sustaining a harmonious existence between the communities.

Other efforts have been made by private institutions. David Cooke confirmed that there had been peace forums held by the Centre for Community Dialogue and Development in a bid to bring the community leaders together to talk about and facilitate mediation.⁸ Okoth *et cetera*, observe that Shalom, a Center for Conflict Resolution and Reconciliation,⁹ began an intervention aimed at reconciling parties and established peace committees comprising leaders from both the Nandi and Luo communities. In 2017, more post-election skirmishes hit the Nandi–Luo border causing more deaths and leading to a number of reconciliatory meetings.

The above efforts notwithstanding, the violence at the border is yet to end. December 2014 witnessed violence between the two communities leading to the burning of sugar cane plantations, especially on farms owned by members of the Luo Community. In January 2016, more violence was witnessed leading to 105 deaths, 11 injured, 10 homes torched, and animals stolen.¹⁰ In May 2018, there was a report of the Nandi County Government coming up with fresh demands for realignment of the boundary as a result of which they set up a team to petition the

⁶ NCIC Briefing Memo on achievements, Challenges and Recommendations (2014-2018) , August 2018

⁷ Ibid

⁸ David Cooke, ‘Centre for Community Dialogue and Development’

⁹ Geoffrey Okoth, Joyce Wamae, Roselyne Serem, Arthur Mageri, ‘Reconciliation paper working to end the cycle of violence in the tribal lands in Eastern Africa’ Kisumu/Nandi project Team, Shalom Centre for Conflict Resolution

¹⁰ Ojwang Joe, Daily Nation, January 9th 2016

National Land Commission to readjust the border to place a number of urban areas in Muhoroni Sub-County within its border.¹¹ This raised further tension along the border, with fear of even more violence expected.

This study examines the process in which the ADR mechanisms have been applied in a bid to resolve the Nandi- Luo communities' border conflict.

1.2 Statement of the Problem

The Nandi-Luo communities' border conflict has resulted into enormous loss of property and human life. This has caused disruption to the social and economic activities of the Luo and Nandi communities. ADR mechanisms have been applied differently by different actors aimed at solving the conflict. However, such attempts to solve the conflict have been futile. This has been evidenced through eruption of violence and fears of such continuation in the future. Further, the processes of applying ADR mechanisms have not been harmoniously coordinated: different actors are applying different ADR mechanisms simultaneously. This has created confusion on a clear way forward to yielding a permanent solution. This study seeks to discuss how the processes of ADR mechanisms have been applied to the conflict with the aim of making recommendations on how ADR mechanisms can be best applied in solving the conflict.

1.3 Research Objectives

The Research paper aims:

1. To discuss the legal conceptualization on the use of ADR in solving the Nandi-Luo communities' border conflict

¹¹ Daily Nation, May 17th 2018

2. To illustrate the findings on how ADR mechanisms have been applied in solving the Nandi-Luo communities' border conflict
3. To establish the manner in which ADR mechanisms may help achieve a sustainable solution in the Nandi-Luo communities' border conflict

1.4 Research Questions

The research aims to answer the following questions:

1. What are the legal conceptualizations on the use of ADR mechanisms in solving the Nandi-Luo communities' border conflict?
2. How have ADR mechanisms been applied in solving the Nandi-Luo communities' border conflict?
3. How can the ADR mechanisms be designed to provide a permanent solution to the Luo - Nandi communities' border conflict?

1.5 Hypothesis

The existing legal and policy framework in Kenya on land and environment based conflicts inadequately and insufficiently addresses the procedure in solving inter-community border conflicts. Thus, there is a lacuna on how ADR mechanisms can be applied at resolving the conflict under study.

1.6 Justification

The findings of this study stand to provide practical solutions in solving the Nandi-Luo communities' border conflict through three main ways.

Firstly, the findings will aid in the development of law and policy both at the national and county levels geared at providing procedures on how ADR should be applied in solving inter communities' conflicts like the border conflicts.

Secondly, the findings of the study will aid in advancing research in the area of applying ADR in inter communities border disputes in Kenya over natural resources.

Thirdly, the use of ADR will solidify the traditional dispute resolution mechanisms as a key ADR foundation for solving community-based border disputes.

1.7 Theoretical Framework

This study deals with conflict within a society and consensus-oriented approach through use of Alternative Dispute Resolution mechanisms for a lasting solution to the conflict. It, therefore, adopts sociological jurisprudence and African jurisprudence as its framework of analysis.

1.7.1 Sociological School of Thought

The term “sociology” was invented by Auguste Comte¹² whose argument was that there existed four means of social investigation, to wit “observation, experiment, comparison and the historical method” but that society was the legitimate object of any scientific study. Emile Durkheim¹³ influenced the sociological understanding of law, by arguing that law defines society with two basic types of “societal cohesion”, namely mechanical solidarity and organic solidarity through repressive and restitution law, and that damages and mediation, which exist in any society, form part of restitution law. He further argues that although social facts are not tangible or physical entities, they need to be considered and treated as “things” since they are as real as physical objects which influence, inhibit and constrain people’s actions. Besides, he posits

¹² Lloyd’s Introduction to Jurisprudence, Ninth Edition, Michael Freeman FBA, Published in 2014 by Thomas Reuters (Legal) Limited, trading as Sweet & Maxwell, 8-002, page 702

¹³ Émile Durkheim “The Division of Labour in Society” (1893)

law as the preeminent social fact and as an institution, has been around for long because many people desire a society with a legal system. The notions of societal cohesion are integral for the Luo and Nandi communities who struggle for the natural resources along the border. The fact will remain that the communities' population will ever increase and the demand for the specific resources will increase, hence potential conflicts in the future. The solution then lies in developing mechanisms which would balance the interests of ever growing demand against an ever diminishing resource. This in the end would emerge as the best tool in fostering the societal integration of the two communities. Sociological school of thought which opines that the law emerges from the culture and social norms provides the best theoretical justification. Further, the legal recognition of traditional dispute resolution mechanisms as a component of ADR promotes the reflection into the norms and culture of the communities in order to strike the balance in using the diminishing resources.

This study focuses on members of a society whose actions require to be regulated by law, a position that was advanced by Roscoe Pound¹⁴ who noted that social facts should be incorporated in making, interpreting and applying law so as to reflect human needs and aspirations. His concern was the effect of law in a society with a need to gather factual information and statistics for a functional approach to law.

In seeking to address the origin and causes of the conflict between members of different communities and use of ADR in resolving such conflict to ensure the peoples' various interests are taken care of, this study strikes a balance between law and society and emphasizes use of law to ensure that competing interests at individual, community and public level are objectively and correctly identified and taken care of for the greater good of the society and for its posterity.

¹⁴ Roscoe Pound, *An Introduction to the Philosophy of Law* 47 (1922)

Management of such conflict must, therefore, take into account the various social issues and their root causes to take care of each party's needs and values, while ensuring that society does not disintegrate and that concerned parties and their generations continue to peacefully co-exist and benefit from available resources.

1.7.2 African Jurisprudence

A reflection on the traditional lifestyle of the African communities invites the analysis of African Jurisprudence as a theoretical foundation in solving border disputes. The African Jurisprudence observes that in African societies, dispute settlement is often connected with a traditional political authority the fullest expression of which is found in chiefs, traditional rulers, family head, and headmen, among others.¹⁵ Concepts like Ubuntu have found place in conflict resolution within the African communities. Ghebretkle and Rammala,¹⁶ discuss the traditional conflict resolution methods through which African societies derived means which are pure from manipulation of politics and inhumane interests. They hold that concepts like Ubuntu stand to solve many conflicts in Africa as they combine an ideology of peace over sanctions. They hold that:

Ubuntu combines traditional conflict prevention and peace-building concept. It embraces the notion of acknowledgement of guilt, showing of remorse and repentance by perpetrators of injustice, asking for and receiving forgiveness, and paying compensation or reparation as a prelude for reconciliation and peaceful coexistence [and] expresses the African philosophy of 'humanness' and it is a notion that has cultural significance in diverse African societies, though the concept is widespread in southern, central and eastern Africa.

¹⁵ Nyarko Tonny Acheampong, 'African Jurisprudence' an article presented at the faculty of Law, Kwame University of Science and Technology, 21.1.17

¹⁶ Tsegai Berhane Ghebretkle and Macdonald Rammala, 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' (2018) 12 Mizan L Rev 325

Closely related to Ubuntu is the Gacaca system applied in Rwanda. This system focuses on healing and restoration as compared to formalistic court or tribunal sessions. Eberechi opines that:¹⁷

‘Gacaca, like most African traditional institutions, is part of the culture of the people and established upon principles of morality and reverence.’

The Kenyan constitutional jurisprudence appreciates and recognizes the sanctity of African jurisprudence on dispute resolution. The Constitution of Kenya also encourages communities to settle environmental disputes through recognized local community initiatives which are in line with it, and it is appreciated that there existed indigenous conflict resolution in African traditional societies. Nyarko Tonny Acheampong observes that in Africa, indigenous mechanisms used both local socio-political actors and traditional community-based judicial and control structures to manage and resolve conflicts within and between communities. Negotiations were the mode for resolving conflicts in the African society. African Jurisprudence, therefore, has great impact in use of ADR mechanisms in resolving community conflicts. However, the success of any mechanism is dependent on proper identification of the basic interests at issue and their roots.

¹⁷ Ifeonu Eberechi, 'Who Will Save These Endangered Species - Evaluating the Implications of the Principle of Complementarity on the Traditional African Conflict Resolution Mechanisms' (2012) 20 Afr J Int'l & Comp L 22

1.8 Literature Review

A lot has been written on the application of various ADR mechanisms in solving border conflict. The study will discuss the literature relevant to the Nandi-Luo border conflict in three main themes.

