

**THE INFLUENCE OF CONFLICT RESOLUTION MECHANISM IN THE
NATURAL RESOURCE MANAGEMENT IN EAST AFRICA REGION; A CASE
STUDY OF MWEA SETTLEMENT SCHEME IN KENYA**

BY

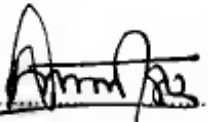
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R52/88205/2016

**RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENT FOR THE AWARD OF THE DEGREE OF MASTER OF ARTS
IN INTERNATIONAL CONFLICT MANAGEMENT, UNIVERSITY OF
NAIROBI.**

DECLARATION

This research project is my original work and has not been presented to any other university for the award of any certificate

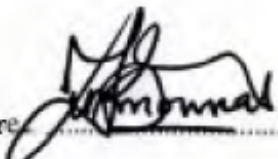
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ACKNOWLEDGEMENT

Special thanks to my supervisor, Dr. Martin Ouma for his advice, guidance and suggestions throughout the project and my classmates for the productive discussion.

DEDICATION

I dedicate this project to my family who supported me throughout this project.

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ABSTRACT

Kenya has continued to experience natural resource based conflicts over the years. These conflicts need to be settled swiftly as they encompass the livelihoods of people. Communities rely heavily on natural resources for survival. However, renewable and non-renewable natural resources have the capacity to lead to eruption of a conflict. Renewable resources include; “crop land, fresh water, free wood and fish” while non-renewable resources include; “petroleum and minerals”. Lack of renewable resources has mainly resulted to violence. This has largely been associated with absence of effectual strategies or methods of settling conflict that demand respect from people involved in the use and access to the resources aforesaid. The general objective of the study was to assess the influence of conflict resolution mechanism in natural resource management in Mwea settlement scheme in Kenya. The specific objectives were to assess the influence of negotiation in natural resource management in Mwea settlement scheme in Kenya, to examine the influence of arbitration in natural resource management in Mwea settlement scheme in Kenya, and to determine the influence of adjudication in natural resource management in Mwea settlement scheme in Kenya. The research has adopted the Conflict Resolution Theory as well as Cooperation and Competition Theory. This is a pragmatic case study that has incorporated both qualitative and quantitative data. The case study research design also permits in-depth study of fundamental themes and is suitable as it helps in description, comparison, evaluation and comprehension of various elements of the study. The study was carried out at Mwea Settlement Scheme in Kenya. The study population included members of the Communities in Embu and Kirinyaga Counties as well as officials of National Government and County Government in the two Counties. Non-probability sampling methods was involved to select the study sample. Convenience and purposive sampling methods were used. Analysis was done using version 23.0 of the SPSS. The study found that negotiation is flexible as it enables parties to agree and resolve their differences in a cost-effective, timely and discreet manner in regard to the management and utilization of natural resources. The study established that arbitration is effective in natural resource conflict management. It was also established that arbitration has been largely adopted to resolve conflicts on natural resources.

ACRONMYS

ADR - Alternative Dispute Resolution

CAR – Central African Republic

CL- Community land

CIAK- Chartered Institute of Arbitrators Kenya Branch

CLO- Crown Land ordinance

DRC – Democratic Republic of Congo

EARC- East African Royal Commission

EIA- Environmental Impact Assessment

ELC- Environment and Land Court

KLR- Kenya Law Reports

KTL – Kikuyu Trust Land

LA- Land Adjudication

LDAC- Land Disputes Appeals Committee

LDT- Land Disputes Tribunal

LEO- Land Executive Officer

MoL-Ministry of Land

NECC- National Environmental Complaints Committee

NET- National Environment Tribunal

NGOs- Non-Governmental Organization

NPOs – Non-Profit Organizations

NLC - National Land Commission

NLTO - Native Lands Trust Ordinance

PID- Preliminary Index Diagrams

RJ - Restorative Justice

RLA- Registered Land Act

RoD- Registration of Documents

SEA- Strategic Environmental Assessment

SESA- Strategic Environmental and Social Assessment

SPSS- Statistical Package for the Social Sciences

TDRs- Dispute Resolution Mechanisms

TDRMs- Traditional dispute resolution mechanisms

TVET- Technical and Vocational Education and Training

UK – United Kingdom

UNF- Unifying Negotiation Framework

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

As sources of revenue, industry and identity, natural resources are an important component of society throughout the globe. Natural resources are becoming more important as a source of revenue for developing nations, and several rely on them entirely to fund their budgets¹. Half of the global population is said to depend on local natural resources with many rural dwellers relying heavily on farming, timber, fishing, minerals for subsistence and as a source of revenue ².

Specific natural resources contribute significantly in the welfare of local populations, which exploit them for commercial reasons³. Natural resources are not just commodities in the global or local economic systems, they are also regarded as part of a country's fulfilment because they provide an important cultural significance and heritage thus the rationale why most economies are eager to protect, preserve and regulate their natural reserves⁴. Community wealth like land, water and timber often have historic and cultural importance since they are the home of ancient civilizations, objects of history and cultural traditions. They essentially form part of a community or people's identity ⁵.

People have a strong connection to the resources that in some instances cut across generations especially where immense hard work has been employed to conserve and

¹ Stone, Moren Tibabo and Nyaupane, Gyan.. Rethinking community in community-based natural resource management. *Community Dev.* 45 no.6 2014, 17–31

² United States of Institute of Peace, Elections and Violent Conflict in Kenya: Making Prevention Stick. <https://www.usip.org/publications/2014>

³ Kitamura, Kenji., Nakagawa, Chigusa. and Sato, Tetsu. Formation of a community of practice in the watershed scale, with integrated local environmental knowledge. *Sustainability*, 10 no. 4. 2018, 404.

⁴ Kitamura, Keji., Nakagawa, Chigusa. and Sato, Tetsu. "Formation of a Community of Practice in the Watershed Scale, with Integrated Local Environmental Knowledge," *Sustainability*, MDPI, *Open Access Journal*, vol. 10(2) 2018, 1-19.

⁵ Bullock, Ryan. and Lawler, Julia. Community forestry research in Canada: A bibliometric perspective. *For. Pol. Econom.* 59(5) 2015, 47–55

protect them from depletion. As a consequence of this, conflicts emerge linked to the use of natural resources⁶. Conflicts over natural resources have been described as instances where utilization, allotment or administration of these reserves results into violence and abuses of human right including preventing people from accessing the resources thus impoverishing them and substantially reducing their wellbeing⁷.

These disputes occur frequently from various uses of resources like wood, water, pasture and land or the intention to administer them in various ways. Environmental factors are seldomly or never known to be the exclusive causes of armed conflict⁸. Nevertheless, the exploitation of natural resources and attributed environmental pressures can contribute immensely in fueling the conflict throughout its cycle including perpetuating and destabilizing chances of attaining peace⁹.

When interests and need are discordant or if existing policies, programs and development exclude some of the user groups, disputes arise quite easily. Conflicts due to such vested interest are quite inevitable in most cultures¹⁰. Arguably, four key circumstances have been suggested as some of the impetus for igniting disputes over the accessibility of natural resources by different user groups. These are: natural resources inadequacies; two or more groups' competing to share the supply; their comparative strength; the degree of dependency on this specific resource and easy access to other sources.

⁶ Ibid pg.1

⁷ Auty RM. Industrial policy reform in six large newly industrializing countries: the resource curse thesis. *World Dev.* 1994;22(1):11–26.

⁸ Bruch, Carl., Muffett, Carroll and Nichols, Sandra.. *Governance, Natural Resources, and Post-conflict Peacebuilding*. London: Routledge, 2016.

⁹ Roba, Hassa. and Oba, Gufu. Understanding the Role of Local Management in Vegetation Recovery Around Pastoral Settlements in Northern Kenya. *Environmental management*, 51, no.4 (2013), 838-849

¹⁰ Castro, Lorena, Jaramillo. and Stork, Adriene. *Linking to Peace: Using BioTrade for Biodiversity Conservation and Peacebuilding in Colombia* In: Young, H and Goldman, L. eds. *Livelihoods, Natural Resources, and Post-Conflict Peacebuilding*. London: Routledge, 2015.

Natural resources, particularly land, may lead to conflicts. According to Le Billon¹¹ management of natural resources may assist in preventing disputes connected to resources from emerging.

Resource-based conflicts have occurred in several nations in Africa like the Democratic Republic of the Congo (DRC), Angola, the Central African Republic (CAR), Sudan and South Sudan, Somalia, Sierra Leone, and Liberia. There is a wealth of information available on resource-based warfare (Elbadawi & Sambanis¹²; Mähler¹³) as a prove that many African nations have encountered devastating confrontations over natural resources like oil, land and solid minerals over the last thirty years. Alao¹⁴ Stresses the significance of natural resource management as a means of comprehending the complex nature of conflicts over natural resources in Africa. One of the main reasons why some governments lack efficient frameworks of natural resource management is due to conflicting interests by both external and internal forces over the ownership of natural resources¹⁵. A perfect example is the DRC where external forces use their local protégés to perpetuate violent ethnic conflicts over the exploitation of natural resources like gold, diamond, coltan, cassiterite, forest and other resources plenty in the Congo basin.

Reports of violent confrontations have been oftenly and extensively recorded over the accessibility of land in Kenya. The rise of Mau Mau rebellion was propelled by agitation to access land in the ‘white highlands’ that had been grabbed by the white settlers during

¹¹ Le Billon, Philippe. Diamond wars? Conflict diamonds and geographies of resource wars. *Annals of the Association of American Geographers* 98, no.2, (2008) 345–372.

¹² Elbadawi, Ibrahim A. and Sambanis, Nicholas. External Interventions and the Duration of Civil Wars. Policy Research Working Paper; No. 2433, 2000. World Bank, Washington, DC.

¹³ Mähler, Annegret. ‘Nigeria: a prime example of the resource curse? Revisiting the oil-violence link in the Niger Delta’, GIGA Research Programme: Violence and Security, no. 120, (2010), 5–6, 13–15, 19, 20, 23–4,

¹⁴ Alao, Abiodun. An Assessment of Climate-Induced Conflict Risks over Shared Water Resources in Africa, (2011).

¹⁵ Ibid, p.g 3

colonialization of the country (kanogo 1987). In recent years several counties that include Narok, Nakuru, Kwale, Uasin Gishu, Nandi to name but a few have experienced conflicts over natural resources, albeit in varying degrees¹⁶. In Narok, Kenya, conflicts over land between the Maasai and Kipsigis on one hand and Maasai and Kisii on the other are quite prevalent resulting in loss of lives and properties. For example, on December 2015 at Olposimoru a violent conflict between the Kipsigis and the Maasai communities living in Narok County erupted leading to loss of lives and displacements of families. Violence linked to natural resources exploitation has also been witnessed in Kwale County and in particular in 2007 when over 3000 residents were displaced to pave way for titanium mining. In Kerio valley and Isiolo conflict over pasture are endemic especially between the Marakwets and Pokots as well as between Boranas and Somalis. In such cases, one may discover that a few herders were accused of 'transgressing' into the territory of another group and were thus attacked¹⁷. The turmoil resulting from the retribution affects many families living in the area thus the need for intervention. Communities in such conflicted areas are not concerned with the arrests and prosecution of perpetrators or persons who ignited the conflict. They are more interested in safeguarding the interests of the entire community, therefore, whatever method of conflict management are employed should address issues of their concerns while also considering the involvement of the society or its representative in the deliberations¹⁸. Similar tendencies were seen in the Mwea Settlement Scheme, where efforts to resettle citizens in the area have been halted

¹⁶ Ochieng, E. G. The role of Traditional Conflict Management Mechanisms in Conflict Prevention and Resolution in Africa. *International Journal of Project Management*, 28 No.5 (2017), 449-460.

¹⁷ Kamau, Winfred, W. *Law, Family and Dispute Resolution: Negotiating Justice in a Plural Legal Context*, PhD Dissertation, York University, 2007.

¹⁸ Muigua, Kariuki. *Resolving Environmental Conflicts through Mediation in Kenya*. (2006) Ph.D. Thesis, Unpublished, University of Nairobi.

because of violence and exchanges of insults between Kirinyaga and Embu Counties political leaders.

The troubled Mwea Settlement Scheme is in Mwea and Makima wards, Mbeere South Sub County in Embu County. The area encompasses roughly 44,000 hectares of land and covers about 10000 families. Historically, the land belonged to the districts of Embu and Kirinyaga, known during the colonial time as the Kikuyu Trust Land (KTL). The land in question initially belonged to the Kirinyaga District village of Ndia and the Embu District community of Mbeere. The Kamba community was later welcomed into the area by the villagers of Ndia and Mbeere. Jeremiah Nyaga, one of the post-independence Cabinet Minister was instrumental in the transfer of Embu from Central Province to the Eastern Province during the Lanchester House Constitutional Conference in London. The first President of Kenya, Mzee Jomo Kenyatta who was a close ally of Nyaga put part of the Kikuyu Trust Land that remained in Kirinyaga District in Central Province under irrigation, today known as the Mwea Irrigation Scheme, although Mwea Settlement Scheme which was not under irrigation remained in Embu, Eastern Province.

There was an attempt by Nyaga in 1963 to sub-divide the settlement scheme between the Mbeere and Kamba communities. However, it was halted via a court lawsuit filed by the Mihirika Kenda of Kirinyaga.

In 1978 another attempt was made to resolve the conflict through the intervention of the then Provincial Administration. It was agreed that communities in Kirinyaga will be allocated 10,000 acres of land that will be given to 1000 people with each person occupying 10 acres while the remaining 34,000 acres was to be divided amongst communities in Embu with each person also getting 10 acres. However, the decision was

not implemented after Kirinyaga residents resisted the allocation of part of the land to other people from the districts of Nyeri, Kiambu and Muranga.¹⁹

After the enactment of the new constitution which provided for creation of devolved governments or counties and election of the first county administrations in 2013, another attempt to subdivide the land was made but this time by the Embu County Administration without involving Kirinyaga County on premise that the land in question is in Embu. In consultation with the National Land Commission (NLC), the Embu County government initiated an adjudication process to divide the area in 2014. The scheme was to be subdivided into 1,732 parcels of land that were to be allocated per community with Mbeere community getting 40%, Kamba community (30%), Embu community (20%) and Kikuyu community (5%) while those who are physically challenged from all the communities were also allocated 5 % of the land ²⁰.

The exercise raised a lot of opposition because majority of the residents in the scheme were not involved during the adjudication exercise. The Kirinyaga County government also opposed and criticized the exercise while claiming that it lacked public participation, primary stakeholders were excluded from the allocation, and that there was an active court order stopping the process. The county government of Embu together with the National Land Commission went ahead to issue title deeds to the allocated beneficiaries without any demarcation on the ground. In 2018, when the beneficiaries tried to access the land, they were attacked and repulsed by those who did not benefit but still occupying the land leading to a confrontation with police, which left one person dead and several

¹⁹ <https://www.nation.co.ke/news/Leaders-residents-disagree-on-Mwea-land-dispute/1056-4395010-7vgeaw/index.html>

²⁰ <https://www.the-star.co.ke/news/2019-04-20-kalonzo-seeks-compensation-for-mwea-scheme-victims/>

others injured. The exercise was immediately suspended by Fred Matiangi²¹, Cabinet Secretary for Interior and Coordination of National Government in consultation with Farida Karoney, Cabinet Secretary for Lands, citing corruption where politicians, administrators and influential persons had allocated themselves big chunks of land at the expense of the squatters.

To date the squatters have vowed not to leave the land under any circumstance and have been demanding to be prioritized in any allocation. Meanwhile, Kirinyaga county government demands to be a stakeholder in the whole exercise of adjudication. There are many court cases blocking the exercise of adjudication and attempts by the Embu county government to have the national government allow ‘beneficiaries’ to access their land has not been successful. In However, it is worth noting that efforts by elders from communities involved in the conflict, members of provincial administration and church leaders to restore calm in the area by talking to the belligerent groups has helped to restore a semblance of peace amid tensions.

The dispute in Mwea settlement scheme in Embu County over the sharing of 44000 acres of land is threatening to become a violent conflict pitting Mbeere, Kikuyu and Kamba ethnic communities against each other thus delaying economic utilization of the contested land. There is need to put in place a sound and effective conflict resolution mechanism to manage the resource-based conflict²². The study seeks to establish the influence of conflict resolution mechanism in natural resource management within Mwea settlement scheme in Kenya.

²¹ <https://www.reuters.com/article/us-kenya-land-conflict/kenya-suspends-land-allocation-as-nine-injured-in-attacks-idUSKBN1HR0BR>

²² Mabrouk, A. El-Skaway. *Community-based Water Law and Water Resource Management Reform in Developing Countries* (Vol. 37, 2018, pg 1994). Madison: American Society of Agronomy.

1.2 Statement of the Problem

Although legal and institutional frameworks exist in the nation to deal with natural resource disputes, they have provided nothing to stop natural resource disputes from occurring due to structural deficiencies. Conflicts over natural resources are common in Kenya and therefore, a cause for great worry²³. The Land problem in Kenya has led into eruption of violent conflicts mainly because the resource is regarded with a lot of passion, emotions and sensitivity to an extent that when it is mishandled such feelings results into volatile situations. Land clashes that were witnessed in the Country between 1992 and 1997 are attributed to a greater degree to unfair distribution of land that has been occasioned by bad policies and programs by the Government that have been seen to discriminate certain groups at the expense of others. Most of the numerous conflicts in Kenya owe their root cause to the issues of access to the natural resource and exploitation. The post-election violence in 2007-2008 is linked to contestations over natural resources access and usage in Kenya and to sentiments of discrimination and alienations when it comes to benefits accrued from distribution and exploitation of the available resources²⁴. Mwea settlement Scheme has largely contributed to violence between communities living in Kirinyaga County and Embu County with devastating results that include loss of lives as well as expulsion of people especially the squatters from the land where they call home for many years. This research was aimed at evaluating the effect of the dispute resolution

²³ Bouwen, R., & Taillieu, T. (2004). Multi-party collaboration as social learning for interdependence: Developing relational knowing for sustainable natural resource management. *Journal of community & applied social psychology*, 14(3), 137-153.

²⁴ Butler, J. R. A., Young, J. C., McMyn, I. A. G., Leyshon, B., Graham, I. M., Walker, I., & Warburton, C. (2015). Evaluating adaptive co-management as conservation conflict resolution: learning from seals and salmon. *Journal of environmental management*, 160, 212-225.

mechanism on the management of natural resources in the Mwea settlement Scheme in Kenya.

1.3 Research Questions

The study sought to answer the following questions;

1. What is the influence of negotiation in natural resource management in Mwea settlement scheme in Kenya?
2. What is the influence of arbitration in natural resource management in Mwea settlement scheme in Kenya?
3. How does adjudication influence natural resource management in Mwea settlement scheme in Kenya?

1.4 Objective of the Study

1.4.1 General Objective

The main objective of the study was to assess the influence of conflict resolution mechanism in natural resource management in Mwea settlement scheme in Kenya.

1.4.2 Specific Objective

The specific objectives of the study were;

1. To assess the influence of negotiation in natural resource management in Mwea settlement scheme in Kenya.
2. To examine the influence of arbitration in natural resource management in Mwea settlement scheme in Kenya
3. To determine the influence of adjudication in natural resource management in Mwea settlement scheme in Kenya

1.5 Literature Review

This section examined both theoretical and empirical literature relevant to the issue of the influence of conflict resolution mechanism in the natural resource management in East Africa Region; a case study of Mwea Settlement scheme in Kenya. It will also be important in as far as examining the key debates and for the identification of the knowledge gaps respectively.

1.5.1 Theoretical Literature Review

A theory is “a well-organized body of recognized knowledge that is used to explain a particular set of events in a range of situations”.²⁵ There are varieties of conflict management theories to choose from. The research has adopted a Conflict Resolution Theory as well as Cooperation and Competition Theory in this part. This was found necessary to help examine the key debates by different scholars on the influence of conflict resolution mechanism in the natural resource management.