- i. The use of ADR to resolve land conflicts
- ii. The effectiveness of ADR to Nandi-Luo border conflict; and
- iii. The framework which ADR uses while solving the border conflicts.

1.8.1 Use of Alternative Dispute Resolution Mechanisms to resolve border (land) conflicts

The major theme under discussion by many scholars is conflict management. Under this theme, scholars worldwide argue for either conflict settlement or conflict resolution.

1.8.1.1 Conflict Management

African writers like Olanike¹⁸ recognize the basic norm that African societies are socially related and interact as such. In his 2017 article analyzing conflict management in Nigeria, he observes that African conflict can be good or bad depending on how the conflict is managed. Thus conflict management becomes a key tool in managing any further escalation of the conflict beyond control of any of the parties involved. To him, conflict management is akin to conflict resolution. This is due to the fact that the conflict might not be fully resolved but it can be controlled to avoid escalation. He observes further that traditional African communities serve as a better tool in conflict management. This is because the traditional system is based on truth. According to him, the invoking of ancestral factors help the communities arrive at truth. Further, Olanike encourages the use of traditional methods to enhance social control for members of the communities involved.

¹⁸ Olanike S Adedokun-Odeyemi, 'Role of Traditional Leaders in Conflict Resolution and Management in Nigeria' (2017) 20 Nigerian LJ 303

The significance of Olanike's writing is of great importance to this research. Firstly, the time the article was written falls within the period of post 2010 when Kenya enacted a new constitution which recognized the use of ADR. His contribution on the role played by traditional processes and actors in solving the processes makes a case for the involvement of traditional leaders for this conflict. Secondly, Olanike's writing discloses lack of rich Kenyan based writers who advance the use of traditional mechanisms in addressing border based conflicts. The Nandi-Luo communities' conflict can better be solved if the traditional mechanisms could be accorded to the legal and theoretical support in terms of development of procedures within which it can be exercised. The gap witnessed among many Kenyan communities is that the knowledge on traditional dispute resolution mechanisms is passed through oral tradition. There has been no community which has embarked at documenting the procedures for future referencing. County governments, through the county executives and county assemblies have neither designed policies nor legislation to protect this knowledge.

Kenyan legal academicians discuss conflict management under two themes: conflict resolution and conflict settlement. Muigua discusses these two concepts in solving conflicts. On one hand conflict resolution is seen as an approach which digs out the root cause. It examines the genesis and tries to offer a plausible solution which is built majorly through consensus. Kariuki notes that "resolution is the mutual construction of a relationship which is legitimate because the needs of the parties and removal of the underlying causes of the conflict can be satisfied".¹⁹ Such an approach has been seen as best applied through the use of mediation and negotiation.

However, the author fails to capture the importance of TDRM in conflict resolution. This study notes that for border conflicts in Kenya, conflict resolution can be better appreciated once it is

19 Kariuki Muigai 'Alternative Dispute Resolution and Access to Justice in Kenya' (2015) Glenwood Publishers Limited 13

dominantly centered in TDRM. This includes the using of informal legal processes rather than the formal procedures we currently use in ADR.

1.8.2 Effectiveness of ADR Mechanisms

The effectiveness of the ADR mechanism used relies heavily on the legitimacy and acceptance of the processes by the communities. In border conflicts, the application of TDRM becomes more effective and meaningful when the formal procedures are locked out. This reality is noted in the observations of Muigua. He notes that:

TDRs are inconsistent, uncoordinated, scattered and jurisdiction is abstract. Whereas the formal legal system is individual oriented, the TDRs are communal based. Further, the focus of formal law is allocation of rights hence retributive and punitive in nature while the primary goal of TDRs is reconciliation, restoration and peaceful-coexistence in the community.

These findings favour the concepts of conflict resolution in border disputes like the Nandi-Luo border conflict. James Ndung'u Njuguna²⁰ examines the effectiveness of Arbitration in Management of Community Land Conflicts in comparison to other ADR Mechanisms and finds that the outcome of arbitration is tied to the legal process and may be challenged thereby leading to delay. Arbitration may also be technical and requires expertise on account of the arbitrator, yet these are the issues that ADR seeks to avoid. He concludes that arbitration is thus not recommended for management of community land conflict.

Njuguna's examination is limited to the formal arbitration under the Arbitration Act, 1995. He fails to capture the traditional arbitration which uses village elders and chiefs who arbitrate in

20 Arbitration as a tool for management of Community Land Conflicts in Kenya) A research paper submitted in partial fulfillment of the requirements for the award of the master of Laws Degree of the University of Nairobi) School of Law, November 2018

land conflicts. His understanding limits TDRM to encompass only mediation and negotiation but locks out arbitration.

1.8.3 Framework of ADR

Most ADR mechanisms have no hard and fast rules governing their (legal) framework. Githu Muigai looks at the practice governing Arbitration²¹ as governed by the Arbitration Act, 1995 which requires parties to agree in writing to be subject to arbitration and to agree on the arbitrator or the arbitral panel, venue, language and the form the arbitration should take.²²

Legal framework aside, it is also important for this study to establish the kind of structures or principles necessary for ADR mechanisms to be effective. The United Nations Interagency Framework Team for Preventive Action²³ observes that whereas peace negotiations and agreements are useful, the focus should not be on the quelling of violence but on land related causes so as to address the root cause of the matter. The root cause might thus be political instigation, cultural misunderstanding or communal beliefs on entitlements on certain privileges against the other community. For these root causes to be solved, a system designed to encourage participation and flexibility among the community members is necessary.

The Guidance Notes of the Secretary General,²⁴ notes that in cases where land is a root cause or trigger of violence (like in the Nandi – Luo conflict), there should be negotiations, with special attention to the displaced and to issues of security of tenure as well as any historical injustices. However, there lies a question on who should facilitate the negotiation and how participants to the negotiation table shall be selected. These issues have not been captured in any policy or law but left for a spontaneous occurrence. While the study agrees that negotiations should exist, it

21 Githu Muigai, *Arbitration Law and Practice in Kenya*, (2011) Law Africa Publishing (T) Ltd 2011, p 4

22 *ibid*

23 The United Nations Interagency Framework Team for Preventive Action: Toolkit and Guidance for Preventing and Managing Land and Natural Resource Conflict: Land and Conflict.

24 Guidance Note of the Secretary General: The United Nations and Land and conflict, March 2019

goes further to suggest that there should be some procedures on how participants should be selected and further mechanisms on how information discussed should be recorded for accessibility by future generations. There should also be settlement planning, access to housing as well as giving priority to implementation of restitution since more often than not, the focus of peace negotiations and agreements is disarmament and elections, rather than land related causes. The notes advise that issues of housing, land and property should be properly addressed and compensation considered for those who have lost land and other property.

The USAID issue brief,²⁵ notes that there is need for engagement of the contending leadership who are usually left out of negotiations but who may come out with outdated land ideologies. It is necessary to engage them in their control arrears and discuss key land issues with them, to find out if they are involved in any reform programmes so as not to sabotage any ongoing talks or agreements reached. The brief does not provide how this is to be achieved. However, the study opines that establishment of procedures on how negotiations are conducted will evoke the need of ensuring documentation of all processes and availing such information for all community members who are otherwise not in a position to participate in the negotiations.

Masataka Okano²⁶ advises that good communication be maintained with residents whose views should be clearly understood and considered in any settlement. He refers to rules of engagement in negotiations such as fostering mutual confidence between political leaders, having secret negotiations and setting a proper stage for negotiation. The need for this is to foster legitimacy and acceptance of the processes being carried. However, such acceptance will not be achieved when there is no clear legal framework setting out the rules of engagement. This stresses the need for the calling of a legal framework on the need of fostering the use of ADR in a manner

25 USAID, 'Land Disputes and Land Conflicts, U.S Agency for International Development', Washington DC 20523-100

26 Masataka Okano, 'How to Deal with Border issues: A Diplomat Practitioners Perspective'

which preserves and documents the procedures followed. The legal framework would further provide for the institution which oversees the implementation of any agreement and resolution arrived at.

The above observations cement the place of TDRM in conflict resolution in border disputes. The formal law should encourage its usage, but fold its hands on how it is used to achieve justice. TDRM might use mediation and negotiation and discussions in arriving at its decision but should never be ‘coerced’ to use the rigorous processes marked with negotiation, mediation or any formal discussions.

1.9 Research Methodology

1.9.1 Research Design

The study adopted a descriptive design leading to collection of qualitative data that was used to examine why use of ADR mechanisms contained in the available data have not worked. The paper presents analyses and interprets the primary data *vis a vis* the existing literature to expose the existing gaps and come up with recommendations going forward.

1.9.2 Types of Data used

The research has utilized both primary and secondary data sources. In primary sources, it has relied on the Constitution of Kenya and other written laws. Primary data has also been collected from a sampled population that comprises the Focus Group Discussions (FGD) and key informant interviews through semi and non-structured questionnaire. Secondary sources used are text books, journal articles, newspapers and electronic repositories including internet and online libraries.

1.9.3 Research/ Field Site

Primary data was collected in Tinderet and Muhoroni sub-counties within Nandi and Kisumu counties, respectively. Special emphasis was laid on Chemelil and God Abuoro locations within Chemelil/Tamu and Muhoroni/Koru wards within Muhoroni Sub-County as well as Kapkitony and Chemase locations within Songhor/Soba and Chemelil/Chemase wards respectively within Tinderet Sub-County.

The reason for this choice was that they are the locations, wards, and sub-counties where most of the flash-points lie and are, therefore, most affected by the conflict. Focus group discussions were held in Mombwa and Chemase centres within Nandi County and in Kipturi and Chemelil centres within Kisumu County, with the discussions ranging between one and a half to two hours.

1.9.4 Sample size and procedure

The sample was a population drawn from each of the four (4) locations of the border Sub-counties of Tinderet and Muhoroni within Nandi and Kisumu Counties respectively, targeting youth, women and elders who have either witnessed or been affected by the conflict and who have been party to the various attempts made through use of ADR to resolve it.

Conducted at a time when fear of the Covid-19 pandemic was real and when the Government had issued directives restricting gatherings, convenience and purposive sampling method was used to identify the respondents as well as only seven participants for each of the four focus group discussions (FGD) spread across the four locations mentioned above.

The discussions enabled the participants to freely give their views and opinions on the causes and effects of the conflict, use of ADR mechanisms to resolve them as well as express their feelings about what they felt were their successes or failures.

Thirty nine key informants were identified and included those with wide knowledge of the area and who have participated in the dispute resolution in one way or another. The sampling method chosen was necessary given that the study was centered more on the process than use of the ADR, which was a constant. Among the respondents in this category are officials of the National Land Commission, Deputy County Commissioners and Sub-County Administrators of both Tinderet and Muhoroni sub- counties, chiefs from two locations in each of the two Sub-counties whose area has been prone to the conflict, community-based opinion leaders drawn from political and religious fields as well as leaders of selected local civil society organizations.

The sample was also fairly balanced in terms of gender and youth and was therefore, in the researcher's view, representative of the two sub-counties under study.

1.9.5 Data Collection Tools

The tools used in the study were questionnaires comprising structured questions to capture the bio data and non-structured questions as well as interview guides on the thematic areas. The questionnaires were self-administered by the Respondents following guidance interviews by the researcher or her assistants. The interviews were scheduled at a time convenient to the interviewees, upon appointment. A few impersonal interviews were conducted online, through the drop off-pick up method, preceded by telephone calls in both instances to introduce the purpose and nature of the interview.

Interview guides containing open-ended questions were used for the Focus Group Discussions which were conducted by the researcher and one assistant in each instance with the assistant leading and the researcher taking notes. The limit of the number to seven participants per group did not, in the researcher's view, compromise the quality of the research in so far as each group consisted of members of both gender, youth and the elderly. The discussions gave the

participants an opportunity to freely express their views and beliefs and led to a diversity of opinion.

1.9.6 Ethical Considerations

Conducted at a challenging time when Covid-19 had just disrupted normal office operations, the researcher had the advantage of having worked with the first County Government of Kisumu as a result of which her County administrators easily opened their doors to her and introduced her to their counterparts. Through them, the researcher was introduced to the respondents to whom the nature and purpose of the research was explained. The respondents were comfortable with the letter of introduction given by the university allowing her to do the research and each gave an informed consent by agreeing to take part in the interviews and the discussions. High level of confidentiality was maintained on the information given.

1.9.7 Limitations

The conflict under study having begun way before independence, there was hardly any recollection by the respondents of the nature and process of any ADR mechanisms, if any, that was used to resolve the conflict at the time.

Besides, the research having been conducted between May and June 2020 when fear of Covid-19 pandemic was real and when the Government had issued directives on social distancing, it was difficult to sample a larger population in conducting the focus group discussions or interviews.

1.9.8 Data Analysis and Presentation

The researcher has used a content analysis approach, by classifying the data obtained under the various themes and thereafter verifying the data using secondary sources. The analysis of the

data is done using M/s excel. The findings are presented in the form of frequency distribution tables, graphs and pie charts.

1.9.9 Approach to collect data on the use of ADR

In order to understudy use of ADR in resolving the conflict, the study targeted officers from the offices of both the National and County Government (formerly Provincial) Administration, National Land Commission as well as well as Church, NGO and political leaders plus community members who had been involved in resolution of the dispute one way or another. These respondents are captured in appendices III (1-11), IV (1-7), V (1-7), VI (1-7) and VII (1-7), while distribution of the Focus Group Discussions is as captured in appendix VIII (1-4).

The respondents were drawn from both gender and included youth and elders. In terms of ratio, the gender representation was as follows:

S/N	Distribution	Number	
		Frequency	%
i)	Male	19	48.7
ii)	Female	20	51.3
	Total	39	100

Figure 1

In terms of age distribution, the frequency of the youth as against those above 35 was as follows:

S/N	Age	Response	
		Frequency	%
i)	18-30	9	23.1
iii)	31-40	9	23.1
iv)	41-50	7	18.0
v)	50-65	8	20.5
	Above 65	6	15.3
	Total	39	100

Figure 2

The study was clearly balanced in terms of gender and youth, which was necessary to come up with a representative data. This enabled the study fulfill its objectives.

1.10 Chapter Breakdown

Chapter one gives an overview of the study and covers the background, the statement of the problem, justification, hypothesis, the theoretical framework, literature review and methodology.

Chapter two discusses the conceptualization of ADR in conflict resolution.

Chapter three discusses the causes of the conflict, the different ADR mechanisms that have been applied, the challenges faced and any successes achieved, while presenting best practices that have worked.

Chapter four gives the conclusion and recommendation of the study in order to ensure that the end and the means to the end in applying ADR mechanism in the Nandi-Luo border conflict is done correctly, while appreciating both the traditional and modern evolutions in the way and manner of life between the communities

CHAPTER II

2.0 THE CONCEPTUALIZATION OF ADR IN CONFLICT RESOLUTION

2.1 Introduction

This chapter lays basis for the legal conceptualization on the use of ADR in conflict resolution among African communities in solving inter community conflicts. The study will discuss this conceptualization in five main themes:

- i. ADR mechanisms as a constitutional entitlement under the Constitution of Kenya, 2010
- ii. ADR mechanisms as an avenue of access to justice
- iii. ADR mechanisms as an avenue for social cohesion among communities
- iv. ADR mechanisms as an avenue for exercising communal rights
- v. ADR mechanisms as an a avenue for restorative justice

2.2 ADR as a Constitutional Entitlement in Conflict Resolution

The Constitution of Kenya 2010 recognizes the use of ADR as an avenue to solve disputes in divergent ways. ADR can be viewed as an avenue which stems from the enjoyment of bill of rights,²⁷ and as a constitutional pillar of establishing the judicial authority.²⁸ Due to the fact that the key actors in this conflict are the Nandi and Luo communities, ADR is best suited avenue of solving inter community disputes to enable harmonious co-existence between the communities.²⁹ This is recognized through the use of traditional mechanisms of addressing inter community conflicts which are viewed as mechanisms of ADR.³⁰ Traditional dispute resolution mechanisms

²⁷ Constitution of Kenya, chapter iv

See Also: Sukhsimranjit Singh, 'Access to Justice and Dispute Resolution across Cultures' (2020) 88 Fordham L Rev 2407

²⁸ Constitution of Kenya, article 159

²⁹ Oyeniyi Abe and Smith Ouma, 'A Re-Assessment of the Impact and Potency of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa' (2017) 6 Ave Maria Int'l LJ 1

³⁰ Adenike Aiyedun and Ada Ordor, 'Integrating the Traditional with the Contemporary in Dispute Resolution in Africa' (2016) 20 Law Democracy & Dev 154

are centred in cultures of communities. These cultures are recognized under the constitution. Article 11 of the Constitution stresses the importance of culture in the Kenyan polity. Culture being a foundation for the Kenyan society has imbued in itself unique skills in solving diverse conflicts that might be arising within communities. This is appreciated with the reality that diverse cultures have unique traditional knowledge practices which can be used in solving long lasting conflicts like border conflicts. Thus the Nandi community procedures in solving disputes might slightly differ from the Luo's. However, a consensus can easily be arrived at in addressing any disparity as the main goal is reconciliation. The compromise must be balanced in weighing the gains and losses of any route taken. It becomes a balancing technique only handled by traditional community experts. Consequently, solving conflicts techniques can be viewed as traditional knowledge which is an intellectual property among the specific communities.³¹

Traditional dispute resolution mechanisms as an intellectual property mechanism in solving disputes has its deep relevance to border conflicts amongst the Kenyan communities. Article 60 (1) (g) recognizes as a principle the need to use local community initiatives in settling land disputes amongst communities. This suggests that beyond the formal mechanisms known in the modern education system, traditional dispute resolution mechanisms stand to provide an alternative option in arriving at a consensus in border rows.³² This is a sublime recognition on the traditional knowledge which might have been swept away with the modern education, yet stands better to offer longer lasting solutions in land rows amongst communities.³³

Article 2 (4) of the Constitution further recognizes the application of customary law and practices in the legal system. Customary law is characterized with diverse recognition of cultures

³¹ Constitution of Kenya, article 11 (2) c

³² *ibid*

³³ John Mukum Mbaku, 'Constitutionalism and Africa's Agenda 2063: How to Build "the Africa We Want"' (2020) 45 *Brook J Int'l L* 537

and the traditional knowledge in solving various disputes in Kenya. These disputes include land disputes like the Nandi-Luo communities' border conflict. Thus, customary law provides another avenue in exploiting and applying traditional knowledge in conflicts in addition to the formal processes.

The fundamental recognition of ADR as an alternative to solving of conflicts is provided under Article 159. This Article cements the place of ADR in the legal system. It recognizes as a principle of the exercise of judicial authority the promotion of ADR and in specific the traditional dispute resolution mechanisms.³⁴ The practical impact of this recognition stresses on the reality that it is legally challenging to present a class suit on behalf of an ethnic community against the other community. Further, the test of legitimacy is found in the application of ADR in border disputes as the members of the communities affected ought to own the processes.