1.5.2 Cooperation and Competition Theory

Deutsch²⁶ originally proposed this idea and Johnson²⁷ refined it. There are two main concepts in this theory. One being the interconnectedness of the conflicting parties' objectives. The other element is the path of action that the two parties pursue. He differentiates between two types of goal independence. The first is good, while the other is bad. The good thing is whether a person's probability of achievement is favourably related to the chance of a person accomplishing his or her goal. In the negative, the goal is

²⁵ Sandefur & Siddiqi (2011). *Forum Shopping and Legal Pluralism*, Oxford University, Centre for the Study of African Economies

²⁶ Deutsch, M. *The Effects of Training in Conflict Resolution and Cooperative Learning in an Alternative High School*, New York, Teachers College, Columbia University, International Center for Cooperation and Conflict Resolution, 2012

²⁷ Johnson and Johnson. *Cooperation and competition: Theory and research*. Edina, MN: Interaction, 1989.

connected, such that the goal is adversely linked to the achievements of others. This means that if both you and another person are well linked, you might drown or float together.²⁸ The opposite of this is that you swim when the other sinks, and you sink if the other swims. According to this idea, a person's actions may be divided into two categories. These are successful actions that increase the odds of an individual achieving a target and bungling activities that deteriorates the possibilities of an individual achieving a target.

The results of this hypothesis resemble those of Morton and Marcus²⁹ who conclude that the path of the event is determined by the cooperative or competitive character of the conflicting players. They also pointed out that individuals have an innate propensity to act positively for their own benefit and adversely to their own peril. This serves as the basis why human beings have capacity for collaboration and compassion as well as competitiveness and hatred. According to Johnson's research³⁰, the collaboration results into better productivity of the group, better inter-human connections, enhanced mental state as well as more self-esteem. The study shows that better conflict resolution is the outcome of collaboration rather than competitive methods.

The findings further indicate that constructive conflict resolution procedures resemble those that are collaborative when solving issues while processes for conflict resolution that are destructive are competitive in nature. Cooperative - constructive conflict -

²⁸ Butler, J. R. A., Young, J. C., McMyn, I. A. G., Leyshon, B., Graham, I. M., Walker, I., & Warburton, C. (2015). Evaluating adaptive co-management as conservation conflict resolution: learning from seals and salmon. *Journal of environmental management*, 160, 212-225.

²⁹ Morton, Rebecca, B. and Marcus, Williams. *Experimental Political Science and the Study of Causality: From Nature to Lab*. Cambridge, MA: Cambridge University Press, 2010.

³⁰ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

resolution processes therefore lead to outcomes such as positive psychological effects, strengthening of relations, satisfaction, and mutual benefit while competitive - destructive processes results to loss of materials and discontentment, breakage of relationships as well as negatively affecting one party psychologically.³¹ According to Alper, Tjosvold and Law³² cooperative approaches to conflict resolution instead of competition leads to conflict efficiency, which in turn leads to successful performance. This result was obtained after a study team of four hundred eighty-nine workers hired from the top electronic production company for a production department³³.

This theory is adopted in this study to help in explaining the influence of conflict resolution mechanism in natural resource management. The cooperative method other than competitive method can be adopted in resolving conflicts on natural resources. This would result in improved relations between the parties.

1.5.3 Restorative Justice (RJ) Theory

This theory was espoused by Charles Burton in 2000. According to Barton³⁴, Traditional knowledge progressively envisages adopting restorative justice actions, which believe the fair and equitable (or best suited) reaction to a crime cannot be best handled by professional judicial officers. Barton argues that when the main parties (victims and offenders) themselves discuss their differences in the presence of their communities (usually friends and friends) makes the most important choices of a formal justice

³¹ Johnson and Johnson. Cooperation and competition: Theory and research. Edina, MN: Interaction, 1989.

³² Alper Steve, Tjosvold Dean, Law Keneth. Conflict management, efficacy, and performance in self-managing workteams. *Pers. Psychol.* 53, 2010:625–3

³³ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. *FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome*, 9-12.

³⁴ Barton, Charles. Theories of Restorative Justice; *Australian Journal of Professional and Applied Ethics*, 2,. (1), (2000), 41 – 53

approach in relation to justice, prevention and social welfare. This is most often the situation if the victim and the guilty parties are known and the circumstance of the crime is not contested and both parties are ready to meet to try to resolve the issue by means of deliberations and negotiations in ways relevant and appropriate to the victim. However, these agreements must be legally binding and clearly not harming the public interest³⁵.

One of the key concepts of restorative justice (RJ) is that it regards crime as a dispute that erupts between people and not between a criminal and the State. Closely associated with this is the idea that the duty for security, crime and disturbance management is to be shared amongst all community members. Restorative justice is therefore a humanitarian method that focuses on the goals of remission, healing, restitution and reintegration³⁶. Therefore, RJ programs bring together and try to include the perpetrator, the sufferer, their respective partners, friends and members of the community in a reconciliation and restitution process. The goal is to enable the offenders and victim to face each other (although frequently indirect communication is utilized) and to express their understanding and experiences. In RJ, there are many distinct practices. Victim reconciliation, family conferences and sentence circles are three common models, which differ in function of the facilitator and in number and kind³⁷. As noted by McCorry³⁸, The formal judicial system was mainly concerned with three issues when a crime was committed: Who did it? Which laws have been violated? How should the perpetrator be

³⁵ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy*.

³⁶ Zehr, Howard. and Mika, Haryy. Fundamental Concepts of Restorative Justice. *Contemporary Justice Review* 1, (1998), 47-55.

³⁷ Sharpe, Susan. Restorative Justice: A vision for Healing and Change. Edmonton, Canada: Mediation and Restorative Justice Centre, (1998).

³⁸ McCorry, Daniel. Alternatives to the Traditional Criminal Justice System: An Assessment of Victim-Offender Mediation and Neighborhood Accountability Boards in the United States; *The New York Sociologist* 4, (2010), 75.

punished or treated? In contrast, the proponents of restorative justice highlight three very distinct issues: What is the nature of the crime-related harm? What should be done to correct it or to remedy the harm? Who's in charge of this repair? Therefore, instead of defining crime merely as a violation of the rule of law, defenders of restorative justice argue that criminals damage victims and communities. Furthermore, another main objective of restorative justice program is to repair the offender rather than pursue recourse and inflict suffering on him³⁹.

There have been many critiques of Restorative Justice. Legesse⁴⁰ claimed that victims are frequently attracted to restorative justice prior to their readiness. Pressure to meet "speed trial" goals may be very counter effective to the victims' interests. Even in the interest of perpetrators, it may be detrimental to have a restorative justice conference with a victim who would be more willing to forgive than to hate. Furthermore, Watson⁴¹ Restorative justice has been described as a "shaming machine" that exacerbates offenders' stigmatization. Despite the aforementioned critiques, RJ remains the primary means of integrating and mending communities, particularly those who have experienced upheaval and high levels of hostility. Restorative Justice (RJ) has been chosen for this research because it takes cultural and community values into account while resolving disputes, and at the end of the procedure, there is no winner or loser.

³⁹ Wamukonya, Njeri. Socio-economic Impacts of Rural Electrification in Namibia: Comparisons Between grid, solar and un-electrified Households. *Energy for Sustainable Development*, 5(3), (2011), 5-13

⁴⁰ Legesse, Asmarom. Oromo Democracy, An Indigenous African Political System. Asmara: The Red Sea Press, Inc, (2000).

⁴¹ Watson, E. *Inter Institutional Alliances and Conflicts in Natural Resources Management*: Preliminary research findings from Borana, Oromiya region, Ethiopia. Marena research project, working paper No. 4, 2011.

1.6 Empirical Review

The deficiencies within the structure have thwarted the efforts of the existing legal and institutional framework in the country in managing resource based conflicts. These conflicts are still common and cause of much concern.⁴² The uneven distribution of land has greatly contributed to violence between different communities. The introduction of multi-party politics in the country which introduced region parties as opposed to a national movements exacerbated the debate on marginalizing and land dispossession as political leaders went out to campaign for votes.

The multi-party politics took tribal dimensions which put the economic considerations of the communities at the forefront thus providing a better opportunity for incitement that led to emergence of land violence witnessed in Kenya in 1992 and 1997. The violence was largely associated with uneven allocation of land resources and poor government policies and programmes that discriminated other groups and favoured others.⁴³ The use and access to environmental resources have largely contributed to conflict in the country as witnessed in the post-election violence in 2007-08.⁴⁴

To help in the identification of the knowledge gap for this study, this section examines literature around the three specific objectives guiding this study: to assess the influence of negotiation in natural resource management in Mwea settlement scheme in Kenya, to

⁴² Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.*

⁴³ Cheserek, G. J., Omondi, P., & Odenyo, V. A. O. (2012). Nature and Causes of Cattle Rustling among some Pastoral Communities in Kenya. *Journal of Emerging Trends in Economics and Management Sciences*, 3(2), 173-179

⁴⁴ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome, 9-12.

examine the influence of arbitration in natural resource management in Mwea settlement scheme in Kenya, and finally to determine the influence of adjudication in natural resource management in Mwea settlement scheme in Kenya.

1.6.1 Influence of Negotiation in Natural Resource Management

The negotiation process allows parties to identify and address problems so that a mutually agreed solution may be found devoid of assistance of a third party. This is a procedure in which parties strive to resolve their misunderstanding via a series of methods, from concessions and bargaining to intimidation and confrontations⁴⁵. It also involves two or more individuals with equal or unequal authority to debate common and/or opposition interests in a certain subject of common responsibility⁴⁶. There are many methods to negotiations, including: position negotiation, negotiation of principles and negotiations based on interest.⁴⁷ The first thing that involves positional negotiations is to differentiate issues from the people. Secondly, to focus on interests rather than views and thirdly, to create alternatives for each other's benefit⁴⁸.

The Negotiated Approach provides a fertile ground for other actors to engage themselves in settlement of natural resource based conflicts at all levels. They engage themselves in formulating, proposing and negotiating on a policy considering the surrounding environment, local expertise, grievances among others. However, this approach is different from conventional participatory processes, where the local groups don't have the chance to respond to strategic plans formulated by experts or policy makers.

⁴⁵ Haysom, Nicholas. adn Kane, Sean. Negotiating natural resources for peace: Ownership, control and wealth-sharing. Centre for Humanitarian Dialogue, Briefing Paper, 26, 2009.

⁴⁶ Moore, Christopher. The Mediation Process: Practical Strategies for Resolving Conflict, 3rd. San Francisco: Jossey-Bass Publishers, 2004.

⁴⁷ Muigua, Kariuki. Resolving Environmental Conflicts through Mediation in Kenya. Ph.D. Thesis, Unpublished, University of Nairobi, 2006.

⁴⁸ Haysom, Nicholas. adn Kane, Sean. Negotiating natural resources for peace: Ownership, control and wealth-sharing. Centre for Humanitarian Dialogue, Briefing Paper, 26, 2009.

The Negotiated Approach emphasizes on capacity building for the local stakeholders in order for them to actively engage effectively in negotiations with policy makers and planners.⁴⁹ This approach therefore, ensures that the local communities are fully involved and prepared in the negotiation process. This includes: “gathering data on the physical and biological characteristics of the local environment, understanding the institutional and legal contexts, power mapping, developing negotiation skills and creating, or linking to, strategic platforms for negotiation”.

The emphasis of talks is on the parties' shared interests instead of their relative strengths or positions⁵⁰. Birner⁵¹ focused analysis of negotiations in the management of natural resources – A case study on conflicts between crop and cattle farmers in Sri Lanka. The research found that the incentives for resource users and politicians rely on the likelihood of a negotiated result from the public administration⁵². The research also revealed that negotiating is a cost-efficient, flexible, quick and confidential method that enables innovative solutions, promotes relations, improves party control and enables personal empowerment and is therefore appropriate for conflict settlement. Negotiation and mediation were effectively used in environmental conflicts in the USA.

Negotiations in Africa are driven by harmonizing and restoring the interests of parties' involved. As a result, even when a Member is pitted against her or his community in a

⁴⁹ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

⁵⁰ Ury, William. Getting to Yes with Yourself and Others, Harper Thorsons, (2015), 147-148.

⁵¹ Birner, Regina, and Pray, Carl. Bioeconomy. In R. Serraj & P. Pingali (Eds.), Agriculture & Food Systems to 2050 (pp. 503–544). Singapore: CGIAR and World Scientific, 2018.

⁵² Hafner, J., Schlarb, M., & Pinili, L. (2003). Community-based natural resource conflict management: the case of watershed planning in Metro Cebu, the Philippines. Natural resource conflict management case studies: an analysis of power, participation and protected areas, 19.

struggle, emphasis is placed on the recovery and reintegration of the wanderer into his or her position in society⁵³. The restoration of a person who rebels may also involve the reinstatement of tranquility and decency in the community, as well as social cohesion and values in a way that conflict management becomes beneficial to all parties involved⁵⁴. Among the Yoruba community of Nigeria, peace was negotiated in their ancient culture. The excuse for mistakes made against individuals and the whole society was one aspect of the discussion. Such apologies were routed via elders of Yoruba, mixed leaders and high caliber leaders in the society. It was performed at or around the level of representatives. A representative in the sense of dispute settlement was the Babaogun (patron) ⁵⁵.

Despite, occurrences of conflict in the society, the parties to a conflict often reach into an agreement facilitated through negotiation and compromise processes.⁵⁶ If these conflicts are not resolved the whole world would have fragmented. According to conflict theorists there are various factors which led to a conflict including “economic, value and power”. Economic dispute encompasses struggle for achieving scarce resources.⁵⁷ Every party strive to attain the most that it can maximize net gains. Value disputes encompasses

⁵³ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

⁵⁴ Olaoba, O. B. (n.d.).The Traditional Approaches to Conflict Resolution in the South-West Zone of Nigeria. Nigerian Army Quarterly Journal, Vol. No.1, Negatons (W.A) Ltd. Pp.22-37.

⁵⁵ McCorry, T. (2010). Alternatives to the Traditional Criminal Justice System: AnAssessment of Victim-Offender Mediation and Neighborhood Accountability Boardsin the United States; *The New York Sociologist* 4, 75

⁵⁶ Hafner, J., Schlarb, M., & Pinili, L. (2003). Community-based natural resource conflict management: the case of watershed planning in Metro Cebu, the Philippines. Natural resource conflict management case studies: an analysis of power, participation and protected areas, 19.

⁵⁷ Ngigi, S. N., Savenije, H. H., & Gichuki, F. N. (2008). Hydrological Impacts of Flood Storage and Management on Irrigation Water Abstraction in Upper Ewaso Ng'iro River Basin, Kenya. *Water Resources Management*, 22(12), 1859-1879.

differences in ways of life, norms and values which different people ascribe to. Power dispute are as a result of all parties wishing to maintain the power to influence relationship and the social setting. This conflict takes place between individuals, groups or nations.

The main objective of negotiation is to result into a “win-win” and therefore positional bargaining is not recommended as it leads to unwise agreements and threatens the existing cordial relationship among the parties.⁵⁸ Negotiations are more preferred since they do not involve long procedures and the agreement reached favours all the parties to a conflict.⁵⁹ Negotiation provides the parties with an autonomy which enables them to devise holistic solutions. Adopting a collaborative rather than a competitive approach to negotiation, parties strive to come up with solutions which favour them.⁶⁰

A collaborative approach to negotiations leads to enhanced relationships, builds trust and respect, self-esteem, reduces stress and achieves more acceptable outcomes. During negotiation process it’s paramount for all the parties to have contextual clarity of the different issues which will help in achieving acceptable outcomes.⁶¹ Separating people from the issues provides them with a good opportunity to respond to the issues without

⁵⁸ Rihoy, L., & Maguranyanga, B. (2014). The politics of community-based natural resource management in Botswana’. *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa*. Earthscan: London, 55-78

⁵⁹ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

⁶⁰ Kariuki, J. G., Magambo, K. J., Njeruh, M. F., Muchiri, E. M., Nzioka, S. M., & Kariuki, S. (2012). Effects of Hygiene and Sanitation Interventions on Reducing Diarrhoea Prevalence Among Children in Resource Constrained Communities: Case Study of Turkana District, Kenya. *Journal of Community Health*, 37(6), 1178-1184.

⁶¹ Mabrouk, A. E.-S. (2018). *Community-based Water Law and Water Resource Management Reform in Developing Countries* (Vol. 37, pp. 1994). Madison: American Society of Agronomy.

distorting their relationship and also assists them to get a clearer view of the substantive problem.

Mutunga⁶² research on “the Framework for Natural Resource Management in Laikipia County, Kenya” is considered as a conflict management approach. In the research, it was found that recurrent droughts and water shortages in Laikipia are threatening peaceful coexistence among communities as a result of increased competition over the natural resource. The systems for administering conflicts and responses by the communities when trying to cope with the requirements were found to be inadequate, with a large percentage of participants expressing a greater need for community engagement and involvement in conflict resolutions and peace committees⁶³. Measures to address this include putting peace and security of communities as a priority of the County Government's programs by embracing suitable conflict resolution mechanisms like negotiations to mitigate against conflicts involving herders and occurrence of inter-ethnic rivalry in the County. Increasing public and community engagement in the formulation of policies and strategies on the County’s Natural Resources including creating awareness during and after the conception of resource management instruments and their operationalization. In the Mwea settlement system negotiations between opposing groups was also witnessed in order to resolve the land problem thus forestalling exacerbation.

⁶² Mutunga, Vanessa Mueni. Natural resource management framework as a conflict management strategy in Laikipia County, 2018.

⁶³ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

1.6.2 Influence of Arbitration in Natural Resource Management

Arbitration is “a process in which a disagreement is presented to one or more arbitrators who render a binding judgment in the dispute by consent of the parties”. By selecting arbitration, the parties decide not to go to court for a private dispute settlement process⁶⁴. Arbitration is distinct from mediation since the impartial arbiter has power to decide the issue. Suzuki⁶⁵ review on conflict resolution in natural resource management established that enough time and resources are required to prevent needless confrontation. The disadvantages of hurry and the necessity to "take time" are important to the development of true and successful local government.

In a study in United Kingdom (UK), Callum⁶⁶ noted that arbitration in the dispute resolution was favored more than adjudication due to the length of the procedures. Similarly, in Switzerland, Scherer and Moss⁶⁷ noted that there was a rise in adoption of arbitration in settling of disputes that derived various benefits such as the length of proceedings and the irrevocability of agreements. Arbitration had a key role in decreasing combative attitudes among parties in dispute in the US. In Canada, Tanielian⁶⁸ argued that, owing to its inherent adventive characteristics which allow procedural flexibility and eliminate hostile enforcement of dispute resolution, arbitration is regarded the best dispute settlement technique for maintaining a business dispute resolution.

⁶⁴ Grossman-Hart. goes global: Incomplete contracts, property rights, and the international organization of production. *J Law Econ Org*30(suppl 1), (1986), i118–i175.

⁶⁵ Suzuki, Akisato. Is more better or worse? New empirics on nuclear proliferation and interstate conflict by Random Forests. *Research & Politics*. April 2015. doi:[10.1177/2053168015589625](https://doi.org/10.1177/2053168015589625)

⁶⁶ “Callum M., (2103) Arbitrate, adjudicate or mediate?”

⁶⁷ “Scherer, M. and Moss, S. (2014). ADR. Reports on Switzerland. International Construction Projects Committee”

⁶⁸ “Tanielian, A. (2012). Arbitration still best road to binding dispute resolution. *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, Volume 5(2), pp.90-96.”