2.2.1 Strengths of recognition of ADR under the Constitution of Kenya 2010

The greatest impact of the Constitution of Kenya 2010 is the constitutional recognition of ADR and its mechanisms like TDRM as a principle of judicial authority. The constitutional recognition overrides any statutory recognition which is marked by varied interpretation as witnessed in the SM Otieno case³⁵. The constitutional recognition further strengthens the confidence in using ADR and especially TDRM as they provide an avenue where local language is carried out in a manner which everyone understands. Muigua observes that "their inclusion in the Constitution of Kenya 2010 is a restatement of these mechanisms' effective application of traditional conflict resolution mechanisms in Kenya can indeed bolster access to justice for

³⁴ Constitution of Kenya, article 159 (2) c

³⁵ Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another (1987) eKLR

all...”³⁶ Further, as Keli observes, the TDRM “are much cheaper and more acceptable”³⁷ among the populations involved.

2.2.2 Weaknesses of recognition of ADR under the Constitution of Kenya 2010

The application of ADR and in specific TDRM in two or more communities poses a challenge of fostering understanding and consensus. Further, TDRM approaches in the two communities might be varying. However, the umbrella goal of TDRM should override any procedural or substantive disagreement between the communities involved.

2.2.3 Prospects for ADR under the Constitution of Kenya 2010

The constitutional recognition of ADR and TRDM provides a rich avenue for African communities to document the traditional procedures for the future generations. As currently practiced, the knowledge is passed through oral tradition.

2.3 ADR as an avenue to access to justice

ADR when used to resolve conflicts like the Nandi-Luo communities’ border disputes plays a key role in facilitating access to justice. Haley³⁸ opines that the use of ADR in conflict resolution is not entirely new in the African contest. She states that the conventional mechanism of ADR find their place in the African customary practices hence removing the cliché that ADR has western approach for accessing justice. She observes:

There is nothing new about the use of informal and non-adversarial dispute resolution in African states. Many of them have a long tradition of using customary dispute resolution processes including negotiation, mediation, and arbitration to resolve legal and social conflicts

³⁶ Kariuki Muigua ‘Natural Resources and Conflict Management in East Africa’ (2014) paper presented at the 1st NCMG East African ADR Summit held on 25th to 26th September, 2014

³⁷ Jemima Keli ‘Suitability of Traditional Justice Mechanism as Alternative Dispute Resolution Mechanisms’ (2016) 4 (1) Alternative Dispute Resolution

³⁸ Jacqueline Nolan-Haley, ‘Mediation and Access to Justice in Africa: Perspectives from Ghana’ (2015) 21 Harv Negot L Rev 59

The successful incorporation of ADR mechanisms as an avenue of access to justice among African communities must find a way in the recognition of the local traditions. These traditions must be incorporated in order to awaken the acceptance of the current ADR mechanisms in solving conflicts.³⁹ The idea is to remove any perception of ADR mechanisms wholly being a western conception and placing it into the African context which long ago witnessed the application of ADR mechanisms. Probably the fear is as a consequence of colonization which 'brainwashed' the traditional perspectives of justice and brought more formal and procedural technicality on how access to justice should be facilitated.⁴⁰ This in the end brought out tensions between the traditional conception on access to justice and the western approaches. Haley observes this tension when she states that:⁴¹

Given the tensions between important values and normative principles of traditional and modern dispute resolution, a simple question arises: why would African justice systems be inclined to adopt Western ADR and its seemingly foreign principles of neutrality, self-determination, and confidentiality in their dispute resolution processes?

The perspective to Haley's question is to view ADR mechanisms as a value added ingredient to the use of African's traditional approaches to access to justice.

Access to justice is further promoted by ADR mechanisms in solving border disputes through facilitating community mediation. Community mediation becomes integral in healing any tension which might be existing between the communities in conflict. However, while facilitating this justice, community mediation should not be done in a vacuum procedure. The recognition fact is that the substance on how the conflict consensus will be arrived at is left to the communities, but the law should generally give guidance on how this consensus should be

³⁹ Ibid

⁴⁰ Laurence Juma, 'Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives' (2005) 13 Mich St J Int'l L 417

⁴¹ (n 49)

reached. This is to ensure that the process promotes justice and there is no procedural injustice which might be occasioned while solving the matter. On this, Yance holds that:⁴²

The use of community mediation requires structure and practices that fight injustice driven by a process that collectivizes and socializes conflict, utilizes dispute resolution procedures already in place, and enforces fundamental human rights.” This use of ADR as a mixture of accessing justice, considering cultural traditions, and asserting human rights, “has the potential to bridge the gap between the kind of law needed to operate in a global marketplace and the type of grass roots justice that works [best] on the ground.”

Thus, the community mediation and negotiations need a guide on how the processes will be conducted and how facilitators are to be selected. The greatest impact of the fourth industrial revolution we now witness will also dictate that whichever procedure adopted must promote access to information by all.

Another perspective of ADR playing a role in promoting access to justice in solving communities’ disputes is whether there is a need to have an African customs court in the judicial hierarchy in Kenya.⁴³ This development is not new in Africa. Ghana has taken a step of having traditional court systems which listens to any issue which might arise from the use of ADR at the traditional levels. The practical consequence incidental to the creation of traditional court system is the availability of procedure guidelines on how ADR mechanisms are conducted in traditional conflict resolution processes. This enables the TDRM procedures to be codified yet still be featured with its flexibility. This makes the notion of access to justice to be wider in perspective in order to draw the line where a traditional court system does not step into the traditional dispute resolution mechanisms among the African communities

⁴² Sarah Yance, 'Blending the Law, the Individual, and Traditional Values to Create an Effective ADR System: A Study on the ADR Processes in Rwanda and Nicaragua' (2014) 14 Pepp Disp Resol LJ 311

⁴³ Catherine Price, 'Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution' (2018) 18 Pepp Disp Resol LJ 393

2.4 ADR as an avenue for social inclusion

Communities' conflicts like the Nandi-Luo border conflict are majorly centred on culture and social settings of the communities' involvement.⁴⁴ Thus, in such conflicts there is a tension between cultures. Often this tension is backed by the notions of superiority over some practices. Whenever such conflicts arise, ADR mechanisms like community mediation play a role in bringing together the warring communities at par in order to get a solution.⁴⁵ This solution is often based on a fusion of different beliefs, customs and cultures of the communities involved.⁴⁶

Under the African communities, cohesion plays the ultimate role in any process adopted to solve the dispute. As observed above, the ADR mechanisms are not new among the African societies. In earlier periods before the inception of western methods of solving disputes, the informal processes were adequately and sufficiently used to achieve social cohesion. The processes were conducted in a manner which enabled the communities to lose and win in order to strike a compromise. These processes are currently under the ADR mechanism of TDRM. Abe and Ouma writing about the principles of traditional conflict resolution hold that:⁴⁷

The principles of conflict resolution in traditional African society were therefore built on the desirability of Africans to administer social order and justice in a unique way based on mutual trust and cohesion, the bedrock of affirming public morality and customary values.

The practical avenue of fostering cohesion and social order in African societies in this modernized era of dispute resolution is through the use of ADR mechanisms. Apart from the clothing of TDRM as a mean of ADR, community negotiations and mediations provide the

⁴⁴ Laura Nader and Elisabetta Grande, 'Current Illusions and Delusions about Conflict Management - In Africa and Elsewhere ' (2002) 27 Law & Soc Inquiry 573

⁴⁵ Mark Davidheiser, 'Harmony, peacemaking, and power: Controlling processes and African mediation' (2006) 23 Conflict Resol Q 281

⁴⁶ Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 Strathmore LJ 22

⁴⁷ Oyeniyi Abe and Smith Ouma, 'A Re-Assessment of the Impact and Potency of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa' (2017) 6 Ave Maria Int'l LJ 1

robust avenue through which communities can make the necessary compromises in solving their disputes. One key development of the law is the needs to safeguard the traditional knowledge on the skills of solving inter community disputes. The Protection of Traditional Knowledge and Cultural Expression Act protect properties and diverse cultural practices which are consistent to good morals and the Constitution of Kenya 2010. As observed earlier above, traditional dispute resolution mechanisms are imbued with unique knowledge on how dispute of land can be solved with a result of obtaining a long lasting solution. These techniques and skills must be protected and preserved for future generations. This Act makes reference to traditional procedures of solving disputes as a key process in addressing any dispute to property or culture by communities.

2.5 ADR as an avenue for exercise of communal rights in solving conflicts

One key feature among African communities is the communal nature of sharing on the benefits and liabilities under the doctrine of communal rights.⁴⁸ This communal perspective enables African societies treat natural resources and wealth of community as communally owned rather than an individualistic adventure.⁴⁹ The continental legal framework which recognizes the enjoyment of community rights is the African Charter on Human and Peoples' Rights. Article 27 of this Charter provides for duties owed by individuals to society. The correlative of duty under Hohfeld's conceptions is rights.⁵⁰ Hence, an individual who owes a community a duty also enjoys a right from the community. These rights are generally enjoyed under the umbrella of communal rights.

⁴⁸ Ross Andrew Clarke, 'Securing Communal Land Rights to Achieve Sustainable Development in Sub-Saharan Africa: Critical Analysis and Policy Implications' (2009) 5 Law Env't & Dev J 130

⁴⁹ Marshall Murphree, 'Communal Approaches to Natural Resource Management in Africa: From Whence and to Where' (2004) 7 J Int'l Wildlife L & Pol'y 203

⁵⁰ Fundamental Legal Conceptions as Applied in Judicial Reasoning. New Haven; London, Yale University Press, 1964

Communal rights involve the need for a community to exploit its mechanisms geared at solving disputes. In African societies such skills and knowledge is imbued under traditional mechanisms of solving disputes. These traditional mechanisms of solving disputes are currently recognized under the umbrella of ADR. This helps solidify the place of ADR in solving community based conflicts like the Nandi-Luo communities' border dispute. The communities involved can seek to pursue traditional mechanisms which enable the communities' foster social order and cohesion in conflicts.⁵¹ ADR mechanism of TDRM therefore provides a rich avenue through which such reality can be achieved. Indeed any peace keeping initiative launched at solving a conflict must be owned by the local community members. This gives legitimacy and ownership of the processes when communities drive the process of healing.⁵² The use of community mediation as a form of TDRM enables communities arrive at a formidable solution to the conflict.