In Nigeria, according to an evaluation by Balogun, Ansary and Thwala⁶⁹ arbitration in dispute settlement showed that the arbitration made the procedures more flexible and removed hostile enforceability leading to their usage in resolving disputes over natural resources⁷⁰. In Tanzania, arbitration is utilized in dispute resolution because of many benefits, including minimization of aggressive enforcement and impartiality. It was observed that arbitration is the greatest way among the Alternative Dispute Resolution (ADR) methods to help in achieving justice in conflicts between parties with equal negotiating strength and with the urge to resolve disputes quickly, particularly business related disputes.⁷¹

The process of resolving natural resource conflicts provides a good platform for achieving environmental democracy as well as promotes right to access to environmental justice. The right of access to justice is important as it provides a platform in which the public challenge utilization and execution of environmental laws and policies. Natural resource conflicts are distinctive because they encompass people's lives. When they are ignored and escalate they can result into massive deaths and destruction. The ADR methods have been effective in solving these conflicts.⁷² For instance, these methods provide parties with an opportunity to develop sustainable solutions that are accepted by all.⁷³

⁶⁹ "Balogun, O.A., Ansary, N. and Thwala, W.D. (2017) Adjudication and arbitration"

⁷⁰ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

⁷¹ "Farooq Khan, Alternative Dispute Resolution, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi."

⁷² Cheserek, G. J., Omondi, P., & Odenyo, V. A. O. (2012). Nature and Causes of Cattle Rustling among some Pastoral Communities in Kenya. *Journal of Emerging Trends in Economics and Management Sciences*, 3(2), 173-179.

However, use of courts and formal tribunals has often been regarded as inflexible and bureaucratic largely because they do not promote cordial relations between the parties. After the proceeding the parties come out bitter and dissatisfied. The ADR helps in reaching multiparty “win-win” options since they focus on the problem and not the person thereby building awareness of interrelationship among different actors.⁷⁴ Interdependence therefore is one of the concepts that influence the negotiation process since all parties need to co-exist after resolving their misunderstandings. Further, other key aspects of party autonomy can be utilised to provide solutions to environmental problems and natural resource conflicts.⁷⁵ Mediation through a third party emphasizes on significant value differences, which are regarded as strenuous to resolve especially in absence of an agreement on the suitable behaviour or ultimate goals.⁷⁶ Additionally, ADR, utilizing the strength of mediation techniques can assist in resolving conflict, by changing the value disputes into interest disputes, establishing superordinate goals and deterrence.⁷⁷

⁷³ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome, 9-12.

⁷⁴ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

⁷⁵ Kariuki, J. G., Magambo, K. J., Njeruh, M. F., Muchiri, E. M., Nzioka, S. M., & Kariuki, S. (2012). Effects of Hygiene and Sanitation Interventions on Reducing Diarrhoea Prevalence Among Children in Resource Constrained Communities: Case Study of Turkana District, Kenya. *Journal of Community Health*, 37(6), 1178-1184.

⁷⁶ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome, 9-12.

⁷⁷ Castro, L. J. & Stork, A. M. (2015). *Linking to Peace: Using BioTrade for Biodiversity Conservation and Peacebuilding in Colombia* In: Young, H and Goldman, L. eds. *Livelihoods, Natural Resources, and Post-Conflict Peacebuilding*. London: Routledge

In Kenya, Ndirangu⁷⁸ while revaluing the impact of arbitration on resolving disputes, argued that freedom was formed in arbitration by selecting an arbitrator and providing a representational influence on a successful resolution of the issue during hearings. The research also highlighted the impact of versatility in arbitration by using appropriate language and norms in the settlement of disputes. The impartiality of an arbitrator via relatively limited appeals to the judgment has been effective in resolving disputes. Furthermore, sectoral legislation in Kenya provides for the handling of conflicts via the national court system. National systems of management of natural resources are premised on legislation and policy statements by regulatory and judicial bodies, including judgment and arbitration as the key approach for conflict management and the decision-making by judges and authorities with the power to enforce disputed resolution⁷⁹. In Mwea settlement scheme, arbitration has been adopted while trying to solve the dispute.

1.6.3 Influence of Adjudication in Natural Resource Management

Adjudication is a conflict resolution method where an unbiased, non-party adjudicator decides fairly, swiftly and non-costly on a particular issue.⁸⁰ Gent and Shannon⁸¹ Finds the more successful termination of territorial disputes than other dispute management methods through binding third-party procedures (arbitration and judgment) because they offer legality, increasing reputational expenses and domestic political coverage. It was found that the unbiased handling of disputes between third parties does not lead

⁷⁸ “Ndirangu, Robert Nguyo. Influence Of Arbitration On Dispute Resolution In The Construction Industry: A Case Of Nairobi County, Kenya, (2014), UON”

⁷⁹ “FAO, ‘Negotiation and mediation techniques for natural resource management,’ op cit.”

⁸⁰ “Bercovitch, Jacob. and Jackson, Richard. Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict. *Negotiation Journal*, 17 No.1 (2001), 59-77.”

⁸¹ “Gent Stephen and Shannon Megan. Bias and the Effectiveness of Third-Party Conflict Management Mechanisms. *Conflict Management and Peace Science*. 2011;28(2):124-144.”

immediately to effective discussions. Instead, contentious parties prefer impartial third parties to negotiate the most probable means of ending conflicts.

In Spain, Anna⁸² considered the function of adjudication as the international dispute settlement and global security and peace mechanism during change in climate age. It was demonstrated that the main method of international conflict settlement was misused in the context of the study of adjudication. The research suggests that adjudication may be more successful if coupled with non-judgmental techniques, such as mediation and enabling conflict settlement. Gent and Shannon⁸³ concentrated on the efficacy of international arbitration and adjudication. It was discovered that conflict management techniques are significantly more essential for resolving disagreements than the degree of bias of a third party. Binding third-party procedures (arbitration and adjudication) are more successful than other conflict management strategies in ending conflict disputes over resources because they offer legality, reputational consequences and domestic policy coverage. Wong⁸⁴ alternative conflict settlement has become more common in Sri Lankan building projects. In particular, he claimed that adjudication was increasingly utilized in managing natural resources because of the nature of its irrevocability of settlement.

In Nigeria, Olele⁸⁵ review on adjudication on dispute resolution mechanism revealed that adjudication is accepted as a conflict resolution mechanism in Nigeria. In South Africa,

⁸² “Anna Spain, *Beyond Adjudication: Resolving International Resource Disputes in an Era of Climate Change*, 30 Stan. Envtl. L.J. 343 (2011), available at <https://scholar.law.colorado.edu/articles/190>”

⁸³ “Stephen E. Gent and Megan Shannon. The Effectiveness of International Arbitration and Adjudication: Getting Into a Bind. [The Journal of Politics](#) 72(02):366 – 380, 2016”

⁸⁴ “Wong, C.H. (2011). Adjudication: Evolution of New Form of Dispute Resolution? Unpublished Research Paper, Faculty of Engineering and Science, University of Tunku Abdul Rahman”

⁸⁵ “Olele, Christian Azuka, Adjudication: A Dispute Resolution Mechanism in Nigeria. *PM World Journal*, 7(6), 2018”

Maiketso and Maritz⁸⁶ investigated adjudication as a means of alternative conflict settlement and observed that adjudication seems to have gained acceptability in South Africa. Due to the restricted timetables, awards may be a useful instrument for the update of access to justice for disputed persons who need to resolve the disagreement in the shortest period feasible.

Kameri-Mbote et al⁸⁷ found that “adjudication of group ranches in Kajiado led to subdivision of the ranches to individual members, leading to transfers of land to outsiders. Further, it resulted to subdivision of land and the emergency of wildlife conservancy practices, hence defeating the original purpose of commercial ranching, preservation of cattle culture and minimization of environmental degradation”. As a result, there have been more human-wildlife confrontations and threats to food security and long term livelihood in this region.⁸⁸ The original aim of group ranching idea was attainment of a equilibrium between ecological sustainability, livestock productivity and reduction of inter-clan conflicts over grazing land.

1.7 Gaps in the Literature

From the above literature review, this study has established that the influence of negotiation in natural resource management in Mwea settlement scheme in Kenya has not been adequately addressed by other scholars. It is also emerging that the influence of arbitration in natural resource management in Mwea settlement scheme in Kenya is equally not widely studied by scholars. This study therefore addresses these areas as well

⁸⁶ “N C Maiketso; M J Maritz. Adjudication as an alternative dispute resolution method in the South Africa. J. S. Afr. Inst. Civ. Eng. vol.54 n.2 Midrand Jan. 2012”

⁸⁷ “Kameri-Mbote, Patricia., Odote, C., Musembi, C. and Kamande, W. *Ours by Right: Law, Politics and Realities of Community Property in Kenya*. Strathmore University Press, Nairobi, (2013).”

⁸⁸ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome, 9-12.

as investigating the influence of adjudication in natural resource management in Mwea settlement scheme in Kenya.

1.8 Research Hypotheses

The following are the hypotheses that guide the study;

H₀₁ Negotiation has no significant influence on natural resource management in Mwea settlement scheme in Kenya

Arbitration has had significant influence on natural resource management in Mwea settlement scheme in Kenya

H₀₂ Adjudication has no significant influence on natural resource management in Mwea settlement scheme in Kenya

1.9 Justification of the Study

This study is premised on the following areas of justification

1.9.1 Policy Justification

The study will be important to the policy makers because it will provide enlightenment on how conflict resolution mechanisms can be used to solve conflicts at Mwea settlement scheme. The policy makers will also understand more on the effectiveness of conflict resolution mechanisms in Mwea settlement scheme. As a result, the results of this research will be used as a guide and illumination on how to improve existing strategies available for proper management and prevent the occurrence of resource-based conflict at Mwea settlement scheme.

1.9.2 Academic Justification

The research will generate knowledge on the impact of conflict resolution mechanism in natural resource management. To academicians their level of understanding will be

enhanced through this study. To researchers, they will be able to use the study as references in future associated research.

1.10 Scope and Limitation of the Study

The study will be conducted at Mwea Settlement Scheme in Mwea and Makima wards, Mbeere South Sub County, Embu County as well as bordering areas of Kirinyaga County. The population will comprise community members and government officials in Embu and Kirinyaga Counties. These individuals will be part of the study population because they reside in the two Counties. The study was limited to Mwea Settlement Scheme. The study period was between May 2021 to July 2021.

1.11 Definition of Concepts

1.11.1 Adjudication

It is the judicial duty to listen to the facts and evidence provided by the parties, to apply the legislation in question and to take a judgment.

1.11.2 Arbitration

It is a private procedure where contentious parties agree that one or more persons may decide on the matter after receipt of evidence and hearing arguments.

1.11.3 Conflict Resolution

It is a systematic procedure that resolves conflict or complaints between two or more socially active people.

1.11.4 Natural Resource Management

It is a strategy to integrate the protection and development of the natural resources (water, soil, trees and local biodiversity) to address poverty, hunger and diseases.

1.11.5 Negotiation

It is a dialog of two or more individuals or parties to achieve a positive result in one or more problems in which there is a dispute in relation to at least one of those issues.

1.12 Theoretical framework

This study applies Conflict Resolution theory to help in framing and to support the arguments in the study.

1.12.1 Conflict Resolution Theory

As per Deutsch⁸⁹, theory proposes that most efficient way to resolve conflict is via effectual cooperative problem-solving. It also compares conflict resolution process with a competition process wherein the opposing sides compete to decide who wins and who loses. The battle usually ends in a defeat for both sides. Supportive behaviour follows the same rules as respect, accountability, honesty, empowerment, and care for friends or other group members.⁹⁰ According to this idea, strong cooperative relationships make it easier to handle unavoidable disputes in a constructive manner. In this approach, the rules are to put disputes in context by finding common ground and shared interests, to address just the topics when there are disagreements, and to avoid personal assaults.

Finally, demonstrate concern, care, and love to the other side during the dispute, since they are both members of one moral community. Schellenberg⁹¹ Studies show that settlement of conflict may occasionally lead to the triumph of one superior side while

⁸⁹ “Deutsch, M. (2012).*The Effects of Training in Conflict Resolution and Cooperative Learning in an Alternative High School*, New York, Teachers College, Columbia University, International Center for Cooperation and Conflict Resolution.”

⁹⁰ “Kinyanjui, K. (2011). *The Challenges of Youth Bulge in Africa: Marginalization, Conflict and Peace Building*. Unpublished paper, Nairobi.”

⁹¹ “Schellenberg, A. (2006).*Conflict Resolution: Theory, Research and Practice*. State University of New York Press, Albany.”

conflict resolution may lead to compromise in other instances. Schellenberg's theory of settling conflict recognises other forms of resolving disputes. Sandole⁹² conflict resolution, according to the author, requires the solution of difficulties, the direct participation of the disputing parties in the collaboration of solution and the assistance of a third parties trained in the conflict resolution process. Schellenberg⁹³ additional comments that cultural and structural conflicts exist. In cultural conflicts, parties create significant disparities in values whereas structural conflicts deal with one or both parties' power inadequacies in a state, an organization, a community or an area which prevents them from meeting their requirements. Burton⁹⁴ posits that it is about the transformation of fundamentally violent systems that affect people's lives so far as they are prepared if not their life to burst into their awareness. In contemporary times, human conflict was most notably biologised by Lorenz⁹⁵ as aggression. He thinks that conflict is unique and part of human existence.

This theory supports the study by explaining how conflicts can be resolved. The theory can be applied in solving conflicts on natural resources through the cooperative problem-solving procedure⁹⁶. The conflicts of natural resources can be solved by putting conflicts in context by recognizing shared basis and interest, which only address issues in disagreements and abstain from personal assaults.

⁹² "Sandole. *Paradigms, Theories and Metaphors in Conflict and Conflict Resolution: Coherence or Confusion?* Manchester University Press, (2013)."

⁹³ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. *FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome*, 9-12.

⁹⁴ "Burton, John. *Contribution to Conflict Resolution Theory and Practice: A Personal View* by Dennis J.D. Sandole, (2013)."

⁹⁵ "Lorenz, Konrad. Emotion in Conflict Formation and Its Transformation: Application to Organizational Conflict Management. *The International Journal of Conflict Management*, 3, (1966), 259-275"

⁹⁶ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.*

1.13 Research Methodology

This section discusses the procedure of sampling that was adopted which include, the target population, the site of study, the design of research, sources of data, the types of data that were collected and techniques of data collection and analysis that was used.

1.13.1 Research Design

This study adopts pragmatic case study that has incorporated both qualitative and quantitative data. The case study research design also permits in-depth study of fundamental themes and is suitable as it helps in description, comparison, evaluation and comprehension of various elements of the study. In addition, the scholar has examined the main features, interpretations and consequences of the study.

1.13.2 Study Site

The study was conducted at Mwea Settlement Scheme in Kenya. The disputed Mwea settlement scheme lies in Mwea and Makima wards, Mbeere South Sub County in Embu County that borders Mwea Irrigation Scheme in Kirinyaga County. The scheme is about 44000 acres of land and is occupied by about 10000 households.⁹⁷ The land belonged to Ndia community of Kirinyaga County and Mbeere community from Embu County. However, members of the Kamba and Kikuyu communities are also squatting on the land after being accommodated by the Ndia and Mbeere communities. The area was part of the larger Mwea Trust Land and measures approximately 17,830.6 Ha. ⁹⁸

⁹⁷ <https://www.reuters.com/article/us-kenya-land-conflict/kenya-suspends-land-allocation-as-nine-injured-in-attacks-idUSKBN1HR0BR>

⁹⁸ "Ministry of Lands and Physical Planning Report on Mwea Settlement Scheme, Embu County."

1.13.3 Target Population

This included members of the Communities in Embu and Kirinyaga Counties as well as officials of National Government and County Government in the two Counties. These respondents were selected because they are key stakeholders of the disputed land and therefore were in a position to provide information needed in the study. The distribution of the population is given in Table 1.1.

Table 1.1: Target Population, Sample and Sampling Procedure

NO	Target population	Sample	Sampling procedure
1	Community members	50	Convenience sampling
2	National Government officials	20	Purposive sampling
3	County Government officials	30	Purposive sampling
	TOTAL	100	

Source: Researcher (2021)

1.13.4 Sampling Procedure

Non-probability sampling methods were adopted to choose the study sample. Convenience sampling was used to sample the community members. Convenience sampling helped in ensuring that all individuals who were most accessible to the researcher were part of the sample. The purposive sampling method was utilized to choose the government officials. Use of purposive sampling also helped the researcher to select a sample that was most useful to the purposes of the research. According to Mugenda and Mugenda⁹⁹, in a research, a sample of 10 to 30 percent is suitable. Therefore, this study adopted 30% of the population targeted.

⁹⁹ “Mugenda and Mugenda. Research Methods: Quantitative and Qualitative Approaches. Nairobi, Kenya. Acts Press (2009).”

Table 1.2: Sample Size

Category	Population	Sample (%)	Sample Size
Community members	50	30%	15
National Government officials	20	30%	6
County Government officials	30	30%	9
Total	100	30	30%

Source: Researcher (2021)

1.13.5 Sources of Data

The study obtained first-hand information using questionnaires from the respondents. Data was also obtained from publications and journal articles.

1.13.6 Types of Data Collected and tools for data collection

The study collected quantitative and qualitative data. The researcher utilized a questionnaire to gather data from community members. Qualitative researchers relied quite extensively on in-depth interview with a range of stakeholders.

1.13.7 Techniques for Data Collection and Analysis

To obtain data, the researcher administered questionnaires with the help of trained research assistants. The respondents were given two weeks to respond to the questionnaires. Using inferential and descriptive statistics, quantitative data was examined.

The study was conducted using version 23.0 of the SPSS. The mean, standard deviation, and percentages are examples of descriptive statistics. Graphs and tables are used to display the data. The connection between both variables is shown using multiple regression analysis. In order to analyze qualitative data, a content analysis method was used.

1.14 Chapter Outline

Chapter one deals with “the backdrop of the investigation, issue description, study goals, research questions, study importance, scope and limits and definition of concepts”.

chapter two discusses the influence of negotiation in natural resource management it states the approaches of negotiation and also shows how negotiations were used in the attempt to resolve the Mwea conflict.

Chapter three discusses the influence of Arbitration in natural resource management. It examines its processes and effectiveness it also shows how Arbitration was applied in a bid to resolve the Mwea conflict.

Chapter four discusses the influence of adjudication in the natural resource management. It examines the processes and effectiveness and finally how it was employed in the effort to resolve the Mwea conflict.

Chapter five discusses the summary findings of the study, its conclusions and the recommendations that arose therefrom.

CHAPTER TWO

INFLUENCE OF NEGOTIATION ON NATURAL RESOURCE MANAGEMENT

2.1 Introduction

This chapter discusses the influence of negotiation on natural resource management in Mwea settlement scheme in Kenya. First, the chapter presents the demographic characteristics of the respondents who participated in the study. The chapter utilizes both primary and secondary data. Negotiations is a process for making decisions usually when two or more parties are involved in a discussion to resettle their conflicting interests. When seeking for solutions that can be mutually beneficial to both parties' (also referred to as interest based), negotiations tend to be very cooperative even when parties are up against each other in a confrontational (also known as opponent or win-lose) discussion. During negotiations, there are five principles in the dispute talks: the concerns of the negotiating parties, the issues arising, the interactions between the parties, the communication via the discussions and the results achieved.¹⁰⁰ Negotiation is the greatest way to manage conflict, to help build an agreement, and preserve the relationship between the parties. In addition, conflict resolution is extremely essential and, as opposed to many other issues, negotiating skills may effectively apply to conflict.

2.2 The Study Demographic Characteristics

The following demographic information applies to the respondents who participated in this research and offered their consent to avail relevant information related to this study. Such demographic information focuses on the gender composition, the level of education and the occupation of the respondents.

¹⁰⁰ "Helpern R (1993). A framework for the development of negotiation skills. J Nurs Staff Dev 9:9-14."

2.2.1 Gender

The proportion of male persons who participated in this research accounted for 40 per cent of the total sample size while the proportion of female accounted for 60 per cent as shown in the figure 2.1 below.

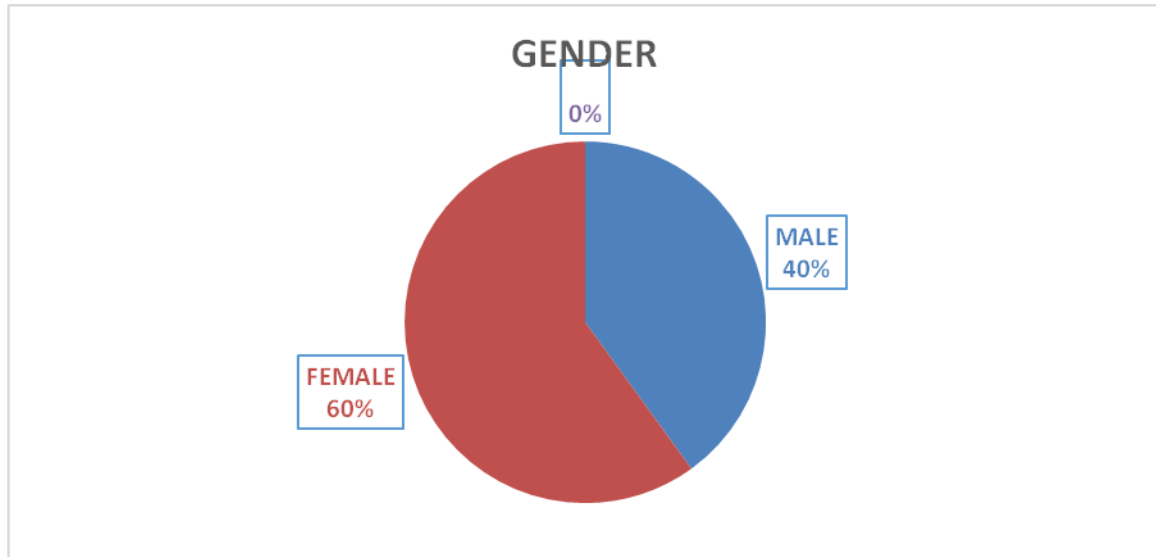


Figure 2.1; Gender of the respondents

Source; Field data; 2021

While there was no bias in the administration of the questionnaire, the number of males who participated was lower than that of women.

2.2.2 Level of education

The table below shows the level of education among the respondents.

Table; 2.1 Respondents level of education

Level of Education	MALE	FEMALE
University	50%	40%
TVET	40%	40%

O-Levels	5%	10%
Primary	5%	10%

Source; Field Data, 2021

The researcher sought to establish the level of education of the respondents so as to examine the level of understanding of the subject under study. The study established that majority of the respondents had attained university education accounting for 50 per cent males and 40 per cent females. 40 per cent males and 40 per cent females had attained TVET education. Those who had primary education accounted for 5 per cent males and 10 per cent females while those with 0-level education comprised of 5 per cent males and 10 per cent females.

2.2.3 Employment Status

The table below shows the distribution of employment among the respondents

Table; 2.2 Respondents Employment Status

Nature of Employment	MALE	FEMALE
Self-Employed	70%	60%
Government Employment	28%	30%
Unemployed	2%	10%

Source Field data, 2021

The research probed further to establish the nature of the work done by the respondents and established that, 70 per cent males and 60 per cent females were self employed, 28 per cent males and 30 per cent females were employed in government institutions while 2

per cent males and 10 per cent females were unemployed. The occupation of the respondents who participated in this research reflected the nature of subject area.

2.2.4 Age of the respondents

Further, the researcher probed the age distribution of the informants and the findings are as shown in the figure below.

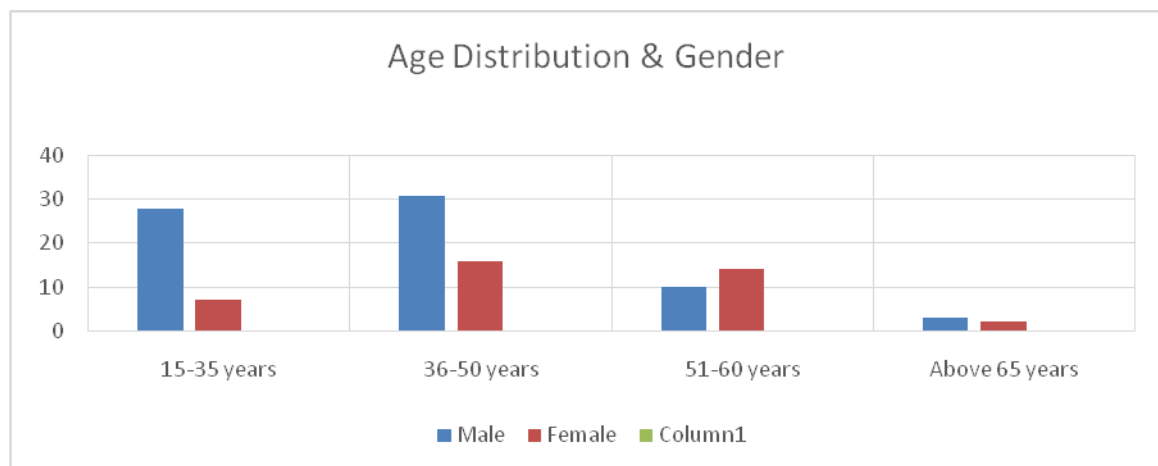


Figure 2.2; Age of the Respondents

Source; Field Data, 2021

The age distribution of the respondents indicates that majority of the respondent aged between 36-50 years of age. The age distribution indicates a suitable category of population which is well informed about the subject area.

2.2.5 Response rate

Table 2.3 Response Rate

Questionnaires Issued	Questionnaires returned	Response Rate
100	90	90%

Source; Field Data, 2021

The response rate was 90 per cent of the total questionnaires issued. This demonstrates that majority of the respondents were knowledgeable about the effect of the dispute resolution mechanism on the management of natural resources in the Mwea settlement Scheme in Kenya.

2.3 Negotiation Dispute Resolution Mechanism

Negotiations is a process for making decisions usually when two or more parties are involved in a discussion to resettle their conflicting interests. It is therefore any form of communication between two or more people with an aim of achieving amicable solutions. According to Fisher and Ury negotiation is an avenue of achieving something you want from others. It's a form of communication aimed at attaining a consensus.¹⁰¹ The negotiators often meet and coordinate together in order to achieved desired results. Frequently, formal negotiation proceedings occur between groups of people rather than individuals, and negotiators utilize a number of tactics which are long and varied.¹⁰²

As noted by Umunadi, negotiation is a basic mechanism utilised in settling disputes peacefully as conflicts are bound to erupt between the parties. The parties collaborate and communicate with each other with an aim of achieving a consensus since the process does not involve third parties. Therefore, negotiation encompasses discussion between parties to a conflict who seeks to resolve their misunderstanding in a peaceful manner.¹⁰³ The parties recognise that they have a problem which can only be resolved through

¹⁰¹ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

¹⁰² Haysom, N. & Kane, S. (2009). Negotiating natural resources for peace: Ownership, control and wealth-sharing. Centre for Humanitarian Dialogue, Briefing Paper, 26.

¹⁰³ Deutsch, M. (2012). The Effects of Training in Conflict Resolution and Cooperative Learning in an Alternative High School, New York, Teachers College, Columbia University, International Center for Cooperation and Conflict Resolution.

communication and dialogue.¹⁰⁴ Through communication and dialogue the parties are able to reach an agreement which favours them.

Negotiation occurs at early stages of a conflict the parties are in good communication. There are two forms of negotiation which include; positional and collaborative negotiation.¹⁰⁵ Positional negotiation is very competitive and adversarial and involves parties aggressively trying to pursue their interests. They make inconsiderable demands which deter achievement of their interests.¹⁰⁶ Parties assume they are in a competition and therefore they focus more on winning rather than working towards a mutually beneficial results. The interest of one party can be achieved at a cost of the other. During negotiation one party tend to be superior than the other which can lead to the breakage of the other party.

According to Fisher and Ury¹⁰⁷ negotiation is the best method adopted in settling of disputes at home and in the community. The parties in dispute may represent themselves or be represented although they influence the negotiation process. Despite consuming a lot of time negotiations results to a ‘win win’ situation where all parties leave contended with the outcomes.¹⁰⁸

¹⁰⁴ Ali, S. Y. B., Joseph Odoaba, A., Abu, M., & Natala, Y. (2011). Explaining the Violent Conflicts in Nigeria’s Niger Delta: Is the Rentier State Theory and the Resource-curse Thesis Relevant? *Canadian Social Science*, 7(4), 34-43.

¹⁰⁵ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

¹⁰⁶ McCorry, T. (2010). Alternatives to the Traditional Criminal Justice System: An Assessment of Victim-Offender Mediation and Neighborhood Accountability Boards in the United States; *The New York Sociologist* 4, 75.

¹⁰⁷ Kitamura, K., Nakagawa, C. & Sato, T. (2018). Formation of a community of practice in the watershed scale, with integrated local environmental knowledge. *Sustainability*, 10(4), 404.

¹⁰⁸ Kariuki, J. G., Magambo, K. J., Njeruh, M. F., Muchiri, E. M., Nzioka, S. M., & Kariuki, S. (2012). Effects of Hygiene and Sanitation Interventions on Reducing Diarrhoea Prevalence Among Children in

2.4 Natural Resource Conflicts Management in Kenya

Kenya has continued to experience natural resource based conflicts over the years. These conflicts need to be settled swiftly as they encompass the livelihoods of people. Communities rely heavily on natural resources for survival. However, renewable and non-renewable natural resources have the capacity to lead to the eruption of a conflict. Renewable resources include; “crop land, fresh water, fire wood and fish” while non-renewable resources include; “petroleum and minerals”.¹⁰⁹ Lack of renewable resources has mainly resulted to violence. This has largely been associated with absence of effectual strategies or methods of settling conflict that demand respect from people involved in the use and access to the resources aforesaid.¹¹⁰ Different actors have discontent ideas on access and utilization of environmental resources. If conflict is not addressed quickly, it can result into negative effects on the environment and distort the livelihoods of many people.¹¹¹

There exists legal and institutional framework in Kenya that helps in solving natural resource based conflicts. These institutions include “the courts of law, tribunals under various Acts, the National Environmental Management Authority, National Environmental Complaints Committee, Environment Tribunal and other various informal

Resource Constrained Communities: Case Study of Turkana District, Kenya. *Journal of Community Health*, 37(6), 1178-1184.

¹⁰⁹ McCorry, T. (2010). Alternatives to the Traditional Criminal Justice System: An Assessment of Victim-Offender Mediation and Neighborhood Accountability Boards in the United States; *The New York Sociologist* 4, 75

¹¹⁰ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community Forestry*. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

¹¹¹ Mähler, A. (2010) ‘Nigeria: a prime example of the resource curse? Revisiting the oil-violence link in the Niger Delta’, *GIGA Research Programme: Violence and Security*, no. 120, 5–6, 13–15, 19, 20, 23–4,

community based resource governance bodies”¹¹². The existing legal mechanism include: “National Environment Tribunal (NET), National Environmental Complaints Committee (NECC), Arbitral tribunals, Statutory tribunals set up under various laws (such as the Land Adjudication Boards) and customary law systems of conflict management”¹¹³.

However, the mechanisms stated above have not been effectual in resolving these conflicts. For instance, Courts are formal, obstinate, bureaucratic and costly.¹¹⁴ They respond to strict legal rights instead of the interest of the parties. The court system does not offer room for negotiation and agreement on issues of interest to the parties.¹¹⁵ Law sometimes has led to escalation of conflict instead of preventing it because it emphasizes on pursuing personal rights instead of achieving a consensus that will favour all the parties and execution of some laws may also result in conflicting results. But this does not mean that the personal rights ought to be disregarded. In some cases, achievement of personal rights may distort the general stability of the society.¹¹⁶

For example, in the traditional community setting, it was necessary to balance community interests with that of individuals especially where such rights are claimed against the interests of an entirely different community. In such cases the concerned communities consider such rights as owned by the whole community and not arising from individuals.

¹¹² Mahler, J. (2013). Sharing South African national parks: Community land and conservation in a democratic South Africa. *Decolonizing nature: Strategies for conservation in a post-colonial era*, 108-134.

¹¹³ Mabrouk, A. E.-S. (2018). *Community-based Water Law and Water Resource Management Reform in Developing Countries* (Vol. 37, pp. 1994). Madison: American Society of Agronomy.

¹¹⁴ Rihoy, L., & Maguranyanga, B. (2014). The politics of community-based natural resource management in Botswana’. *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa*. Earthscan: London, 55-78.

¹¹⁵ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community Forestry*. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

¹¹⁶ Rihoy, E. (2015). *The Commons Without the Tragedy?: Strategies for Community Based Natural Resources Management in Southern Africa*: SADC Wildlife Technical Co-ordination Unit, Malawi.

Thus emergence of a threat is considered as a threat to the whole community.¹¹⁷ A bottom-top approach to natural resource management and settling of conflicts provides a room for inclusion of local people who may have knowledge on the problem. Therefore, the mechanisms utilised in settling of disputes should consider public participation. Litigation, does not provide an opportunity for public participation as it includes procedural technicalities which may impact on its success.¹¹⁸

The existing national legal systems are constrained by a number of factors which hinder successful management of nature resources as well as conflict management.¹¹⁹ Conflicts requires to be resolved through inclusivity and engagement of all parties so as to balance their interests as well as prevent adverse impacts of the conflict in a society.¹²⁰ The three aspects of a conflict which include “goal incompatibility, attitudes and behavior”, need to be balanced so as to attain a peaceful society where groups do not misuse their power to exploit weak or vulnerable groups or individuals.¹²¹ The traditional and customary systems for resolving conflicts are related to several strengths namely; they engage all individuals and respect local values and customs, they are affordable and flexible, they

¹¹⁷ Ngigi, S. N., Savenije, H. H., & Gichuki, F. N. (2008). Hydrological Impacts of Flood Storage and Management on Irrigation Water Abstraction in Upper Ewaso Ng'iro River Basin, Kenya. *Water Resources Management*, 22(12), 1859-1879.

¹¹⁸ Bingham, L. B., & Hallberlin, C. J. (2009). Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace. *Harvard Negotiation Law Review*, 14(1), 1-50

¹¹⁹ Ombara, I., Nzomo, M., & Maluki, P. (2020). Cross Border Natural Resource Management in Kenya: How Role and Responsibilities of Actors Influence Sustainable Peace in Eastern Africa Region. *European Journal of Conflict Management*, 1(1), 1-22.

¹²⁰ Rihoy, L., & Maguranyanga, B. (2014). The politics of community-based natural resource management in Botswana'. *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa*. Earthscan: London, 55-78.

¹²¹ Mwanika, P. A. N. (2011). *Environmental Conflict Management in Africa: The Natural Resource Conflict Debate and Restatement of Conflict Management Processes and Strategies in Africa*.

involve all individuals in decision making, they also use local language which everyone understand and these factors among others help in reaching an amicable consensus.¹²²

2.5 Approaches of Negotiation in Natural Resource Management

There are many negotiating methods, including: positional negotiations; principled negotiations; and interest-based negotiations.¹²³ Position negotiation involves separation of individuals from the issue, concentrating on interests and not stances and creating alternatives for mutual benefit.¹²⁴ The talks concentrate instead of their relative strength or position on the shared interests of the parties. The aim is to minimize over-emphasis on how the conflict occurred, but to offer alternatives that meet both individual and shared objectives.¹²⁵ Principled negotiations on the other hand, rather than a wrangling process focused on what each party is saying and not doing, determine the merits of the matters.

It implies that a negotiator should seek mutual benefit as much as feasible and, when different interests clash, that negotiators should be pushed to achieve a solution based on fair standards regardless of desire on both sides.¹²⁶ Interest-based negotiations move the emphasis from one position to the next, creating a discussion based on various options

¹²² Bingham, L. B., & Hallberlin, C. J. (2009). Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace. *Harvard Negotiation Law Review*, 14(1), 1-50

¹²³ “R. Fisher, et al, getting to Yes: Negotiating an Agreement without Giving In, op cit, pp. xxvi-xxvii”

¹²⁴ “Roger Fisher and Ury, W., Getting to Yes-Negotiating Agreement Without Giving in Op cit., p. 42; See also Ireland Law Reform Commission, Consultation Paper on Alternative Dispute Resolution, July 2008, p. 43”

¹²⁵ Ombara, I., Nzomo, M., & Maluki, P. (2020). Cross Border Natural Resource Management in Kenya: How Role and Responsibilities of Actors Influence Sustainable Peace in Eastern Africa Region. *European Journal of Conflict Management*, 1(1), 1-22.

¹²⁶ Ombara, I., Nzomo, M., & Maluki, P. (2020). Cross Border Natural Resource Management in Kenya: How Role and Responsibilities of Actors Influence Sustainable Peace in Eastern Africa Region. *European Journal of Conflict Management*, 1(1), 1-22.

and provide solutions for parties to attain a consensus that helps in achieving their needs and interests.¹²⁷

As the goal of negotiations is to find "win-win" solutions, position deliberations are not suggested as the standard negotiating theory because arguing about hard line positions can lead to unwise agreement, ineffectiveness, threatening ongoing relations and leading to a coalition of parties with more indicating than significant mutual interests.¹²⁸

Negotiations are preferred because they are unstructured and frequently lack formal processes, implying a framework that is tailored to the specifics of each negotiation.¹²⁹

The significance of this is that, because of the process' flexibility, parties may agree on what works best for them in a particular situation. To ensure that parties come up with innovative ideas, negotiation gives them independence in the approach and over the result. Parties may try to create a solution agreeable to all sides by adopting a collaboration instead of a competing approach to negotiation. This will make both parties feel like victors.¹³⁰

The consequence of collaborative negotiating is stronger relationships, more opportunities for developing self-confidence, respect and trust, greater pleasure, more gratifying results and lesser stresses.¹³¹ As a first essential stage in negotiations, it is necessary for the parties to have conceptual clarity on the various problems, particularly the differences

¹²⁷ “UNESCO-IHP, “Alternative Dispute Resolution Approaches And Their Application In Water Management: A Focus On Negotiation, Mediation And Consensus Building” Abridged version of Yona Shamir, Alternative Dispute Resolution Approaches and their Application, Accessible at <http://unesdoc.unesco.org/images/0013/001332/133287e.pdf>”

¹²⁸ Ibid, p.23.

¹²⁹ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

¹³⁰ “A. French, Negotiating Skills, (Alchemy, 2003), p. viii.”

¹³¹ Haysom, N., Kane, S., & Centre for Humanitarian Dialogue. (2009). Negotiating natural resources for peace: Ownership, control and wealth-sharing. HD Centre for Humanitarian Dialogue.

between ownership concerns, issues pertaining to regulatory controls and issues related to the handling of natural resources income. Separating individuals from the problems enables parties to resolve the problems without destroying their links but also allows people to gain a better grasp of the critical issue.¹³²

With respect to the management of natural resources, public participation was characterized as a type of negotiation, in which joint decisions were taken between groups with interconnected but contradictory interests.¹³³ The benefits of principled negotiations may promote mutual agreement on matters and therefore resolve conflicts. Negotiation is welcomed as a procedure that may provide community and government members more empowerment and knowledge about the disputes and their cause.¹³⁴ Differences may be settled or avoided via involvement of populations in making decisions, since each party has a chance to express his/her concerns in a common venue wherein they can all be answered in order to achieve agreement or compromise.¹³⁵

In a conflict-based situation on natural resources, it's been highlighted out that the learning and communication must be made on: value and concern, perception of other participants, procedural issues, financial issues, legal and technical issues; their own objectives, and those of other participants; personalities; styles of communication; their own establishment of possibilities; and relative benefits to various strategies.¹³⁶ The main

¹³² “Fisher, R. and Ury, W., Getting to Yes-Negotiating Agreement Without Giving in, op cit., pp. 10-11”

¹³³ “Daniels, S.E. & Walker, G.B., ‘Collaborative Learning and Ecosystem-Based Management,’ Environ Impact Asses Rev, Vol. 16, 1996, pp. 71-102, pp. 78-79.”