2.6 ADR as an avenue for restorative justice in solving conflicts

Many inter community conflicts seek to promote restitution, compensation, reconciliation and healing. This has been captured through various legal developments in Africa at large and Kenya in particular. In Kenya, restorative justice has been driven through reports and enacted legislation. Under the Truth, Justice and Reconciliation Commission (TJRC) Report, reparation is portrayed as a key implementing initiative which promotes healing and reconciliation to parties in dispute. These reparations must ensure the inclusion and participation of the affected communities in decision making processes. In order to achieve the desired reparation and healing, ADR mechanisms play as an important avenue of arriving at a desired goal.

⁵¹ Olajide O Akanji, 'Group Rights and Conflicts in Africa: A Critical Reflection on Ife-Modakeke, Nigeria' (2009) 16 Int'l J on Minority & Group Rts 31

⁵² Laurence Juma, 'Africa, Its Conflicts and Its Traditions: Debating a Suitable Role for Tradition in African Peace Initiatives' (2005) 13 Mich St J Int'l L 417

Under the Victim protection Act, 2014 restorative justice is facilitated through ADR mechanisms. Under section 2 of the Act, restorative justice is defined as:

(a) The promotion of reconciliation, restitution and responsibility through the involvement of the offender, the victim, their parents, if the victim and offender are children, and their communities; or

(b) A systematic legal response to victims or immediate community that emphasizes healing the injuries resulting from the offence.

Such a system which promotes reconciliation among communities is better achieved through ADR. Since border conflicts like Nandi-Luo communities' border conflict results into physical injuries and loss of properties, options like restitution and communal responsibility which were practiced in pre-colonial times comes handy in providing a permanent solution.⁵³ ADR facilitating restorative justice stands to solve indigenous conflicts which have spanned for decade of years.⁵⁴

2.7 Conclusion

This chapter has discussed the contextualization and viability on the use of ADR in solving conflicts within the African societies. This context enables the study's examination on how ADR has been applied in the Nandi- Luo communities' border conflict with the aim of identifying the gaps.

⁵³ Stephen Kabera Karanja, 'Land Restitution in the Emerging Kenyan Transitional Justice Process' (2010) 28 *Nordic J Hum Rts* 177

⁵⁴ Abra Lyman and Darren Kew, 'An African Dilemma: Resolving Indigenous Conflicts in Kenya' (2010) 11 *Geo J Int'l Aff* 37

CHAPTER III

3.0 THE APPLICATION OF ADR IN THE NANDI-LUO BORDER CONFLICT

3.1 Introduction

This chapter presents and interprets the data on ADR that was generated during the study. The study sought to establish the various ADR mechanisms that have been employed in a bid to resolve the conflict under study as well as the framework and processes used, in order to establish existing gaps and weaknesses. This chapter discusses six main themes:

- i. The cause of the Nandi-Luo communities' conflict
- ii. The ADR mechanisms which have been applied to the conflict
- iii. Nature of facilitators who officiate meetings
- iv. Successes witnessed from the application of ADR to the conflict
- v. The challenges associated with the application of ADR to the conflict
- vi. The best practices from other jurisdictions

These themes will be assessed against the discussion under chapter two which provide for the conceptualization of ADR as an avenue for social cohesion, restorative justice, constitutional entitlement, and as an avenue for access to justice.

3.2 Causes of the Conflict

The causes discussed here display the reason why the dispute under study occurs and why same keeps recurring.

3.2.1 Cattle Rustling

Majority respondents including key informants and members of the focus groups confirmed that incidents of theft of cattle, which are common among the two communities, are not only a great

cause of the conflict but also a trigger for violence.⁵⁵ This has been witnessed over the years and is mostly perpetrated by the Nandi who have a traditional belief that all cattle belong to them. Despite reports to the police, there have been very few instances of recovery of the stolen cattle. As a consequence, the Luos react in a retaliatory manner. One youth from Tinderet, Nandi community, when asked on the possible causes of the border dispute, confirms that cattle rustling is a key cause for the recurrence of the dispute. This is confirmed by an official of a peace network organization who views the major cause as stock theft. Further, a youth leader from the Luo community holds the view that wrong perceptions of culture are the key causes of the conflict as one community feels it is entitled to have more cattle than the other.

3.2.2 Land Disputes

Closely related to cattle rustling is the need for land for grazing of cattle. This has been described as another key cause for the recurrence of the conflict as was observed mainly by members of the focus groups within Muhoroni sub-County. This is the battle of the natural resource, land, which is used for grazing of cattle.⁵⁶ The herders, in most cases, let their animals loose on any idle land without any concern to other plantations which might be growing maize. This is typical with the Nandi who have more cattle and, therefore, always seek additional grazing areas for their animals thereby causing migration of the Nandi community into land held by the Luo community.

Boundary dispute was mentioned by all participants as being a “perpetual” cause of the conflict.⁵⁷ Different focus groups interviewed by this study disclose a unique belief among the

⁵⁵ Alewo Johnson Akubo, 'Resource-Based Conflicts and Its Implications on the Socio-Economic Relationship between Farmers and Herders in Kogi State, Nigeria' (2019) 11 *Cogito: Multidisciplinary Res J* 142

⁵⁶ Kathryn E Witchger, 'Equality in Process: Community Land Dispute Resolution Mechanism in Kenyan Law' (2018) 37 *Colum J Gender & L* 68

⁵⁷ Abra Lyman and Darren Kew, 'An African Dilemma: Resolving Indigenous Conflicts in Kenya' (2010) 11 *Geo J Int'l Aff* 37

locals along the border. They cite historical land injustices, stemming from as far back as pre-independence days when it is said the colonial regime displaced communities in, especially, the hilly and fertile areas, and the Nandi believe they lost out due to their resistance to colonial rule. It is also argued that huge tracks of land held by the colonialists, and which is what is mostly occupied by the Muhoroni, Miwani and Chemelil factories was leased out to Indians, a good number of whom had built the railway line. The Indians signed lease agreements with the then Government and given that the leases are expiring, members of both communities feel they have a right to the land.

3.2.3 Political Differences

Political differences occur especially close to the election year and when the two (2) communities are on the opposite sides of the political divide. It is thus a periodic occurrence of a span of five (5) years. It is brought about by negative ethnic outbursts and attitudes during campaigns by politicians aiming to be seen to be championing the rights of the people. This is what led to conflicts between 1992 and 2002 during the Nyayo regime when the late President Moi was in power and when members of the Luo community were considered the opposition. Political tensions seem to take a dire direction when the two communities are seen as opposing groups rather than cooperating ones. For instance, in 2007, there was some calm, brought about by the fact that both communities were in the same political camp.

This is confirmed by a number of focus groups interviewed by the study. The mention of political differences as a cause for the recurrence of the border conflict was discussed at the level of the political coalitions made at election times. These coalitions often take an opposite dimension placing the Luos at contesting position to Nandis and vice versa.

Currently there is an uneasy calm and suspicion between the two communities brought about by the rapprochement between the Hon. President Uhuru Kenyatta and the former Prime Minister, Hon. Raila, which is perceived to be intended to deny the Deputy President, Hon. William Ruto, ascent to the presidency

3.2.4 Cultural Intolerance

As noted above, cultural beliefs and intolerance relate to the deceptive belief of ownership of livestock and land over another community. The discussions with the focus groups disclosed the beliefs by the Nandi that Luos are not only lazy, but are also timid and easily scared and driven away by fight especially one of “treated” arrows. At the earliest instigation, the Nandi are usually quick to attack hoping to scare away the Luo, thereby leading to a dispute. Further, the other cause of this remains the belief by the Nandi that they are heroic given their initiation through circumcision, making them feel superior to the Luos, who have no circumcision rites.

3.2.5 Table on Common Causes of the Dispute

The study established that the most common causes of the dispute were boundary disputes, cattle rustling and cultural/ political differences, as shown in the table below.

S/N	Nature	Response	
		Frequency	%
i)	Cultural/ political conflicts	10	26
ii)	Cattle rustling	7	18
iii)	Intercommunity border disputes	22	56
	Total	39	100

Figure 3

3.2.6 Table on Frequency of the Conflict

On frequency of the dispute, all respondents(including members of the Focus Group Discussions) indicated that the dispute escalates every election year, and was/ is therefore frequent as is indicated in the table below:-

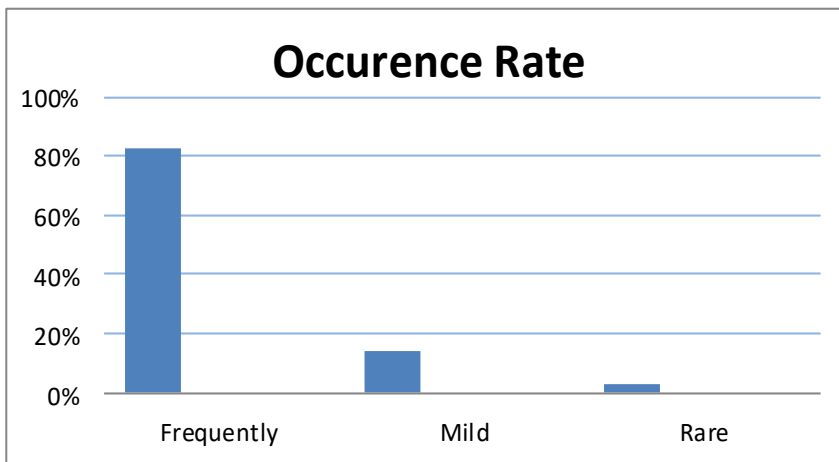


Figure 4

3.2.7 Conclusion on the Causes

All the respondents confirmed that the conflict is far from over and that it reoccurs every election year, depending on the political alignment of members of the two communities. The major reason for this is utterances by politicians during their campaigns, touching on the issues that are yet to be resolved. Key among these issues are the boundary dispute, the resettlement of displaced persons, recovery of some of the stolen cattle or items and the bringing to book of the perpetrators of violence a good number of whom continue to live within the same community.