¹³⁴ “Castro, A.P. & Nielsen, E. (eds), ‘Natural resource conflict management case studies: an analysis of power, participation and protected areas,’ (Food and Agriculture Organization of the United Nations, 2003), p. 224.”

¹³⁵ Butler, J. R. A., Young, J. C., McMyn, I. A. G., Leyshon, B., Graham, I. M., Walker, I., & Warburton, C. (2015). Evaluating adaptive co-management as conservation conflict resolution: learning from seals and salmon. *Journal of environmental management*, 160, 212-225.

¹³⁶ Haysom, N., Kane, S., & Centre for Humanitarian Dialogue. (2009). *Negotiating natural resources for peace: Ownership, control and wealth-sharing*. HD Centre for Humanitarian Dialogue.

negotiators should thus have a solid understanding of the topics involved. This is one method that they may meet in order to achieve a “win-win scenario”.

Negotiation may fail and as such, parties may be obliged to attempt another method by introducing a third party to a stalemate and not to achieve an agreement. They come from a third party to assist the parties define problems, interests and requirements. Negotiations with the assistance of a third party are termed as mediation. Negotiation contributes to mediation, since the necessity for mediation follows the negotiations of the opposing parties but has been blocked.¹³⁷

This researcher sought to establish the influence of negotiation in natural resource management and therefore asked respondents to indicate whether they agree or disagree on the impact of the negotiation process on management of nature resource and conflict management. The findings established are presented in figure 2.1 below.

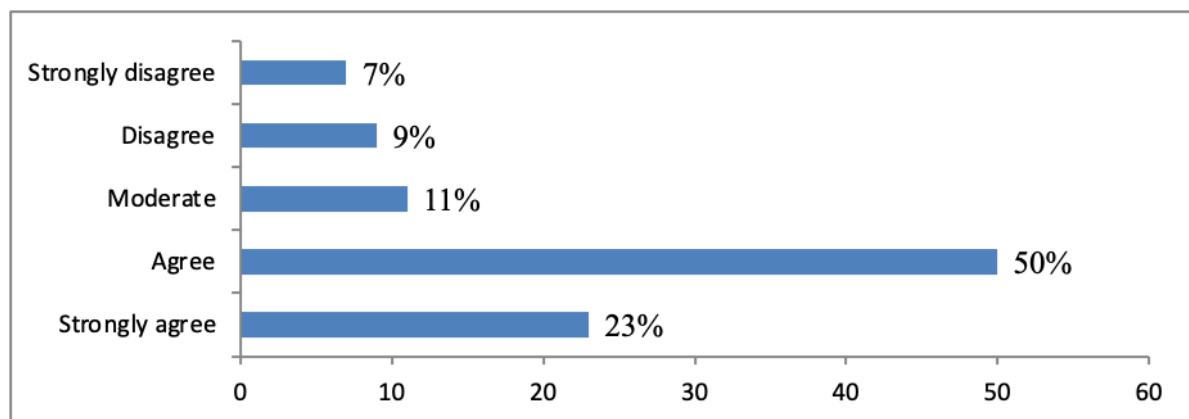


Figure 2.3: Influence of Negotiation in Natural Resource Management

Source: Field Data, 2021

¹³⁷ “M. Mwangi, Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116”

Majority of the respondents (50 per cent) strongly agreed that negotiation have been effective in management of natural resources as well as conflicts emanating from the resources. This is because negotiation provides the parties with an autonomy which enables them to devise holistic solutions. They stated that in the Mwea settlement scheme, negotiations between opposing groups were utilized in order to resolve the land problem thus forestalling exacerbation. Such views were affirmed by Birner¹³⁸ in his study on negotiations in the management of natural resources -A case study on conflicts between crop and cattle farmers in Sri Lanka where he argued that, negotiating is a cost-efficient, flexible, quick and confidential method that enables innovative solutions, promotes relations, improves party control and enables personal empowerment and is therefore appropriate for conflict settlement. This was followed by (23 per cent and 11 per cent) of the respondent who also affirmed. Contrastingly, (9 per cent) disagreed on the efficacy of negotiation in managing natural resources.

2.6 Consensual Negotiations in Natural Resource Management

Stakeholders recognize their own wants and interests, and then develop methods to enhance mutual benefits through consensual bargaining. This method aims for high levels of cooperation and assumes that all stakeholders are willing to communicate across the procedure. Conciliation is often used to build good will. When the goal is to build long-term working relationships, consensus discussions are especially essential. Because the disputants figure out their own resolutions, they may also create more gratifying and enforceable agreements.¹³⁹

¹³⁸ Birner, Regina, and Pray, Carl. Bioeconomy. In R. Serraj & P. Pingali (Eds.), *Agriculture & Food Systems to 2050* (pp. 503–544). Singapore: CGIAR and World Scientific, 2018.

¹³⁹ “Warner, M. 2001. *Complex problems, negotiated solutions: tools to reduce conflict in community development*. London, ITDG Publishing.”

Hard and soft negotiating techniques are two more kinds of negotiation. To push each party to make compromises and achieve an agreement, hard-style discussions often use more forceful tactics. They're especially useful when one of the opposing parties has adopted a rigid and strong stance. Hard-style negotiations are often combative and hostile. Rather than mutually satisfactory agreements, most outcomes are dependent on compromising (give-and-take: "I hold back something, and you give up something").¹⁴⁰

Negotiations in a soft approach may go to the opposite extreme, when parties focus more on preserve links than to pursue their own objectives. Concessions may be made too readily in these circumstances, leading to anger or dissatisfaction later.¹⁴¹ Difficult topics are frequently ignored, which may cause discrepancies. Stronger stakeholders may utilize soft negotiations to raise their demands rather than tamper them. The results tend to be founded on accommodations ("I will let you go - it's more essential to me [or less damaging] than going on with the argument").¹⁴²

Consensus negotiations provide an option to the "winner-takes-all" competitions, typically in adjudication and arbitration, which are extremely hostile and non-consensual. Moreover, the flexible and usually inexpensive character of alternative dispute resolution enables obstacles to be removed that frequently prohibit poor people, women, unprivileged groups and rural communities from accessing national judicial systems. The

¹⁴⁰ "Lewicki, R.J., Gray, B. & Elliott, M. 2003. Making sense of intractable environmental conflicts. London, Island Press."

¹⁴¹ Butler, J. R. A., Young, J. C., McMyn, I. A. G., Leyshon, B., Graham, I. M., Walker, I., & Warburton, C. (2015). Evaluating adaptive co-management as conservation conflict resolution: learning from seals and salmon. *Journal of environmental management*, 160, 212-225.

¹⁴² Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy*

main aim is establishing agreements and outcomes that favour all parties will less trade-off and compromise. The goal is to get the best feasible consensus in order to address the conflicting elements. The greatest result is win-win solutions that benefit all parties.¹⁴³

The researcher sought to establish the effectiveness of community participation in negotiations on natural resource management and conflict resolution and the responses are distributed in figure 2.2 below. The researcher asked the respondents to indicate their level of agreement on effectiveness of the community participation.

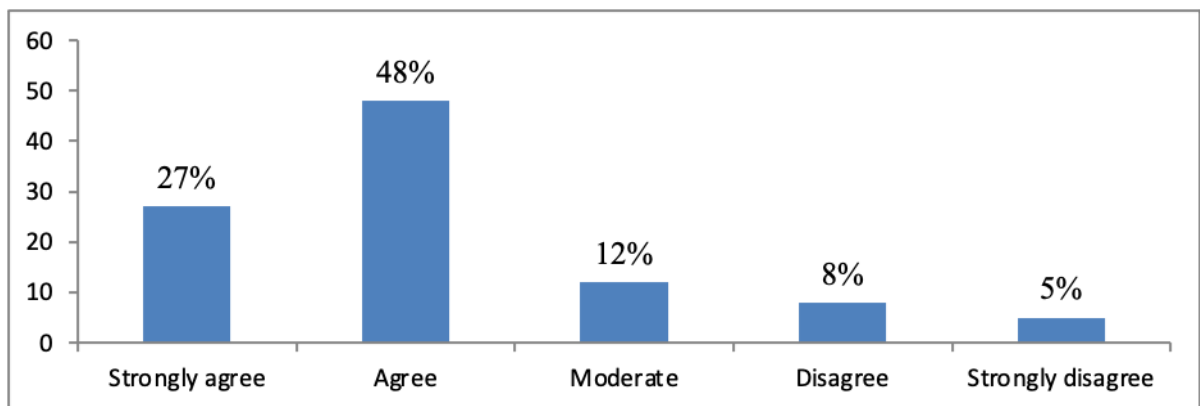


Figure 1.4: Community Participation in Negotiation

Source: Field Data, 2021

The findings indicate that majority of the respondents (48 per cent) agreed that community participation in negotiations on natural resource management was highly effective, (27 per cent) of the informants strongly agreed, (12 per cent) were moderate. Contrastingly, (13 per cent) disagreed on the efficacy of the community engagement on management of natural resources. The respondents pointed out that, community involvement in decision-making may be addressed through negotiations since each side has a chance to express its concerns on a common platform. This collaborates findings

¹⁴³ Ibid, pg. 28

conducted by Mutunga¹⁴⁴ research on “the Framework for Natural Resource Management in Laikipia County, Kenya” where it was found that, recurrent droughts and water shortages in Laikipia are threatening peaceful coexistence among communities as a result of increased competition over the natural resource. The systems for administering conflicts and responses by the communities when trying to cope with the requirements were found to be inadequate, with a large percentage of participants expressing a greater need for community engagement and involvement in conflict resolutions and peace committees.¹⁴⁵ Therefore, increasing public and community engagement in the formulation of policies and strategies on county natural resource including creating awareness during and after the conception of resource management instruments and their operationalization will help managing of natural resources as well as resolving resource based conflicts.

2.7 Collaborative Natural Resource Management

Collaborative management entails shared decision making on access and resource management by government, communities, Non-Governmental Organization (NGOs)/Non-Profit Organizations (NPOs) and the commercial sector. It refers to a process by which two or more parties negotiate, define and ensure a shared management function, ownership and responsibilities for a specific area or group of natural

¹⁴⁴ Mutunga, Vanessa Mueni. Natural resource management framework as a conflict management strategy in Laikipia County, 2018.

¹⁴⁵ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

resources.¹⁴⁶ Institutional cooperation management agreements may take many forms, from the formal acknowledgment of traditional tenure rights up to annual contracts that enable people to use severely limited State holdings. Government agencies may share the distribution of resources or management duties with indigenous people, and others such as user groups, NGOs/NPOs and businesses. These management systems are available across a variety of woods, pastures, wildlife, fisheries, protected regions – in which it may be difficult to exclude access among competing users.¹⁴⁷

Although various interested parties might have distinct objectives, the basic assumption is that power sharing and decision-making enhances the resource management process and make it more adaptable to a variety of requirements. Collaborative management is considered, in particular, to promote conservation and livelihoods objectives efficiently, fairly and sustainably.¹⁴⁸ Many collaborative partnerships emerged as creative answers to long-standing disputes natural resource management and utilization of the same. This supports the notion that conflict may be a social creative factor. Sharing the administration of disputed resources and rewards lessened conflicts that appeared unending, where improvement was difficult to analyze.¹⁴⁹

However, the practice of collaborating on management may lead to disputes. This is partially due to the fact that the individuals, organizations, and agencies involved have a wide variety of natural resource usage concerns as well as different levels of negotiating power. Furthermore, powerful organizations or individuals try to twist choices on natural

¹⁴⁶ Borrini-Feyerabend, G., Farvar, M.T., Nguingiri, J.C. & Ndangang, V.A. 2000. Co-management of natural resources: organising, negotiating and learning-by-doing. Heidelberg, Germany, GTZ and IUCN, Kasperek Verlag.

¹⁴⁷ “Castro, A.P. & Nielsen, E. 2001. Indigenous people and co-management: implications for conflict management. *Environmental Science and Policy*, 4(4–5): 229–239.”

¹⁴⁸ “FAO. 2003. Natural resource conflict management case studies. Rome.”

¹⁴⁹ Ibid

resources in order to favour them.¹⁵⁰ Notably, effective collaborative resource management necessitates a focus on dispute resolution. In most cases, disagreements over access privileges, a lack of agreement on management goals, and disinformation or misconceptions arise. Resolving disputes is essential for creating an environment where constructive solutions may be found and implemented..¹⁵¹

It is not simple to deal with disputes among many groups, cultures or stakeholders. City residents often have difficulties picking up their way through judicial or administrative institutions, while on the other hand rural people face difficulties in accessing the legal system due to distance “either physical nor social”, expenses and the particular disinterest or expertise of lawyers in natural resources issues. Accessibility to conflict management may be a problem for most rural people, even within their own communities. This largely affects women and other vulnerable groups. There are numerous locations where the local ability to address the various conflicting circumstances arising from collaborative management has to be enhanced. Rural communities frequently lack the ability to resolve disputes relating to collaborative management arrangements and their implementation.¹⁵² Such people are familiar with negotiation, and are as experienced at negotiating as anyone else.¹⁵³

The research sought to establish the degree of cooperation between the negotiating parties. The findings from the respondents are presented in figure 2.3 below.

¹⁵⁰ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy

¹⁵¹ Haysom, N., Kane, S., & Centre for Humanitarian Dialogue. (2009). Negotiating natural resources for peace: Ownership, control and wealth-sharing. HD Centre for Humanitarian Dialogue.

¹⁵² “Castro, A.P. & Nielsen, E. 2001. Indigenous people and co-management: implications for conflict management. *Environmental Science and Policy*, 4(4–5): 229–239.”

¹⁵³ “Castro, A.P. & Nielsen, E. 2001. Indigenous people and co-management: implications for conflict management. *Environmental Science and Policy*, 4(4–5): 229–239.”

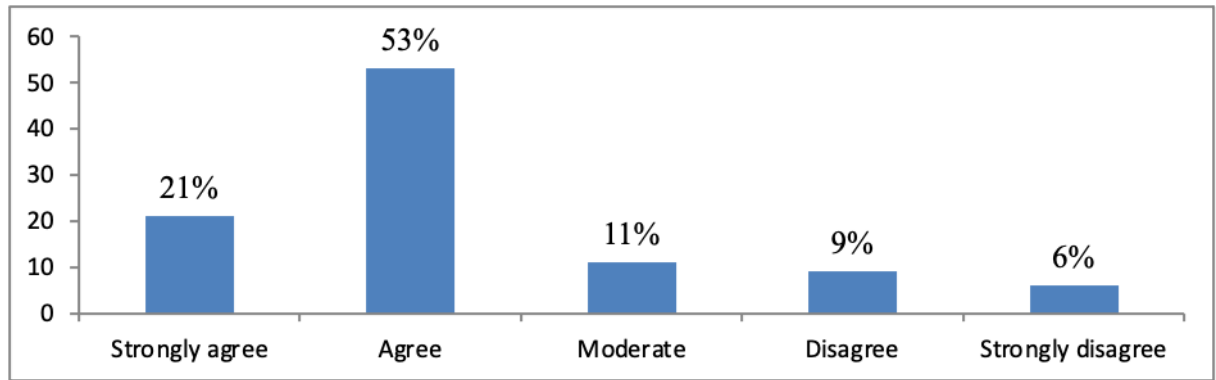


Figure 2.5: Collaboration of Negotiation Parties

Source: Field Data, 2021

Majority of the respondents (53 per cent) agreed that, negotiation parties are collaborative and hence they can find a solution that is satisfactory, (21 per cent) strongly agreed, 11% were moderate, while 9% disagree and 6% strongly disagreed and pointed that collaboration of negotiating parties in management may lead to disputes due to the fact that the individuals, organizations, and agencies involved have a wide variety of natural resource usage concerns as well as different levels of negotiating power. However, collaboration by negotiation parties leads to enhanced relationships, builds trust and respect, self-esteem, reduces stress and achieves more acceptable outcomes. In this view, Mabrouk, in his study “Community-based Water Law and Water Resource Management Reform in Developing Countries” argues that, in a collaborative approach negotiation parties strive to come up with solutions which favour them. Therefore, during negotiation process it’s paramount for all the parties to have contextual clarity of the different issues which will help in achieving acceptable outcomes.¹⁵⁴ Further, separating people from the issues provides them with a good opportunity to respond to the issues without distorting their relationship and also assists them to get a clearer view of the substantive problem.

¹⁵⁴ Mabrouk, A. E.-S. (2018). *Community-based Water Law and Water Resource Management Reform in Developing Countries* (Vol. 37, pp. 1994). Madison: American Society of Agronomy.

2.8 Enhancing the Use of Negotiation in Natural Resource Conflicts Management in Kenya

While it's impossible to fully eliminate conflicts, Kenya tries to avoid violence related to resource management that it has experienced in previous years.¹⁵⁵ Negotiation and mediation can be utilised to achieve peace, although ADR function applies in specific places. The existing legal and institutional framework need to be enhanced in order to assist in resolving resource based conflicts.¹⁵⁶ Kenya should borrow from other countries such as Rwanda which have combined the ADR and legal and institutional frameworks to manage conflicts related to resources.¹⁵⁷

In some other jurisdictions, different mechanisms such as "co-management, joint management, or joint stewardship" have been adopted to manage conflicts emanating from disputed territory owned by two or more parties. Co-management is "an inclusionary, consensus-based approach to resource use and development". The approach involves sharing of decision making among different actors involved in resource management. This method is recommended because it emphasizes on negotiation rather than litigation as the best approach to settle conflict and its capacity to connect western scientific knowledge and traditional environmental knowledge with an aim of enhancing

¹⁵⁵ Wamukonya, N. (2011). Socio-economic Impacts of Rural Electrification in Namibia: Comparisons Between grid, solar and un-electrified Households. *Energy for Sustainable Development*, 5(3), 5-13

¹⁵⁶ Haysom, N., Kane, S., & Centre for Humanitarian Dialogue. (2009). Negotiating natural resources for peace: Ownership, control and wealth-sharing. HD Centre for Humanitarian Dialogue.

¹⁵⁷ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community Forestry*. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy

management.¹⁵⁸ This leads to mutual trust and engagement and offers a platform for airing grievances as well as addressing all the needs of the parties. This culminates into reduction of natural resource conflicts.¹⁵⁹ Trust emanates from sharing of power, dissemination of information and knowledge as well as involvement in decision making especially on resource issues.¹⁶⁰ As such, trust-building involves providing enough resources, efforts and providing an opportunity for dialogue among the key players with an aim of establishing the problem and developing amicable solutions.

Various stakeholders involved in conflict management can borrow lessons from jurisdictions so as to handle resource based conflicts. The legal fraternity in Kenya has initiated efforts to strengthen the legal and institutional frameworks governing mediation. They include; “the Civil Procedure Act, and the Mediation (Pilot Project) Rules”¹⁶¹. The Rules provide “that every civil action instituted in court after commencement of the Rules, should be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation”.

The NGOs/NPOs have played a pivotal role in facilitating and capacity building in other jurisdictions, and this has helped in connecting different views between local people and

¹⁵⁸ Watson, E. (2011). Inter Institutional Alliances and Conflicts in Natural Resources Management’: Preliminary research findings from Borana, Oromiya region, Ethiopia. Marena research project, working paper No. 4.

¹⁵⁹ Bercovitch, J. & Jackson, R. (2001). Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict. *Negotiation Journal*, 17(1), 59-77.