Not to mention the continued suspicion existing among the two communities

Although there have been efforts by several state and non-state actors to resolve the dispute using various ADR mechanisms, such resolutions occur only as and when a conflict arises.

Besides, there is usually no implementation of resolutions made.

3.3 ADR Mechanisms that have been used to resolve the Nandi-Luo Communities' Border Conflict

The study established from members of each of the groups interviewed that conciliation, negotiation, mediation and arbitration had been used to resolve the conflict under study and it is necessary to briefly define these concepts before presenting the data obtained. These mechanisms must be analysed to see whether they fulfill the ideals of ADR provided under chapter two. These include the need to have social cohesion and restorative justice.

3.3.1 Conciliation

This is described as a process that involves parties to the dispute and a neutral party who facilitates negotiation between them. Conciliation as a mechanism for ADR provides an avenue for fostering social cohesion between the communities as identified under chapter two.

One respondent from the Nandi community observes that on several occasions, officials from the sub-county security committee had invited representatives of the two communities for a discussion and reconciliation. The chairperson of the Muhoroni sub-county security committee confirms that the dispute is majorly based on land issues. Thus, the key obligation is to enable the communities to reach a consensus on the ownership of land. Despite the fact that there have been strides, the chairperson holds the view that such progress stands thwarted once politics comes into play.

Other frontal actors pushing for reconciliation are the church leaders and local elders. Their approach is a little flexible as compared with the sub-county security committee. One church leader observes that the approach is based on reflecting and talking with the youths at informal set-ups, encouraging them to embrace forgiveness, hard work and reconciliation. This approach further uses practical ideals of incorporating traditional conceptions of living in peace. For

instance, another church elder further observes that the practical display of the love preached at pulpits finds its way into conceptions like *utu*; in the South African context, the *Ubuntu*. Another respondent notes that conciliation as a process has been successful because the methods and mechanisms of handling it are local hence locally understood. The reality is that it incorporates the elements of traditional dispute resolution mechanisms which consequently give the process more legitimacy and approval.

While reconciliation has sought to encourage social cohesion between the two communities by encouraging forgiveness, the successes seem to be shortly lived.

3.3.2 Negotiation

This is where parties in dispute need to identify and discuss issues affecting them so as to reach an amicable solution without necessarily involving a third party. This platform enables the two community exercise their communal rights to strike a balance needed to ensure social cohesion. It is fairly informal, with no set procedure and the negotiating parties are themselves in charge of the process. The application of this mechanism is manifest in the interpersonal dialogues. A good number of respondents who cited grazing land as a cause for the dispute observe that some individuals who have been in conflict in the past are now opting to negotiate for grazing ground. This has enabled the individual members of the communities access each other's land upon the oral discussion they have had.

One village elder who was interviewed observes that:

“Negotiation has only been effective in resolving our small differences like those regarding someone's cattle grazing on another's land because it reflects on the traditional concepts of understanding between the communities.”

It is thus easily accepted because it is considered as legit and locally developed. Even in situations where government representatives are in attendance, the process is majorly driven by the elders. The elders seem to own the process and the conduct of the sessions is imbued with unique traditional knowledge.

3.3.3 Mediation

Fenn⁵⁸ describes it as a voluntary, informal, consensual, strictly confidential and non-binding process of conflict management in which a neutral party helps the parties in dispute reach an amicable solution. Mediation as an avenue to access justice needs an experienced mediator who understands the roots of the conflict. This mediator should not be appointed only by virtue of government position, but rather according to the knowledge he or she possesses about the conflict. A paralegal community elder, who doubles up as an NGO Chair , and who is specialized in mediation in the region observed that this mechanism takes a wide range of actors who freely discuss issues in a more flexible manner. She notes that actors like the Government representatives, elderly members of the two communities and the youths have been involved in discussions geared towards creating hospitality and accommodative tendencies between the two communities.

3.3.4 Arbitration

This is a process through which parties agree either before or after a dispute arises to have the matter arbitrated by an arbitrator who is experienced in the area of dispute, who gives a binding award. The arbitrator can be appointed directly by the parties or by an appointing authority. This process is formalistic in nature and has been rarely used in the Nandi-Luo border conflict.

⁵⁸ (n 1)

The mechanisms as used are captured in the table below.

S/N	ADR techniques	Response	
		Frequency	%
vi)	Negotiation	9	28
vii)	Mediation	12	36
viii)	Conciliation	11	33
ix)	Arbitration	1	3
	Total	33	100

Figure 5

3.4 Choosing of Facilitators

The study established there was no definite procedure of choosing facilitators. However, the facilitators who have presided over the processes were chosen based on the following:-

- (i) Through identification by churches and NGOs concerned about continued violence resulting into loss of lives and destruction of property
- (ii) By virtue of being a Government officer or member of the National security team
- (iii) By volunteering

This is summarized in the table below:-

	Choice of facilitator	Response	
		Frequency	%
i)	Volunteering	5	7
ii)	An officer in the National Government/security team	16	41
iii)	By virtue of church, NGO/community position	20	52
	Total	39	100

Figure 6

3.4.1 Type of Facilitators involved in the Nandi-Luo Communities' Conflict

All the respondents indicated the facilitator's designation included chiefs, pastors, officials of NGOs or Government administrators and political leaders. The study established that ADR mechanisms are mostly handled like any community dialogue where facilitators are either chosen from community representatives mostly as political and religious leaders or from the NGO or offices of the National Government Administration.

3.4.2 The Practice of Appointing Facilitators in Conventional ADR Mechanisms

The above presentation is quite different from the known legal framework where facilitators should be chosen and agreed on by the parties in dispute. Sangoo Lee and Alee Forss,⁵⁹ observe that while negotiation is important in settling boundary disputes, there is need for concession if a

⁵⁹ Sangsoo Lee and Alee Forss Institute for Security and Development Policy 21, Central Asia- Caucasus Institute: Dispute Resolution and Cross Border Cooperation in North East Asia: Reflections on the Nordic Experience

third party is to be involved to ensure control of both the settlement process and the outcome which helps in promotion of good and long lasting cooperation.

As far as mediation is concerned, an impartial mediator takes the role of encouraging and facilitating the resolution of a dispute that exists between parties in disagreement or conflict. The process is akin to the court one especially where the mediation is handled by qualified mediators, including those who are appointed or accredited by court. In such instances, parties to a conflict agree to involve a third party to assist them continue with negotiations and eventually break an impasse. It is however not the role of the mediators to dictate any term or outcome of the process

3.4.3 The Gap in the Selection of Facilitators in this Conflict

The data showed that the parties employed no known (legal) process in conducting the ADRs. This should however only work effectively where mediation, conciliation, reconciliation, negotiation or traditional dispute resolution are concerned since there are no hard and fast rules on need for a legal framework governing them. The parties involved can, on their own, elect to use any of these methods without having to go to court and to bring in third parties if need be. Indeed the report on Shalom and other reports referred to above show that parties to the conflict under study have not followed any laid down framework in their efforts to reach a sustainable solution.

3.5 Successes Witnessed in the Solving of the Conflict

The successes on how ADR mechanisms have been applied must be tested against the conceptualizations identified under chapter two. The test lies whether the mechanisms have yielded social cohesion, fostered restorative justice, acted as an avenue for access to justice, or been an avenue for exercise of communal rights.

The study sought to find out whether the ADR mechanism employed at Tinderet/ Muhoroni Sub-counties bordering locations was able to achieve a resolution of the conflict and in this regard, the respondents were required to indicate whether the issue dealt with had been completely settled or was still recurring or expected to recur.

Although the respondents were agreed that the ADR mechanisms used were able to lead to a cessation of violence where same existed and that in cases of cattle rustling, there would even be return of all or some of the stolen cattle, a good number of the respondents agreed that that the conflict between the two communities is far from over and that same recurs every election year.

The general responses indicated that the solutions arrived by use of ADR mechanisms were short lived and there was fear that they might recur. This means that social cohesion has not really been achieved in solving this conflict.

This is as is captured in the table below.

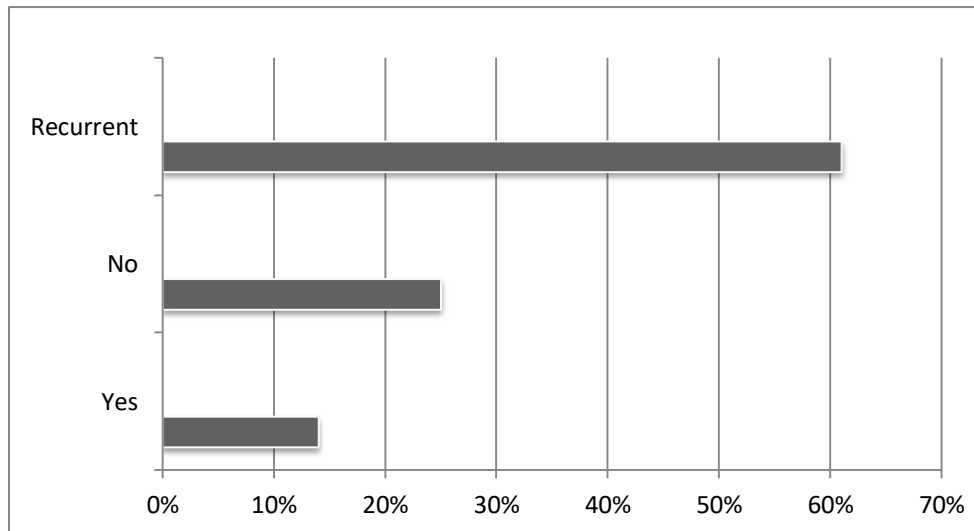


Figure 7

This study notes that other than the fact that the ADR mechanisms more often than not lead to cessation of conflict, the focus should be on the resolution of the same. This is restorative as opposed to retributive justice where compensation is made for property, including land, houses, household goods as well as cattle that have been stolen, lost or destroyed. There should also be settlement planning and giving priority to implementation of restitution since, more often than not, the focus of peace negotiations and agreements is disarmament and elections, rather than land-related causes. The guidance notes of the Secretary General advise that issues of housing, land and property should be properly addressed and compensation considered for those who have lost land and other property.

There is no doubt that ADR can work and available literature shows that it has worked in some communities, even when it wasn't ADR like is presently known. Some of these communities are the pastoralists in the Karamoja cluster⁶⁰ and the Abakuria which applied customary law in the community to ensure rule of law⁶¹

3.6 Challenges faced on How ADR Mechanisms were applied

The study observed that challenges associated with the applying of different ADR mechanisms can be classified under two categories. Firstly are the internal challenges within the communities. Secondly are the external challenges brought by actors outside the communities.

⁶⁰ Jackline Apiyi Adhiambo, 'Indigenous Conflict Resolution Mechanisms Among the Pastoralist Communities in the Karamoja Custer- A Case Study of the Turkana,'(20140 University of Nairobi eRepository, 114-15

⁶¹ David Mwangi Kungu, Risper Omari and Stanley Kipsang' A Journey into the Indigenous Conflict Management Mechanisms Among the Abakuria Community, Kenya: The Beauty and the Beast' (2015) 11 (16) European Scientific Journal, 214-215

3.6.1 Internal Challenges within the Communities

These are challenges which the two communities face during processes of solving the conflict. A middle aged man, who is educated to the undergraduate level, stated that issues with language barrier and high illiteracy levels affect the smooth operation of the ADR processes.

Language barrier is occasioned due to the fact that the two communities are of different dialects. This makes the communication between the elderly particularly difficult. This forces the need to employ a translator or resort to either English or Kiswahili, thereby hampering access to justice. The resort to Kiswahili and English is further affected by the high illiteracy levels with regard the two languages. The consequence then is loss of information and increased misunderstanding.

3.6.2 External Challenges

These are challenges which are caused by the involvement of different actors outside the members of the community. The study observed that some members of the two communities were not comfortable when processes are driven by officials who are not members of the community. According to the respondents interviewed, the study identified the issues of legitimacy and acceptance of the end bargain when the process is driven by ‘outsiders’. A section of the members stated that they are not bound to accept any resolution reached through a process driven by ‘outsiders’.

Another challenge identified was the manner in which the ADR mechanisms were applied. The focus group discussions revealed that the processes were too rigid and seemed to lock out open and frank discussion among the members of the communities

3.7 Best Practices on how ADR Mechanisms are applied to Solve Conflicts

3.7.1 Ghana

Ghana has seen robust development in the use of ADR in solving community based conflicts.⁶² It has implemented the provisions of the African Charter for Human and People's Rights which recognize the societal roles under a legal system. The legal system of Ghana is designed in a manner which accords chiefs judicial authority to arbitrate, mediate and facilitate negotiation in case of a conflict. This includes situations where there are inter-community disputes like border conflicts. The chief in exercising judicial authority partners with the community elders in order to apply the traditional dispute resolution mechanisms approach needed in such a conflict. The authority for the involvement of the chiefs is derived from customary law of communities.⁶³

Thus Ghana's approach to the use of ADR has been cemented as a rich avenue of access to justice and enhancing of social cohesion.

Kenya has a better legal environment through which it can improve on Ghana's conceptualization of making real the use of ADR mechanisms in resolving community based conflicts. The presence of county governments and county assemblies can design the appropriate legal framework which establishes rules and procedures to follow in the administration of ADR in situations like border conflicts. Among the findings of the study was the reality that the application of ADR mechanisms to the Nandi-Luo communities' border conflict was marred with uncertainty and sometimes some programmes were running simultaneously. These uncertainty and simultaneous conduct of ADR processes led to confusion.

⁶² Ernest E. Uwazie, 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' 16 (2011) Africa Security Brief

⁶³ Victor S Gedzi, 'Principles and Practices of Dispute Resolution in Ghana' (2009) A Doctoral Thesis submitted to Erasmus University Rotterdam, Hague

Proper design of the rules, procedures and standards on how ADR can be applied to these conflicts stand to help realize the permanent solution needed in addressing the Nandi-Luo border conflict.

3.7.2 Botswana

Botswana is another African nation with a developed system on how ADR mechanisms are applied in its legal system. The country has a dual legal system centred on both the state law and customary law.⁶⁴ The state law recognizes the use of ADR mechanisms in their formal nature while customary law recognizes the use of ADR in its traditional way of practice. However, despite the two angles, the goals of both the state law and customary law are the same.⁶⁵ In Botswana has imbued ADR mechanisms in solving conflicts under the constitutional legal system in enabling access to justice.

The greatest development in Botswana is the documentation of the customary law ADR procedures. This documentation indicates steps for matters opting for the use of traditional ADR, the facilitating actors and the institutions involved. Just as the formal court procedures, the traditional system is imbued with hierarchy of institutions indicating the procedure of appeal.⁶⁶ These developments are however lacking in Kenya as the use of TDRM as an ADR mechanism is characterized with disorganization and uncertainty of procedures.

3.8 Conclusion

This chapter has analyzed the data extracted from the research in order to determine the findings of the study against the framework in chapter two. The study observes gaps on how the processes

⁶⁴ C M G Himsworth, 'The Botswana Customary Law Act, 1969' (1972) 16 J Afr L 4

⁶⁵ Rekha A Kumar, 'Customary Law and Human Rights in Botswana: Accredited Survival of Conflicts' (2010) 2 City U HK L Rev 277

⁶⁶ Charles Manga Fombad, 'Customary Courts and Traditional Justice in Botswana: Present Challenged and Future Perspectives' (2004) 15 Stellenbosch L Rev 166

are conducted and the procedures on selection of facilitators. These gaps form the basis of conclusions and recommendations in the next chapter.

CHAPTER IV

4.0 CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

This chapter presents conclusions and recommendations of the study through four thematic areas: summary of the study; study findings; conclusion and recommendations

4.2 Summary of the Study

The study sought to establish the use of ADR in the Nandi-Luo border conflict between the Nandi and Luo communities. The study discussed the legal framework, the causes, effects and findings of the Nandi-Luo border conflict with the aim of assessing the application of various mechanisms of ADR to the conflict.

The overall objective was to examine the application of the ADR to the conflict in order to produce a lasting solution.

The specific objectives were:

1. To discuss the legal conceptualization on the use of ADR in solving the Nandi-Luo communities' border conflict
2. To illustrate the findings on how ADR mechanisms have been applied in solving the Nandi-Luo communities' border conflict
3. To establish the manner in which ADR mechanisms may help achieve a sustainable solution in the Nandi-Luo communities' border conflict

To achieve the objectives of the research, the study was guided by the following research questions:

1. What are the legal conceptualizations on the use of ADR mechanisms in solving the Nandi-Luo communities' border conflict?
2. How has ADR mechanisms been applied in solving the Nandi-Luo communities' border conflict?
3. How can the ADR mechanisms be designed to provide a permanent solution to the Luo - Nandi communities' border conflict?

4.3 Study Conclusions

The study finds that the application of the use the ADR mechanisms in the solving the conflict has partially fulfilled the designed goals of ADR discussed under chapter two.

As a constitutional entitlement, ADR mechanisms have cemented the position as a crucial and key principle of judicial authority exercised freely by the parties in dispute.

As an avenue for access to justice, the application of ADR mechanisms have been faced with procedural uncertainty and lack of documentation on the resolutions arrived. Further, the study observes lack of institutions responsible for monitoring the progress of resolutions arrived at the county levels.

As an avenue for social cohesion, the experience has been a mixture of feeling. The cohesion seems to last only for a short while there continues to be fear of eruption of violence

As an avenue for exercise of communal rights, the application has provided an avenue where the two communities can negotiate; however, this needs to be enlarged to cater for the wider members of community.

As an avenue for restorative justice, the study finds that victims have not been compensated for their losses suffered over the years.

4.5 Recommendations

4.5.1 Short -Term Recommendations

The choice of any ADR mechanism in resolving community border conflict should be based on its ability to ensure a fast and acceptable determination of a dispute as opposed to an unending resolution like the one witnessed in the Nandi- Luo conflict, to set it apart from litigation. The reasons for this have been highlighted and the following recommendations are made to ensure ADR mechanisms used achieve their desired goals.

4.5.1.1 Public Awareness

The need for access to information cannot be gainsaid. It is integral in accessing justice. There should be aggressive public awareness on use and purpose of the various ADR and TDRM administration processes to ensure the same are embraced by members of the two communities. This includes having a proposal on language to be used during the negotiations due to the fact that the two communities have different lingual communications. This is to facilitate clear presentation from the communities and/or obtaining suitable translators to facilitate communication between the representatives of the Nandi and Luo communities.