¹⁶⁰ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. *FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome*, 9-12

¹⁶¹ Ali, S. Y. B., Joseph Odoba, A., Abu, M., & Natala, Y. (2011). Explaining the Violent Conflicts in Nigeria’s Niger Delta: Is the Rentier State Theory and the Resource-curse Thesis Relevant? *Canadian Social Science*, 7(4), 34-43.

government agencies as well as settling conflict among the communities.¹⁶² People have a good will with the NGOs/NPOs they work with and therefore, it's suggested that in absence of negotiation and mediation talks, the NGOs/NPOs can play an instrumental role in increasing the communities' participatory capacity and strengthen the chances of achieving amicable results. This can be attained by involving community in decision making and assisting it to comprehend the complexity of the law.¹⁶³

Kenya also requires strengthening environmental democracy.¹⁶⁴ In managing conflicts related to natural resources it's also paramount to balance local and national needs such as land issues. The state should learn to better work with the people who utilize and take care of the land while meeting the emerging needs.¹⁶⁵ In the issues of NLC (2015) Kenya Law reports (KLR), the Supreme Court observed that "the dominant perception at the time of constitution-making was that the decentralization of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfillment, through an enlarged scheme of actual participation in governance mechanisms by the people thus giving more fulfilment to the concept of democracy".¹⁶⁶ Sustainable development need to borrow knowledge form the

¹⁶² Haysom, N. & Kane, S. (2009). Negotiating natural resources for peace: Ownership, control and wealth-sharing. Centre for Humanitarian Dialogue, Briefing Paper, 26.

¹⁶³ Deutsch, M. (2012). The Effects of Training in Conflict Resolution and Cooperative Learning in an Alternative High School, New York, Teachers College, Columbia University, International Center for Cooperation and Conflict Resolution.

¹⁶⁴ Castro, L. J. & Stork, A. M. (2015). Linking to Peace: Using BioTrade for Biodiversity Conservation and Peacebuilding in Colombia In: Young, H and Goldman, L. eds. *Livelihoods, Natural Resources, and Post-conflict Peacebuilding*. London: Routledge.

¹⁶⁵ Bercovitch, J. & Jackson, R. (2001). Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict. *Negotiation Journal*, 17(1), 59-77.

¹⁶⁶ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. *FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome*, 9-12

relevant scientific and stakeholder communities.¹⁶⁷ Public participation is important because it helps in achieving an outcome which is accepted by all players in the society.¹⁶⁸

The traditional approaches, left out some crucial aspects of public participation in that it only provided an opportunity for the government agency to make decisions without considering the general public.¹⁶⁹ For instance, the Environment Impact Assessment (EIA) is a dominant tool which helps in keeping the corporations in check. The general public should be empowered through use of negotiation so that the victims of the conflict can acknowledge their engagement in conflict management and decision-making processes.¹⁷⁰ The Strategic Environment Assessment (SEA) should also engage the general public so that they can play a role in environmental democracy.¹⁷¹

Public participation in Strategic Environment and Social Assessment (SESA) should be effectual because it combines emerging social issues apart from the environmental considerations.¹⁷² These tasks should be comprehensively done. The communities that have been affected should be involved so that they can offer feedback on the implications

¹⁶⁷ Kitamura, K., Nakagawa, C. & Sato, T. (2018). Formation of a community of practice in the watershed scale, with integrated local environmental knowledge. *Sustainability*, 10(4), 404.

¹⁶⁸ Kariuki, J. G., Magambo, K. J., Njeruh, M. F., Muchiri, E. M., Nzioka, S. M., & Kariuki, S. (2012). Effects of Hygiene and Sanitation Interventions on Reducing Diarrhoea Prevalence Among Children in Resource Constrained Communities: Case Study of Turkana District, Kenya. *Journal of Community Health*, 37(6), 1178-1184.

¹⁶⁹ Kairo, J. G., Kiviyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

¹⁷⁰ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. *FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome*, 9-12

¹⁷¹ Mähler, A. (2010) 'Nigeria: a prime example of the resource curse? Revisiting the oil-violence link in the Niger Delta', *GIGA Research Programme: Violence and Security*, no. 120, 5–6, 13–15, 19, 20, 23–4,

¹⁷² Mabrouk, A. E.-S. (2018). *Community-based Water Law and Water Resource Management Reform in Developing Countries* (Vol. 37, pp. 1994). Madison: American Society of Agronomy.

on different aspects of the community.¹⁷³ They should be involved through negotiation in order to deter such conflicts from erupting in future. Environmental issues should be handled by involving all people at all levels. All citizens should have a chance to access the judicial and administrative proceedings. Participatory approaches have been recommended as the best strategies of responding to complex environment and sustainable development issues.¹⁷⁴ Scholars have asserted that “participatory approaches should be thought of as located somewhere on a continuum between consensus-oriented processes in the pursuit of a common interest and compromise-oriented negotiation processes aiming at the adjustment of particular interests”.¹⁷⁵

Customary natural resource management and conflict resolution mechanisms rely on application of capacities of traditional authorities.¹⁷⁶ When traditional elite groups power reduce their ability to enforce a decision also reduces. When customary practices are integrated within the national legal frameworks they may present a better starting point to increase the traditional authorities' capacity to handle the emerging and existing natural resource conflicts.¹⁷⁷ This will place Kenya in a better position due to its utilization of Traditional Dispute Resolution Mechanisms (TDRMs) which are in tandem with the constitution.

¹⁷³ Lorenz, R. (1966). Emotion in Conflict Formation and Its Transformation: Application to Organizational Conflict Management. *The International Journal of Conflict Management*, 3, 259-275.

¹⁷⁴ Ghebretেকে, T. B. (2017). Traditional natural resource conflict resolution vis-à-vis formal legal systems in East Africa: The cases of Ethiopia and Kenya. *African Journal on Conflict Resolution*, 17(1), 29-53

¹⁷⁵ Sandole, D. (2013). *Paradigms, Theories and Metaphors in Conflict and Conflict Resolution: Coherence or Confusion?* Manchester University Press.

¹⁷⁶ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community Forestry*. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy

¹⁷⁷ Mähler, A. (2010) ‘Nigeria: a prime example of the resource curse? Revisiting the oil-violence link in the Niger Delta’, *GIGA Research Programme: Violence and Security*, no. 120, 5–6, 13–15, 19, 20, 23–4,

Natural resource conflicts are bound to emerge and if unresolved they may have adverse implications on all aspects of the society. ADR and Traditional dispute resolution mechanisms, such as negotiation have been effectual in resolving disputes between different communities. They have been acknowledged in the constitution¹⁷⁸ as they help in promoting access to Justice. Negotiation allows public engagement as well as inclusivity of all persons especially in decision-making. Its successful implementation in tandem with the constitution will result into a paradigm shift in the policy on addressing resource based conflicts and increase access to justice.¹⁷⁹ These strategies should be utilised and connected well with courts and tribunals so as to enhance access to justice and public involvement. Settling natural resource conflicts in Kenya by using negotiation and other ADR mechanisms is an exercise worth pursuing for purposes of achieving Environmental Justice and long term development.

2.9 Negotiation and Natural Resource Conflicts Management in Mwea Settlement Scheme

Regarding, natural resource management, public participation in Mwea Settlement Scheme has been recognised as an aspect of negotiation, where there is joint decision-making among parties with interdependent yet conflicting interests.¹⁸⁰ Principled negotiations have been seen to have advantages that can lead to mutual agreement on

¹⁷⁸ Watson, E. (2011). Inter Institutional Alliances and Conflicts in Natural Resources Management': Preliminary research findings from Borana, Oromiya region, Ethiopia. Marena research project, working paper No. 4.

¹⁷⁹ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy*

¹⁸⁰ Rihoy, L., & Maguranyanga, B. (2014). The politics of community-based natural resource management in Botswana'. *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa*. Earthscan: London, 55-78.

issues and finally culminate into conflict resolution.¹⁸¹ Negotiation is regarded as a process that can result into empowerment of the village-level and government agencies as well as enhance awareness of the conflicts and their key sources. It also encourages public engagement in decision making which helps in resolving the conflict by achieving a cordial agreement. Further, in a conflict-oriented natural resources situation, the key actors should learn and communicate on different aspects including; “technical, legal, and financial issues at hand; procedural issues; perceptions, concerns, and values of other participants; one's own goals, and those of others; personalities; communication styles; one's own set of options; and relative benefits of different strategies”.¹⁸² It's therefore important to have some knowledge on the issues at hand. This will help in achieving a win-win situation.¹⁸³

2.10 Framework for Management of Recurring Resource-Based Conflicts in Mwea through Negotiation

The recurrence of conflicts in Mwea over the years due to contestation of natural resources indicates that effective conflict management mechanisms need to be put in place for speedy resolutions. There are a few efficient frameworks whose integration into the decentralization processes for the management of natural resources would aid address these conflicts. The Unifying Negotiation Framework (UNF) as advanced by Daniel and

¹⁸¹ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. *FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome*, 9-12.

¹⁸² Roba, H. G., & Oba, G. (2013). Understanding the Role of Local Management in Vegetation Recovery Around Pastoral Settlements in Northern Kenya. *Environmental management*, 51(4), 838-849.

¹⁸³ Ochieng, E. G. (2017). The role of Traditional Conflict Management Mechanisms in Conflict Prevention and Resolution in Africa. *International Journal of Project Management*, 28(5), 449-460.

colleagues¹⁸⁴ deriving from Fisher's¹⁸⁵ earlier work stressing the prominence of public policy as a social constructed negotiation among conflicting discourses, provides a multi-faceted analytical lense for the design of enhanced policy formulation discursive processes. The framework provides a compass and essential map to guide the maneuver through multi-level and complex-laden negotiation platforms through the primary use of participatory public processes. The framework guides designers and implementers to better understand and investigate complex natural resource states that builds firm foundations for the later design of proper redress strategies¹⁸⁶. The benefit to this is that the framework does predict values in determining which factors need more emphasis instead, it offers an organized context for the exploration of all relevant aspects.

A primary feature of the framework is the multi-level approach that it adapts that is, the micro (focus on individual) level which is primarily the design matrix as well as a higher level where external forces and structures institute space contextual design (macro). Daniels builds on Li's¹⁸⁷ work which accounts for both the macroeconomic policies that are the contextual aspects with the individual aspect that encompasses personality distrusts and contests with others during natural resource negotiations. The six pillars of UNF which are culture, agency, incentives cognition, institutions and oriented actor experience constitute a paramount role in the discourse process as they provide a holistic approach to the analysis of both individual and contextual factors. Particularly, in

¹⁸⁴ Daniels, S.E., Walker, G., Emborg, J., 2012. The Unifying Negotiation Framework: a model of policy discourse. *Conflict. Resolution. Q.* 30, 3e31.

¹⁸⁵ Fischer, F., 2003. *Reframing Public Policy: Discursive Politics and Deliberative Practices*. Oxford University Press, Oxford, U.K.

¹⁸⁶ Cheserek, G. J., Omondi, P., & Odenyo, V. A. O. (2012). Nature and Causes of Cattle Rustling among some Pastoral Communities in Kenya. *Journal of Emerging Trends in Economics and Management Sciences*, 3(2), 173-179.

¹⁸⁷ Li, M., Tost, L.P., Wade-Benzoni, K., 2007. The dynamic interaction of context and negotiator effects e a review and commentary on current and emerging areas in negotiation. *Int. J. Confl. Manag.* 18, 222e259.

management of natural resource issues, studies have shown that the incorporation of climate, its seasonality and natural resources as additional pillars, resulted in adaptive unified discourse resolutions.

In Mwea negotiations, it encompassed parties meeting to establish and dialogue on the key issues with an aim of achieving a consensus without involving a third party.¹⁸⁸ This is a procedure in which parties strive to resolve their misunderstanding via a series of methods, from concessions and bargaining to intimidation and confrontations¹⁸⁹. It also involves two or more individuals with equal or unequal authority to debate common and/or opposition interests in a certain subject of common responsibility. It therefore permits party autonomy in the process and over the results. Since it's not coercive, it provides an opportunity for the parties to develop creative solutions.¹⁹⁰

2.11 Summary of Findings

The study found that negotiation is adopted to resolve conflicts about natural resource management; it is flexible as it allows parties to get an understanding and agreement on what works best for them in natural resource management and is a cost effective, speedy and confidential process. The research also showed that community involvement in decision-making may be addressed via negotiation, since each side is given a chance to express its concerns at a common forum. Further, in negotiation parties are collaborative

¹⁸⁸ Ngigi, S. N., Savenije, H. H., & Gichuki, F. N. (2008). Hydrological Impacts of Flood Storage and Management on Irrigation Water Abstraction in Upper Ewaso Ng'iro River Basin, Kenya. *Water Resources Management*, 22(12), 1859-1879.

¹⁸⁹ Haysom, Nicholas. and Kane, Sean. Negotiating natural resources for peace: Ownership, control and wealth-sharing. Centre for Humanitarian Dialogue, Briefing Paper, 26, 2009.

¹⁹⁰ Cheserek, G. J., Omondi, P., & Odenyo, V. A. O. (2012). Nature and Causes of Cattle Rustling among some Pastoral Communities in Kenya. *Journal of Emerging Trends in Economics and Management Sciences*, 3(2), 173-179.

and hence they can find a solution that is satisfactory because negotiation provides for innovative ideas, strengthens connections, and increases control over conflicting parties.

In the Mwea Settlement scheme conflict, the community representatives commenced Negotiations and adopted the interest base approach. *Nyangi Ndiiriri* council of elders representing the Aembu community, *Ngome council of elders* representing the Mbeere community, *Kamba elders* representing the Akamba Community, *Mihiriga Kenda council of elders* representing the Kikuyu Community, and finally political leaders from Embu and Kirinyaga Counties. However, the Negotiations were jeopardized by involvement of political leaders who influenced the *Mihiriga Kenda council of elders* and the *Kamba elders* to disregard the outcome of negotiations even after agreeing on how the land was to be distributed. The elders filed several cases in court thus scuttling the process. However, they negotiations were instrumental in restoring calmness in the area due to the intervention of elders. Today the conflicting parties have formed the Embu Mwea Peace Makers Forum to spearhead a peaceful conflict resolution process.

CHAPTER THREE: INFLUENCE OF ARBITRATION ON NATURAL RESOURCE MANAGEMENT

3.1 Introduction

This chapter discusses the influence of arbitration in natural resource management in Mwea settlement scheme in Kenya. Arbitration involves the use of third-party decision-makers. In any case, the parties determine the procedure to be followed. Arbitration occurs when parties or the appointing authority shall resolve conflict through an arbitrator. A final, binding judgment shall be made.

3.2 Arbitration and Conflict Management

Arbitration is a method of solving disputes by use of an arbitrator who gives a final and binding award between parties in a conflict. In arbitration disputing parties consent on tabling their grievances to a third party for settlement.¹⁹¹ The advantages of arbitration include; parties in a dispute can consent on one arbitrator who will determine the issue, the arbitrator have proficiency in the subject area, a party can choose any person to represent him or her, it's not expensive and does not involve long procedures therefore its fast and leads to binding outcomes.

The public can follow courts proceedings without obstructions, however, proceedings in commercial arbitration are private, and this is an advantage to parties that seeks to maintain their commercial secrets.¹⁹² Arbitration is the best and fastest strategy among the ADR mechanism in facilitating justice in a dispute involving two powerful parties such as

¹⁹¹ Ngigi, S. N., Savenije, H. H., & Gichuki, F. N. (2008). Hydrological Impacts of Flood Storage and Management on Irrigation Water Abstraction in Upper Ewaso Ng'iro River Basin, Kenya. *Water Resources Management*, 22(12), 1859-1879.

¹⁹² Matiku, P., Mireri, C., & Ogol, C. (2013). The Impact of Participatory Forest Management on Local Community Livelihoods in the Arabuko-Sokoke Forest, Kenya. *Conservation and Society*, 11(2), 112-129.

business related issue. One challenge facing arbitration is its private nature in resolving conflict hence it can disregard the jurisdiction of the court by referring to the requirement of non-interference in the arbitration process.¹⁹³ It's argued that, arbitration is not the best process to utilize in settling environmental matters or issues, mainly because the court needs to preserve a supervisory role in the natural resource conflicts management, especially if a foreign investor is engaged and the rights of the communities are likely to be abused.

3.3 Arbitration Dispute Resolution Mechanism

Arbitration involves a consent by the disputing parties to present their grievances to an arbitrator who will offer a binding solution.¹⁹⁴ Therefore arbitration is “a long-established procedure in which a dispute is submitted, by agreement of the parties, to one or more impartial and independent arbitrators who make a binding and enforceable decision on the dispute”. It's one of the mechanisms of the ADR, which is utilised at all levels and it based on the consent of the disputing parties to table their grievances to an arbitrator. Parties have the opportunity to solve their misunderstandings outside the court jurisdiction.¹⁹⁵

Arbitration settles disputes through use of documents which eliminates the challenges of attending courts proceedings, presenting evidence in front of the judge, press and to the party. In case hearing is needed, which is essential the parties consent on the convenient

¹⁹³ McCorry, T. (2010). Alternatives to the Traditional Criminal Justice System: An Assessment of Victim-Offender Mediation and Neighborhood Accountability Boards in the United States; *The New York Sociologist* 4, 75.

¹⁹⁴ Ngigi, S. N., Savenije, H. H., & Gichuki, F. N. (2008). Hydrological Impacts of Flood Storage and Management on Irrigation Water Abstraction in Upper Ewaso Ng'iro River Basin, Kenya. *Water Resources Management*, 22(12), 1859-1879.

¹⁹⁵ Mabrouk, A. E.-S. (2018). Community-based Water Law and Water Resource Management Reform in Developing Countries (Vol. 37, pp. 1994). Madison: American Society of Agronomy

time and venue.¹⁹⁶ Due to its private nature any sensitive knowledge (information) and individual reputation is preserved. Arbitration is distinctive because it is based on agreement of all parties in a dispute. It therefore delivers justice in a hastily manner, while ensuring equality and respect of human rights unlike the courts of law which follows certain procedure and rules of evidence.

The Arbitration Act No. 4 of 1995 guides arbitration process in Kenya.¹⁹⁷ The Chartered Institute of Arbitrators – Kenya Branch (CIAK) initiated in 1984, assists in settlement of disputes by Arbitration. Other methods of ADR can also assist in filling the gap between the formal legal system and traditional modes of African justice. The incorporation of ADR in African legal systems will also help in enhancing security and development. ADR is an important apparatus for promoting peace building and settling of conflicts at all levels.¹⁹⁸ It assists in delivery of justice to all parties and reduces chances of a conflict relapse. ADR also helps in the stabilization process and promotes state building efforts. For, instance if well utilised in land conflicts in Liberia, to reconciliation in Côte d'Ivoire, and in natural resource management in Africa's Great Lakes region, ADR can help in resolving these problems in a hastily manner.¹⁹⁹ Uwazie suggests that different stakeholders should pull enough resources that will help in training and offer infrastructural support for ADR networks so that they can continue to foster best practices. The government should also provide capacity building programs and training

¹⁹⁶ Mahler, J. (2013). Sharing South African national parks: Community land and conservation in a democratic South Africa. *Decolonizing nature: Strategies for conservation in a post-colonial era*, 108-134.

¹⁹⁷ Matiku, P., Mireri, C., & Ogol, C. (2013). The Impact of Participatory Forest Management on Local Community Livelihoods in the Arabuko-Sokoke Forest, Kenya. *Conservation and Society*, 11(2), 112-129.

¹⁹⁸ Kitamura, K., Nakagawa, C. & Sato, T. (2018). Formation of a community of practice in the watershed scale, with integrated local environmental knowledge. *Sustainability*, 10(4), 404.