Not to mention, possible places where the ADR is to be conducted, to enable the parties in dispute feel free enough to express themselves without having to look over their shoulders.

Public awareness is to be done through the local dialect radio stations and chief barazas. While this mode has lost efficacy in recent times due to advancement of technology, the application of TDRM requires that the elderly, too, acquire this information for they are a big component of TDRM knowledge. The bottom line is that the Government, in this case National and County should ensure facilitation of public awareness and of course, public participation by not only

widely sharing the information required but also ensuring that such information is widely available to members of various communities and the public at large. This should start as soon as practicably possible as an immediate measure and should continue until such time that the information has gone round while continuing periodically for the benefit of those who may have missed out.

4.5.1.2 Choice of ADR

The choice will be between the conflict resolution and conflict settlement. The ADR mechanism selected must promote a long lasting social cohesion. As observed in the discussion above, conflict resolution serves the best approach of solving the recurring problem between the Nandi and Luo communities. The choice of conflict resolution must be broken down into three main segments. The first segment collects information on the root cause(s) of the Nandi-Luo border conflict. The second segment must involve legitimizing the process by the representatives seeking wider community participation to get the ideas on how the conflict can be resolved. The final segment will look into developing a consensus and necessary compromise knowing that conflicts are solved through honest give and take from both sides. This segment must be publicized through informing the respective communities on the decisions arrived at and the progress of implementation. This includes reaching out to clan councils and community economic vigilant groups majorly comprising of the youth in order to sensitize them on the decisions arrived at. Each segment should take one calendar month.

4.5.1.3 Facilitators

As much as possible, both the National and County Administrative system should desist from playing the dual role of administrators and dispute solvers at the same time. As an avenue of

exercising communal rights, facilitators should be selected among the community members who are experienced in conflict resolutions. The facilitation to resolve this conflict must rest with the representatives of the two communities. The representatives of the national and county governments must take the passive role in order to legitimize the process to be community based. The roles of government representatives must be limited to initiating the process. This is to avoid situations where parties begin to question their role in the community and may not feel free enough to fully participate in the ADR process.

4.5.2 Long Term Recommendations

Under long term recommendations, focus should be on the roles played by National and County Governments' executives and by parliament and county assemblies. These long term resolutions should provide a solid avenue for exercise of restorative justice, and access to justice which is featured with procedures so that processes do not suffer procedural injustices like lack of documentation of resolutions.

4.5.2.1 Parliament

The National Assembly and the Senate should enact laws which mandate the use of TDRM in solving border disputes among communities. The enactment of laws would include:

- i. To enact a law on ADR and specifically recognizing the role of TDRM in border disputes. This law ought to oblige county governments to adopt documentary measures of recording the TDRM and make the recording available in county libraries and in electronic form for accessibility.

This Act should provide the general procedure of identification of facilitators among the communities who spearhead the integration and conflict resolution processes. The

general concept of public participation must be reflected in the community consultation procedures. As noted above under the short term recommendations, the procedures should be designed to meet the timelines identified. Despite this progress, the Act should be designed in a manner which does not formalize the TDRM. The flexibility of TDRM must be maintained. This is because flexibility is perceived as an integral part in legitimizing the process.

- ii. To amend the Basic Education Act to incorporate learning on the knowledge of ADR and TDRM in different communities in Kenya as a mandatory subject.

4.5.2.2 County Assemblies

Counties are in a position to legislate county laws in relation to the preservation of the knowledge of ADR with special emphasis on TDRM of the communities within each respective county. For instance, Kisumu, Siaya, Homa Bay and Migori counties stand a better position to collect and preserve the data on TDRM through legislating on the acceptable procedures on TDRM among the Luo community. The county acts should give room for the creation of ADR and TDRM committees which should be the implementing bodies. These committees should exist at every sub county and ward level. This entails a robust collaboration among the counties in the design of the bills.

4.5.2.3 National Executive

The national executive ought to design a policy paper on ADR (including TDRM) among the communities in Kenya. The policy paper should identify salient features for all the communities in application of these areas. Further, the policy paper should provide avenues for collaboration

of communities where the procedures vary among communities in conflict like the instant case of the Nandi-Luo communities' border conflict.

4.5.2.4 County Executives

The county executives must facilitate the establishment of county committees geared at initiating the processes of the use of ADR and TDRM in border conflicts like the Nandi-Luo border conflict. The committees are to be responsible in recording the agreements between the parties in conflict and ensuring the same is available in electronic format and in county libraries, in line with the access to justice.

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NLC Commissioner/Officer () - Pastor/Church, Elder () – Party Leader/Youth
Management Officer () Other ()

Specify_____

4. Duration of stay in your respective position/ (Tick as applicable)

1 - 5yrs () 6 - 10yrs () 10 - 15yrs () Over 15yrs ()

5. Have you ever participated in any ADR process in the -County?

Yes () No ()

If yes, -in what capacity?_____

6. What kind of ADR mechanism was used?

7. **What was/were the issue(s) in dispute?**

8. How was the process conducted? -

9. Who else participated in the process and which role did he/she/they play?

10. Who was the facilitator?

11. How did he/she become a facilitator?_

12. What **were/was the** route cause(s) of the -dispute?

13. What was the outcome of the process?

14. Was/were the issue(s) resolved?

Explain_____

14. Has a similar or other issue(s) arisen since then?_____

15. Was it connected to the earlier dispute? (If yes, explain how)_____

16. Has/have the subsequent issue(s) been resolved?

17 Is there an outstanding dispute and if so, what is it about?_____

18 Has the subsequent dispute been resolved?

END

THANKS FOR YOUR PARTICIPATION

Appendix II

FOCUS GROUP DISCUSSION QUESTIONNAIRE GUIDE

I am a Master of Laws student at UoN Kisumu Campus. The purpose of this research is to examine why use of ADR mechanisms has not achieved a sustainable solution to the Nandi/Kisumu border conflicts. The information received will be used for this study purpose only.

1. Have you ever been involved in any ADR Process?
2. What ADR mechanism was used?
3. What was/were the issue(s) in dispute?
4. What were /are the effects of the disputes?
5. How was the facilitator chosen?
6. How was the process conducted?
7. Who were the other participants?
8. What was/were the root cause(s) of the dispute?
9. What was the outcome of the process?
10. Was/were the issue(s) resolved?
11. Has a similar or other issue(s) arisen since then?
12. Has/have the subsequent issue(s) been resolved?
13. Is there any pending issue/dispute?
14. If yes, which?

THANKS FOR YOUR PARTICIPATION.

APPENDIX III

RESPONDENTS FROM COUNTY GOVERNMENT OFFICES

(1)	Deputy County Commissioner 1	(F)	31-40
(2)	Deputy County Commissioner 2	(M)	41-50
(3)	Sub County Administrator 1	(M)	50-65
(4)	Sub County Administrator 2	(M)	41-50
(5)	Chief 1	(M)	41-50
(6)	Chief 2	(M)	41-50
(7)	Chief 3	(M)	41-50
(8)	Chief 4	(M)	41-50
(9)	National Land Commission Officer 1	(F)	31-40
(10)	National Land Commissioner Officer 2	(M)	31-40
(11)	Assistant Chief 1	(M)	50-65

APPENDIX IV

RESPONDENTS FROM CHEMELIL/CHEMASI WARD

			<u>Years</u>
(1)	Community Based opinion leader	(M)	(50 – 65)
(2)	Teacher/Youth Leader	(M)	(18 – 30)
(3)	Student/Youth organization member	(F)	(18 – 30)
(4)	Pastor	(F)	(50 – 65)
(5)	Cross boarder peace committee member	(F)	(50 – 65)
(6)	Church Elder/ Opinion leader	(M)	Over 65
(7)	Catechist	(M)	(50 – 65)

APPENDIX V

RESPONDENTS FROM KAPKITONY LTION (SONGHOR/SOBA WARD)

			<u>Years</u>
(1)	Teacher	(F)	(50 – 65)
(2)	Youth Leader	(M)	(31 – 40)
(3)	Church Choir Member	(F)	(18 – 30)
(4)	Pastor	(F)	(18 – 30)
(5)	Farmer/Family Head	(F)	Over 65
(6)	Cross Border Committee Member	(F)	(50 – 65)
(7)	Community Based opinion leader	()	(31 – 40)

APPENDIX VI

RESPONDENTS FROM GOD ABUORO LOCATION (MUHORONI – KORU WARD)

		Years
(1)	Branch Secretary, Maendeleo ya Wanawake (F) Organization	(31 – 40)
(2)	University Student (M)	(18 - 30)
(3)	University Student (F)	(18 – 30)
(4)	Farmer/Businessman (M)	(Over 65)
(5)	Teacher/Pastor (F)	(50 – 65)
(6)	Pastor (F)	(41 – 50)
(7)	Family head/ Farmer (M)	(Over 65)

APPENDIX VII

RESPONDENTS FROM CHEMELIL LOCATION (CHEMELIL WARD)

			<u>Years</u>
(1)	Community Opinion Leader	(F)	(31 - 40)
(2)	Church Elder	(M)	(Over 65)
(3)	Community Peace Committee member	(F)	(50 - 65)
(4)	Youth Leader	(F)	(31 - 40)
(5)	Local Women Representative	(F)	(18 - 30)
(5)	Secretary, Peace Network	(M)	(31 - 40)
(6)	Youth Leader	(F)	(18- 30)
(7)	Pastor	(F)	(Over 65)

APPENDIX VIII

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|-----|---------------|---|----------|
| (1) | Focus Group 1 | - | Mombwa |
| (2) | Focus Group 2 | - | Chemase |
| (3) | Focus Group 3 | - | Chemelil |
| (4) | Focus Group 4 | - | Kipturi |