¹⁹⁹ Lorenz, R. (1966). Emotion in Conflict Formation and Its Transformation: Application to Organizational Conflict Management. *The International Journal of Conflict Management*, 3, 259-275.

for all actors involved in the ADR mechanisms.²⁰⁰ This will help in enhancing the country's conflict mitigation and prevention capacity as well as minimize the numerous cases which overburden the court dockets.

3.4 Arbitration Law in Kenya

The “Arbitration Act of 1995, the Arbitration Rules of 1997, the Civil Procedure Act, and the Civil Procedure Rules of 2010” regulate arbitration in Kenya. It is also one of the ADR procedures envisaged under Kenya's 2010 Constitution²⁰¹, Which requires courts and tribunals to be governed by specific principles when exercising judicial powers. One such doctrine is to promote optional dispute settlement methods such as reconciliation, mediation, arbitration and traditional mechanisms for conflict resolution, unless these violate the Bill of Rights, are not compatible with the law, morality and/or lead to consequences that are despicable to morality and justice.²⁰²

Arbitration occurs when the parties choose a neutral third party to decide the controversy and to provide a final binding award to it. The Arbitration Act, 1995 describes arbitration as any form of arbitration whether handled by an established arbitral institution or not. This is not very detailed and additional sources must be taken into account. According to Khan,²⁰³ arbitration involves parties to a dispute consenting on submitting complaints for settlement to a third party. It is an opposing procedure that mimics lawsuit in many aspects.

²⁰⁰ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

²⁰¹ “Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference.”

²⁰² “Article 159 (2) (c) of the Constitution of Kenya, (Government Printer, Nairobi, 2010).”

²⁰³ “Khan, F., Alternative Dispute Resolution, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.”

It is advantageous in that parties may come to an agreement on an arbitrator to decide the issue, the arbitrator has knowledge on the subject, any individual can represent parties to the dispute, it's not costly, it is flexible, fast in delivery of decision and it is binding. Commercial arbitral procedures are confidential, which advantages parties that seek to maintain their commercial secrets.²⁰⁴ The parties also control the arbitrator, time and venues but allow the arbitrator to deliver a binding decision.²⁰⁵

The researcher sought to establish the effects of arbitration on natural resources management by asking the participants to indicate their levels of agreement. The responses are presented in figure 3.1 below.

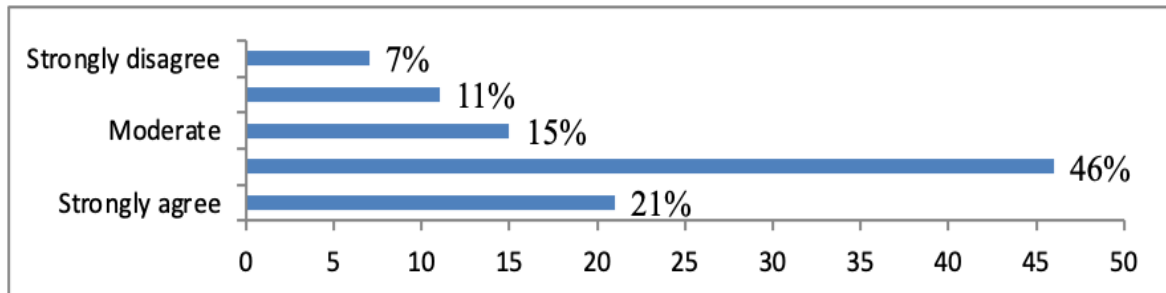


Figure 3.1: Influence of Arbitration in Natural Resource Management

Source: Field Data, 2021

From the findings, majority of the informants, (46 per cent) agreed that arbitration impacts on natural resource management, (21 per cent strongly agreed), (15 per cent) were moderate while (11 per cent) disagreed. The respondents affirmed that arbitration has helped in management of natural resources and settling of disputes largely because of its inherent adventive characteristics which allow procedural flexibility and eliminate

²⁰⁴ Ibid, pg. 33

²⁰⁵ Kairo, J. G., Kiviyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

hostile enforcement of dispute resolution. This argument was supported by an evaluation conducted by Balogun, Ansary and Thwala²⁰⁶ which found out that, arbitration in dispute settlement made the procedures more flexible and removed hostile enforceability leading to their usage in resolving disputes over natural resources.²⁰⁷ Further, according to Farooq, he argues that, arbitration is the greatest way among the ADR methods to help in achieving justice in conflicts between parties with equal negotiating strength and with the urge to resolve disputes quickly, particularly business related disputes.²⁰⁸

3.5 Management of Community Land Disputes through Arbitration in Kenya

The Land Disputes Tribunal (LDT) Act (Cap 303A) under section 4 governs land related issues.²⁰⁹ The tribunal established under this Act and in full acknowledgment of the customary law adjudicate such cases upon hearing the parties to the dispute and the witnesses.²¹⁰ The High Court of the Land Disputes Appeals Committee (LDAC) deals with any appeals made. However, despite this Act, allowing adoption of customary law, it does not provide provisions which acknowledge utilization of ADR approaches in settling land disputes whether they are occupied by the community or group. The current constitution changed this narrative as it acknowledges utilisation of formal and informal

²⁰⁶ “Balogun, O.A., Ansary, N. and Thwala, W.D. (2017) Adjudication and arbitration”

²⁰⁷ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

²⁰⁸ “Farooq Khan, Alternative Dispute Resolution, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.”

²⁰⁹ Cheserek, G. J., Omondi, P., & Odenyo, V. A. O. (2012). Nature and Causes of Cattle Rustling among some Pastoral Communities in Kenya. *Journal of Emerging Trends in Economics and Management Sciences*, 3(2), 173-179.

²¹⁰ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

methods in settling land disputes and environmental matters.²¹¹

The Constitution allows the Parliament to establish courts with the status of the High Court which will help in settlement of land disputes as well as environmental issues. Consequently this provision led to establishment of the Environment and Land Court (ELC) under the ELC Act, No. 19 of 2011 in compliance with Article 162(2) (b) of the Constitution which is mandated with settling land related problems and environment issues.²¹²

Further, the Court also allows appeals over decisions of subordinate courts on land related disputes and environment issues. The court can give relief in terms of interim or permanent preservation orders such as “injunctions, prerogative orders, award of damages, compensation, specific performance, restitution, declaration and/or costs”. However, the efficacy of the specialized court as a remedy for resolving land disputes has been questioned.²¹³ For example it is argued that, establishment of ELC is likely to led to creation of more courts resulting to overcrowding of already crowded legal system, thereby leading to application of the provisions of the Constitution in a manner that was not anticipated. Some of the scholars emphasize on application of ADR in settling land disputes.²¹⁴ Further, there exist scanty of information on the differences between dispute

²¹¹ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

²¹² Cheserek, G. J., Omondi, P., & Odenyo, V. A. O. (2012). Nature and Causes of Cattle Rustling among some Pastoral Communities in Kenya. *Journal of Emerging Trends in Economics and Management Sciences*, 3(2), 173-179.

²¹³ Deutsch, M. (2012). *The Effects of Training in Conflict Resolution and Cooperative Learning in an Alternative High School*, New York, Teachers College, Columbia University, International Center for Cooperation and Conflict Resolution.

²¹⁴ Cheserek, G. J., Omondi, P., & Odenyo, V. A. O. (2012). Nature and Causes of Cattle Rustling among some Pastoral Communities in Kenya. *Journal of Emerging Trends in Economics and Management Sciences*, 3(2), 173-179.

settlement and conflict resolution.

3.6 Effectiveness of Arbitration in Natural Resource Management

The characteristics of arbitration may be more adjudicative than negotiation or mediation. Although the proceedings itself are freely accepted by the parties, certain third parties make the decision or settlement²¹⁵. In arbitrations, typically the parties agree in advance on arbitration procedures including accepting that the judgment of the arbitrator (often of the board or the panel) is binding and final just like decisions made by courts are final. Therefore, agreement between the parties is confined to the mutual willingness to reach a resolution via this jointly agreed procedure. In contrast to the adjudication, the parties choose the decision-maker(s) and establish the other rules. Even in arbitration, mutual agreement between the parties is the foundation for resolution.²¹⁶

Its advantages is that parties can consent on a dispute arbitrator; the arbitrator has expertise in litigation; any person can represent a litigant party; it is cost- effective , it is fast, efficient; secretive; and the outcomes are binding. The public are allowed to follow court proceedings while trade arbitration procedure is private, and thus commercial arbitration may be chosen by parties that want to preserve their trade secrets. Arbitration offers the best means of improving access to justice in disputes between equal bargaining parties and the need to settle disputes swiftly, especially those involving business.²¹⁷

²¹⁵ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

²¹⁶ “Conca K., Carius A. and Dabelko, G. (2005), ‘Building Peace through Environmental Cooperation’, *State of the World 2005: Redefining Global Security*, New York: Norton, pp. 144–55”

²¹⁷ *Ibid*, pg.31

One of the often mentioned advantages of arbitration is that the procedure may be accelerated considerably and does not last long like a court proceeding.²¹⁸ The argument that arbitration is less expensive than litigation is closely connected with the benefits of flexibility and the fact that it can be an accelerated procedure. Parties may simplify the procedure and prevent delays in formal proceedings. Additionally, arbitration procedure being private and secret is often considered a positive. Arbitration is a private and flexible process to prevent formalities, delays, expenses and aggravation common in regular legal proceedings.

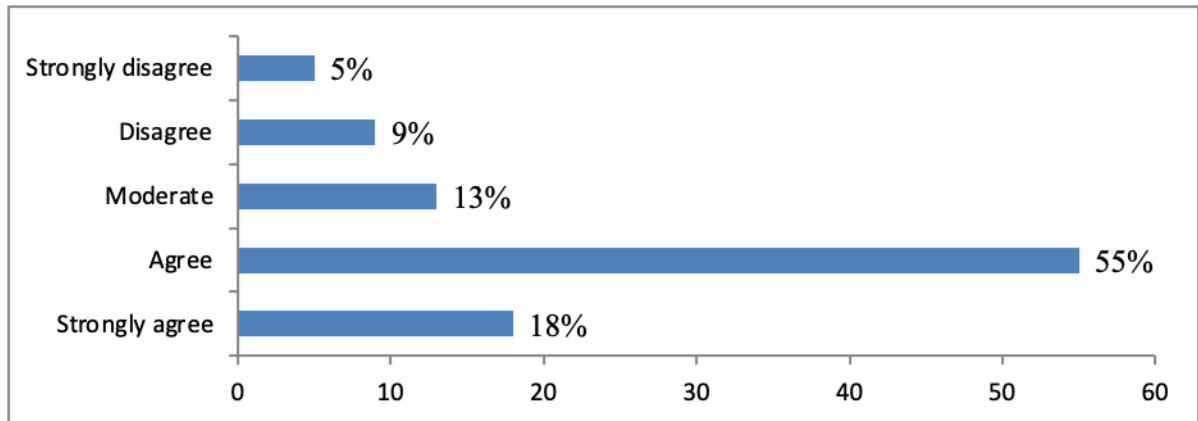
It is beneficial because the parties while being led by their legal counsel (if represented), may choose the person who wishes to arbitrate their conflicts, mainly a competent person on environmental issues and specifically who is experienced and proficiency in the specific area of disagreement. The parties may select a single arbitrator from the onset to the end to address the problem. This gives the arbitrator a constant wide view that is informed thus helping him to adopt a thorough approach when dealing with various concrete issues where there is a disagreement.²¹⁹ The difficult issues that could arise when arbitration is employed when resolving natural resource-related disputes is that owing to its private character combined with the requirements of arbitration the Court's jurisdiction is likely to be removed by ensuring that there are nonintervention requirements during the arbitration process.²²⁰

²¹⁸ “De Jong, M. (2014). Arbitration of Family Separation Issues - A useful adjunct to Mediation and the Court Process PER/PELJ 2356”

²¹⁹ “Developed from McKinney, M. (2013), Natural resources conflict resolution – Handbook, University of Montana.”

²²⁰ “Developed from McKinney, M. (2013), Natural resources conflict resolution – Handbook, University of Montana.”

The researcher sought to establish the effectiveness of arbitration in natural resource conflict management. The responses from the informants are provided in figure 3.2 below.



Source: Field Data, 2021

Figure 3.2: Effectiveness of Arbitration

Based on the findings most of the respondents (55 per cent) agreed that arbitration is effective in settling resource disputes, (18 per cent) strongly agreed, (13 per cent) were moderate while 9 per cent disagreed. The respondents argued that effectiveness of arbitration in solving resources based disputes is attributed to the fact that disputing parties are allowed to agree on ways in which conflicts are handled. The purpose of arbitration is to have an unbiased third party to fairly settle disputes without excessive costs or delays. Depending on the situation, the arbitration proceedings may be subdivided, restructured or abridged based on the prevailing situation. Arbitration may often be heard and determined within a short period than it takes a judicial procedure to be heard. Additionally, in the arbitration proceedings, time and venue are agreed upon while putting the parties, arbitrators and witnesses into consideration.

3.7 Efficacy of Arbitration in Settling the Community Land Disputes

It's important to comprehend the nature of the conflicts and parties engaged. This helps in understanding and establishing the challenges and benefits of arbitration as a method of ADR mechanisms.²²¹ The averments of "the Report by the Njonjo Commission" on the land issues have an impact on the nature of community land conflicts. Land ownership and management as well as community land rights are controlled by the nature of social and cultural connections rather than juridical principles and this is important in analyzing arbitration as the best strategy for settling disputes.²²²

Therefore, it can be deduced that, ADR mechanisms are the most preferred strategies of settling community land issues compared to litigation.²²³ They seek to establish the root causes of the conflict. Community land conflicts are mostly addressed through use of Traditional Dispute Resolutions (TDRs). The TDRs are extensive and are specific to each context although some portray same characteristics. In resolving land issues using arbitration it's imperative to address some issues such as understanding the substantive law to be utilised as well as the value of the awards render and the relative enforcements.²²⁴

The general challenge confronting use of arbitration alone is its adjudicatory nature inefficiency. Despite being formal arbitration does not follow the same general style as a

²²¹ Ali, S. Y. B., Joseph Odoaba, A., Abu, M., & Natala, Y. (2011). Explaining the Violent Conflicts in Nigeria's Niger Delta: Is the Rentier State Theory and the Resource-curse Thesis Relevant? *Canadian Social Science*, 7(4), 34-43

²²² Abadi, S.H., (2011). The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration. *Effectius Newsletter*, Issue 13, 3.

²²³ Deutsch, M. (2012). *The Effects of Training in Conflict Resolution and Cooperative Learning in an Alternative High School*, New York, Teachers College, Columbia University, International Center for Cooperation and Conflict Resolution.

²²⁴ Castro, L. J. & Stork, A. M. (2015). *Linking to Peace: Using BioTrade for Biodiversity Conservation and Peacebuilding in Colombia* In: Young, H and Goldman, L. eds. *Livelihoods, Natural Resources, and Post-Conflict Peacebuilding*. London: Routledge.

courtroom proceeding. However, the arbitrator accepts the evidence tabled, listens to the witness or witnesses as well as the arguments laid by the parties.²²⁵ More so, the additional procedures in arbitration might lead to enhanced costs of the process. Some elements on the procedures might make it identical to litigation. It is also challenged by other issues if inefficient and time consuming. Further, the issues of fees are not clear especially when it involves different communities.²²⁶ The parties in a conflict are concerned on settling the dispute and issues that may erupt. Arbitration due to its adversarial nature might not handle psychological issues that may arise in community land conflicts. Parties that are not contented may seek for appeals which might be a challenge if the parties had consented not to appeal. Arbitration may also be challenged by issues of power imbalances which may impact negatively on the process and final results.²²⁷

3.8 Arbitration in Resource Management Disputes in Mwea Settlement Scheme

In Mwea Settlement Scheme it has been observed that despite arbitration being one of the methods of Alternative Dispute Resolution as envisaged under Article 159 (2) (c) of the Constitution, it has had several drawbacks especially with regards to courts' interference; and thus, may not accord the parties involved in the case of community land disputes the benefits envisioned under the Constitution²²⁸. Arbitration has received increasing

²²⁵ Burton, J. (2013). Contribution to Conflict Resolution Theory and Practice: A Personal View by Dennis J.D. Sandole.

²²⁶ Ali, S. Y. B., Joseph Odoaba, A., Abu, M., & Natala, Y. (2011). Explaining the Violent Conflicts in Nigeria's Niger Delta: Is the Rentier State Theory and the Resource-curse Thesis Relevant? *Canadian Social Science*, 7(4), 34-43

²²⁷ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153.

²²⁸ Deutsch, M. (2012). The Effects of Training in Conflict Resolution and Cooperative Learning in an Alternative High School, New York, Teachers College, Columbia University, International Center for Cooperation and Conflict Resolution.

criticism based largely on the contention that it closely resembles conventional litigation, producing undue burdens and costs. The issues of delay, costs and binding nature of the arbitral award makes the process less suitable in managing disputes connected to community land in Kenya.

The Community Land Act envisions an arbitration process conducted under “the provisions of the Arbitration Act, No. 4 of 1995”. The Arbitration Act governs all issues with regards to arbitration.²²⁹ The first problem that may arise in using arbitration to manage community land disputes is the appointment of the arbitral tribunal. Under the Community Land Act, “where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of the Arbitration Act, No.4 of 1995, relating to the appointment of arbitrators should apply”. These provisions are provided in section 12 of the Arbitration Act where by in default of agreement by parties, the High Court has powers to appoint an arbitrator.²³⁰

It has been identified that community land disputes are peculiar in nature and requires a person with a deep understanding of the affairs of the community to effectively deal with the underlying issues in such a dispute. Where an arbitrator is appointed by the High Court, this purpose may be defeated²³¹. Further, community land disputes would not normally occur in urban areas where most of the arbitrators in Kenya are located. These disputes are likely to arise in rural areas where pastoralist or agriculturist communities are located. Appointing someone with little or no background knowledge on such disputes

²²⁹ Castro, L. J. & Stork, A. M. (2015). Linking to Peace: Using BioTrade for Biodiversity Conservation and Peacebuilding in Colombia In: Young, H and Goldman, L. eds. *Livelihoods, Natural Resources, and Post-Conflict Peacebuilding*. London: Routledge.

²³⁰ Mähler, A. (2010) ‘Nigeria: a prime example of the resource curse? Revisiting the oil-violence link in the Niger Delta’, *GIGA Research Programme: Violence and Security*, no. 120, 5–6, 13–15, 19, 20, 23–4,

²³¹ Matiku, P., Mireri, C., & Ogol, C. (2013). The Impact of Participatory Forest Management on Local Community Livelihoods in the Arabuko-Sokoke Forest, Kenya. *Conservation and Society*, 11(2), 112-129.

may not effectively resolve them. The law on ADR in Kenya contemplates some formal process in appointing these experts, which may not necessarily be synonymous with possession of actual expertise²³². It has also been argued that the impact of arbitration is yet to be felt especially among the local population, since it has been presented as an exotic idea oblivious to the prevailing circumstances of the local populace.

It has been pointed out that the spirit of conflict management among indigenous Kenyan communities emphasizes harmony/togetherness over individual interests for the common good of the community²³³. This is more so important when it comes to disputes relating to community land where there is a need to effectively resolve such disputes in order to keep the community together. The Arbitration Act requires an arbitral tribunal to make an award after the proceedings. An arbitral award is a determination by the arbitral tribunal on the merits of the arbitration. It is synonymous to a judgment in a court of law and is binding and enforceable in the same manner unless challenged in court. The award may be monetary or non-monetary in nature²³⁴.

In community land disputes, the arbitral award may be a recipe for chaos. The aim of dispute resolution within the context of a community is not to punish an action since this will be regarded as harm to the group twice. It is geared towards restoring harmony and good relations among differing members. In the context of community land, where an

²³² McCorry, T. (2010). Alternatives to the Traditional Criminal Justice System: An Assessment of Victim-Offender Mediation and Neighborhood Accountability Boards in the United States; *The New York Sociologist* 4, 75.

²³³ Mähler, A. (2010) 'Nigeria: a prime example of the resource curse? Revisiting the oil-violence link in the Niger Delta', *GIGA Research Programme: Violence and Security*, no. 120, 5–6, 13–15, 19, 20, 23–4,

²³⁴ Muigua, K., (2006). Resolving Environmental Conflicts through Mediation in Kenya. Ph.D. Thesis, Unpublished, University of Nairobi.

arbitral award has been made, this goal may not be achieved²³⁵. The party being dissatisfied with the decision may end up challenging the award in court in accordance with the provisions of the Arbitration Act.

This will ultimately strain the relationship between the parties and result in delays contrary to the principles underpinning dispute resolution among indigenous Kenyan communities where there is need to expeditiously resolve disputes and maintain relationships between parties in order to enhance peace and harmony in the community. Further, in case of a dispute between an individual member and the community over utilization of community land, where the award is made in favor of the individual, the community may feel aggrieved²³⁶. Such an individual will end up being treated with contempt and suspicion and it may end up being difficult to integrate with the rest of the community. This is irrespective of whether the individual has a valid claim against the community.

Thus, where arbitration is used to resolve community land disputes, it is hard to draw a line between individual interests and communal interests since arbitration is a formal process based on established legal principles and the arbitrator is required to issue an award based on law²³⁷. As discussed, traditional justice systems give preference to communal interests over individual interests and it is possible to suppress individual rights and interest for the good of the entire community. Another drawback with

²³⁵ McCorry, T. (2010). Alternatives to the Traditional Criminal Justice System: An Assessment of Victim-Offender Mediation and Neighborhood Accountability Boards in the United States; *The New York Sociologist* 4, 75.

²³⁶ Ngigi, S. N., Savenije, H. H., & Gichuki, F. N. (2008). Hydrological Impacts of Flood Storage and Management on Irrigation Water Abstraction in Upper Ewaso Ng'iro River Basin, Kenya. *Water Resources Management*, 22(12), 1859-1879.

²³⁷ Rihoy, E. (2015). *The Commons Without the Tragedy?: Strategies for Community Based Natural Resources Management in Southern Africa*: SADC Wildlife Technical Co-ordination Unit, Malawi

utilization of arbitration in settling community land disputes is that arbitration does not settle the underlying issues in a dispute posing the risk of a dispute reemerging in future. In the case of community land disputes where there is need to preserve peace and co-existence among members of the community, this may affect the fabric of the community²³⁸.

Land holds an important position among indigenous Kenyan communities and is much more than just physical soil. As pointed out by the Njonjo Commission Report, ‘For indigenous Kenyans, land also has an important spiritual value. It unites the present generation with the future emerging generations.’²³⁹ Due to the nature of land among indigenous Kenyan communities, disputes related to land necessitates the use of an approach that would resolve rather than settle them. Settlement is a power-based approach which focuses on interests of parties to a dispute. It fails to respond to needs that are important to human beings, parties’ relationships, emotions, perceptions and attitudes in dealing with a dispute²⁴⁰. Resolution encompasses a result based on mutual problem-sharing whereby parties to a conflict engage with each other so as to reanalyse their conflict and their relationship. This results in outcomes that are non-coercive, enduring and which address the root cause of conflicts²⁴¹. Thus, community land disputes are better managed through resolution rather than settlement in order to guarantee long lasting and

²³⁸ Ngigi, S. N., Savenije, H. H., & Gichuki, F. N. (2008). Hydrological Impacts of Flood Storage and Management on Irrigation Water Abstraction in Upper Ewaso Ng’iro River Basin, Kenya. *Water Resources Management*, 22(12), 1859-1879.

²³⁹ Rihoy, L., & Maguranyanga, B. (2014). The politics of community-based natural resource management in Botswana’. *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa*. Earthscan: London, 55-78.

²⁴⁰ Roba, H. G., & Oba, G. (2013). Understanding the Role of Local Management in Vegetation Recovery Around Pastoral Settlements in Northern Kenya. *Environmental management*, 51(4), 838-849.

²⁴¹ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community Forestry*. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy

mutually acceptable solutions. Since arbitration is one method of resolving dispute, it might not warrant the expected outcomes.²⁴²

3.9 Effectiveness of Arbitration in Mwea Settlement Scheme

Majority having used arbitration the respondents in Mwea Settlement Scheme had different results in regard to the impact of the arbitration process. The levels of contentedness on the results emanating from the arbitration process have a subjective measure based on the events that took place during the process and the type of dispute that was being settled.²⁴³ This resulted into rating arbitration as an effectual mechanism of settling land disputes. The respective arbitration processes attended to function well resulting into settling of dispute amicably. This is because the clients wanted the dispute to be resolved by use of a court justice system which guarantees their claim.

Some respondents argued that arbitration is not a means to an end in resolving of dispute.²⁴⁴ They pointed that there was no need to pursue arbitration and later result to court again pushing for execution of the award. This argument was affirmed by some advocate who stated that “clients typically prefer to litigate in court for a final determination. And some clients are not agreeable to the same and prefer the normal court process”. This indicates that the clients wish to resolve their issues utilizing the best platform that will lead to amicable solutions. However, arbitration process is challenged by lack of no appeal and the challenges raised to challenge arbitration are few.

²⁴² Sandole, D. (2013). *Paradigms, Theories and Metaphors in Conflict and Conflict Resolution: Coherence or Confusion?* Manchester University Press.

²⁴³ Schellenberg, A. (2006). *Conflict Resolution: Theory, Research and Practice*. State University of New York Press, Albany.

²⁴⁴ Schellenberg, A. (2006). *Conflict Resolution: Theory, Research and Practice*. State University of New York Press, Albany.

The respondents who adopted arbitration argued that it's a very expensive process which can only be used for big claims. If the client cannot afford the fee he or she cannot use it to small claims. For one to secure a good arbitrator in Kenya he or she has to part with an approximately Kenya shillings two hundred thousand (ksh. 200,000). This is different from the court which charges an estimate of Kenya shillings 10,000.00 for a dispute which is non-liquidated.

3.10 Summary of Findings

The study established that arbitration is effective in natural resource conflict management. The study also found that arbitration has been adopted to resolve conflicts on natural resources. The purpose of arbitration is to ensure that an impartial third party may resolve conflicts without undue expenditure or delay, and it is to pursue a reasonable resolution of the issue by an impartial third person without undue expense and without undue delay. Depending on the conditions, arbitration processes may be divided, expedited, or simplified. Arbitration meetings must be held at times and at places suitable for parties, arbitrator and witness, and may generally be heard sooner than court procedures. Arbitration proceedings frequently take place at times and places convenient for parties, arbitrator and witness.

In the Mwea conflict after the provincial administration called for a cease fire, the parties to the conflict agreed to have the then provincial commissioner to arbitrate the issues arising. The parties to the arbitration were mainly elders and were represented as follows; *Nyangi Ndiriri* council of elders representing the Aembu community, *Ngome council of elders* representing the Ambeere community, *Kamba elders* representing the Akamba community and *Mihiriga Kenda council of elders* representing the Kikuyu Community.

The Arbitration resulted into an agreement that the land be divided equally among different communities living in the area according to their population size leading to cessation of hostilities by different communities. However, delays in the implementation of the decision created disaffection among some parties who decided to enforce the same through the court process.

CHAPTER FOUR: INFLUENCE OF ADJUDICATION IN NATURAL RESOURCE MANAGEMENT

4.1 Introduction

This chapter is an evaluation of influence of adjudication in natural resource management in Mwea settlement scheme in Kenya. Adjudication is a highly organized procedure in which one side compels the other to submit a disagreement to a neutral court for mandatory resolution. Alternatively, conflicts may be settled via procedures and norms devised by the parties involved. As a result, adjudication is predicated on the presence of a rationally understandable principle, whose application to the given circumstance decides the conclusion.

4.2 Adjudication and Conflict Management

According to the CI Arb (K) Adjudication is a conflict resolution method where an unbiased, non-party adjudicator decides fairly, swiftly and non-costly on a particular issue.²⁴⁵ Adjudication is not a formal process and functions under very tight time scales, affordable, flexible and allows for power asymmetry in relationships to be handled in order to enable the weaker sub-contractors be able to operate with more powerful contractors.²⁴⁶

The adjudicator gives the final decision which is acceptable by all the parties unless the case is referred to arbitration or litigation. Adjudication is therefore effectual especially in

²⁴⁵ Vandergeest, P. (2003). Land to some tillers: development-induced displacement in Laos. *International Social Science Journal*, 55 (175), 47

²⁴⁶ Wamukonya, N. (2011). Socio-economic Impacts of Rural Electrification in Namibia: Comparisons Between grid, solar and un-electrified Households. *Energy for Sustainable Development*, 5(3), 5-13

simple construction disputes that requires less time to resolve.²⁴⁷ It is also the best mechanism of ensuring justice is served at the shortest time especially for parties who wish to settle their disputes and return to their normal business in order to avoid making business losses.²⁴⁸ The disadvantages of adjudication include; it's not the best mechanism to apply in non-construction disputes, selecting the adjudicator is also vital since he or she provides a binding decision and it does not strengthen relationships between the parties. Nevertheless, it's important to devise a framework within which environmental disputes can be resolved by use of adjudication.²⁴⁹

4.3 Adjudication in Natural Resource Management

The Adjudication encompasses settling of disputes through use of an impartial third-party-neutral adjudicator who decides fairly, swiftly, and cost-effectively on the disagreement arising under the construction contract. Adjudication is an irregular procedure that works on a very narrow timetable (the adjudicator has to determine within 28 days or a contract period). It is a flexible and economic process that enables the equilibrium of power in the relationship to be addressed in such a way that more powerful parties are clearly addressed by the weaker parties.²⁵⁰ The decision of the adjudicator shall be binding save when an arbitration or lawsuit is referred to. The award is thus useful in basic disputes which need to be resolved under extremely stringent time

²⁴⁷ Watson, E. (2011). Inter Institutional Alliances and Conflicts in Natural Resources Management': Preliminary research findings from Borana, Oromiya region, Ethiopia. Marena research project, working paper No. 4.

²⁴⁸ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy

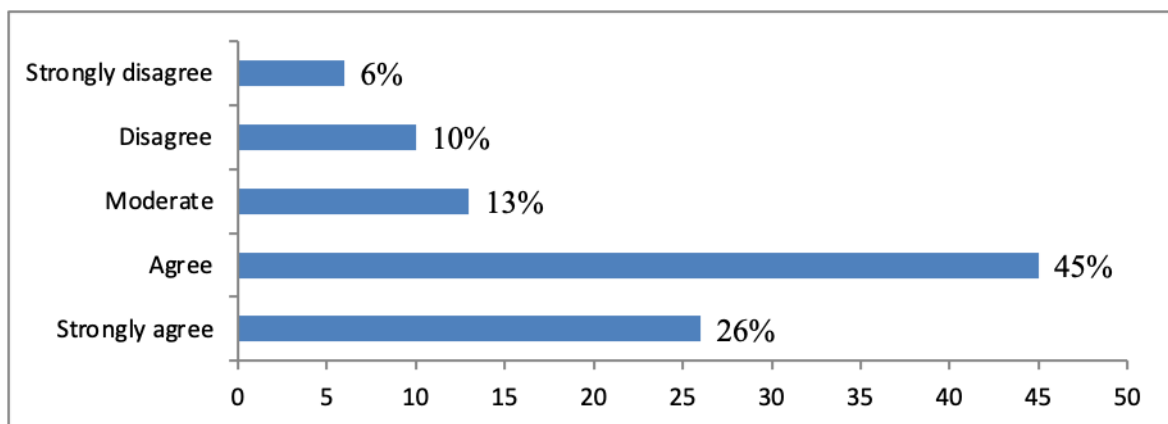
²⁴⁹ Haysom, N., Kane, S., & Centre for Humanitarian Dialogue. (2009). Negotiating natural resources for peace: Ownership, control and wealth-sharing. HD Centre for Humanitarian Dialogue.

²⁵⁰ "Sussman, E., Developing an Effective Med-Arb/Arb-Med Process, NYSBA New York Dispute Resolution Lawyer, Spring 2009, Vol. 2, No. 1, p. 73"

constraints. Because of its restricted timeframes, awards may be a useful means to update disputed parties' access to justice, who need to resolve the dispute as soon as possible and resume operations to minimize any financial or commercial damages.²⁵¹

The Chartered Institute of Arbitrators (CI Arb) Adjudication Rules accommodates procedural reasonableness, fair play, courts methodology, purview of the authorities, meaning of development settling, extent of the adjudicators powers, time allocation and period augmentation, administration of adjudication grants, stay of court procedures awaiting adjudication, engagement of adjudicators, impropriety of adjudicators and other behavioral issues, arbitration expenses per scale or as decided by the functions, acknowledgment of adjudication grants, remedy of slips or mistakes, legal questions, degree of court intercession, inability to adjudicate and adjudication accord.²⁵²

The researcher sought to determine the respondent's opinion on the influence of adjudication on natural resource management. The findings are presented in figure 4.1 below.



²⁵¹ Ibid

²⁵² “K. W. Chau, Insight into resolving construction disputes by mediation/adjudication in Hong Kong, Journal Of Professional Issues In Engineering Education And Practice, ASCE / 2007, pp 143-147 at P. 143,”

Figure 4.1: Adjudication Influence on Natural Resource Management

Source: Field Data, 2021

According to the findings majority of the informants (45 per cent) agreed that adjudication influences natural resource management, (26 per cent) strongly agreed, (13 per cent) were moderate while (10 per cent) disagreed. This indicates that adjudication influences natural resource management. The respondents also affirmed that adjudication is adopted in resolving natural resources conflicts, as it permits conflicting parties to a dispute to maintain privacy, provides final judgment which parties are urged to respect. Additionally, binding third-party procedures (arbitration and adjudication) are more successful than other conflict management strategies in ending conflict disputes over resources because they offer legality, reputational consequences and domestic policy coverage. In regard to this, Maiketso and Maritz²⁵³ investigated adjudication as a means of alternative conflict settlement and observed that adjudication was increasingly being utilized in managing natural resources because of the nature of its irrevocability of settlement, restricted timetables as well as the awards may be a useful instrument for the update of access to justice for disputed persons who need to resolve the disagreement in the shortest period feasible.

4.4 Land Adjudication in Kenya

Land is a precious resource that supports basic and essential food, housing and commercial requirements.²⁵⁴ The issue of ultimate land proprietorship in Kenya is still a

²⁵³ “N C Maiketso; M J Maritz. Adjudication as an alternative dispute resolution method in the South Africa. *J. S. Afr. Inst. Civ. Eng.* vol.54 n.2 Midrand Jan. 2012”

²⁵⁴ “Smucker, T. (2002). Land tenure reform and changes in land-use and land management in semi-arid Tharaka, Kenya. *LUCID Working paper series No. 11, ILRI, Nairobi.*”

difficult one because it is cumbered with complicated rules and long processes especially in regard to awarding, consolidating and registering land.²⁵⁵ Land adjudication in Kenya is highly influenced by politics borrowed from the colonial legacy of divide and rule, however, its socio-economic purpose is to give people the legal right to occupy the land which they own in the hope of promoting better agricultural production, control and utilize the land in a better way and minimize land related disputes.²⁵⁶ Enhanced land rights is anticipated to result into the commercialization of land by making it easy to use land as an asset that can be bought or sold, mortgaged and levies as an invaluable asset.²⁵⁷

The Land Adjudication Act in Kenya is based on chapter 284 of the Kenyan Law. The procedure is launched after the Minister of Lands has declared that a Trust Land area has been awarded. The Minister will then select an adjudicator to manage the procedure. In order to manage the procedure, the adjudication officer allocates demarcation officers, survey officials and recording officers. The Arbitration Officer divides the ground into arbitration parts in collaboration with the county commissioner. The adjudication officers and the team prepare the adjudication register, which in the adjudication section includes the land rights and interest record. Anyone with land issues to be assigned must be present to demonstrate the demarcation officers their boundaries. Anyone who believes that his rights were violated in adjudication procedure must file a complaint with the adjudication committee. The Minister of Lands shall be responsible for any dispute about

²⁵⁵ “Mwenda, J. N. (2001). Spatial Information in Land Tenure Reform with Special Reference to Kenya. Paper presented at ‘*The International Conference on Spatial Information for Sustainable Development*’. Nairobi, Kenya, 2nd –5th October, 2001. At: <http://www.fig.net/pub/>”

²⁵⁶ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy

²⁵⁷ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. *FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome*, 9-12

the completeness or validity of the Adjudication Register. The minister makes the ultimate decision on appeals, although the judgment of the minister may be contested on instructions from the high court.²⁵⁸

During the land judgment procedure, landowners agree upon and designate their borders by planting hedges. Aerial photography is therefore achieved as soon as the covers are sufficiently developed to make the air visible. Maps are then made by directly drawing borders as seen in the larger images. The limits that are not visible to air are estimated on the images. Boundary tracings lead to preliminary index diagrams (PID).²⁵⁹ PIDs are used to record the land registration documents and are referred to in Chapter 300 of the Registered Land Act. According to Bruce²⁶⁰ Adjudication may achieve formalized and unofficial land rights for rural people who are seen as essential in enhancing the livelihood of the poor in developing countries in process of local governance, management of conflicts, gender inequalities, natural resource management, food security, agricultural production, economic growth.

Further, apart from land registration, land adjudication should also cover other elements such as accepting traditional ownership regimes, designing of infrastructures, safeguarding of the environment and enhancing the livelihood of the people in rural areas. This process involves participation of community elders and persons with proficiency in environmental issues. Land adjudication should be regarded as a developmental process

²⁵⁸ “Njuki, A. K. (2001). Cadastral Systems and their Impact on Land Administration in Kenya. *Paper Presented at ‘The International Conference on Spatial Information for Sustainable Development’*. Nairobi, Kenya 2nd – 5th October, 2001. At: <http://www.fig.net/pub/proceedings/>”

²⁵⁹ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. *FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome*, 9-12

²⁶⁰ “Bruce, J. (2012). “Simple Solutions to Complex Problems: Land Formalization as a ‘Silver Bullet’.” In *Legalisation of Land Rights, Yes but How? Towards Just Land Governance for Rural Development*, edited by M. Otto and A. J. Hoekema. *Leiden: University of Leiden Press*”

which enhance growth, eradicate poverty and helps in creation of wealth rather a weapon for defensive ownership if title.

Individualization of ownership rights on former communal land has led to increased hostility, assumptions and contradictions between communities in rural areas and this call for re-integration of the customary norms and institutions so as to manage transactions on individual titles at the local level. This is because due to the resilience of the traditional system it still pivotal in control and management of adjudicated communal land in Kenya.²⁶¹ The village land succession and dispute settlement courts are contemplated and advocated.

4.5 Origin of land adjudication in Kenya

Traditionally, land was owned by the community in Kenya.²⁶² Therefore, individual ownership of land and individual rights never existed. All people gained from the community land. Customary rules allowed all people to have equal access and use of the land. Families were allocated land based on their needs for example polygamous families received vast land compared to a newly married family.

The traditional law managed and controlled land issues and elders together with sorcerers helped in allocation of land to families and assisted in resolving disputes arising from land issues. The land allocated to the families was largely utilised for residential purpose

²⁶¹ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

²⁶² Haysom, N., Kane, S., & Centre for Humanitarian Dialogue. (2009). Negotiating natural resources for peace: Ownership, control and wealth-sharing. HD Centre for Humanitarian Dialogue.

and arable use. Grazing land was used on a communal basis.²⁶³ The land was taken back to the tribe when the family no longer needed it. The residential houses were merged in one place while the arable or farmland for each family was located in a periphery.²⁶⁴

Before colonial period, leadership structures that existed helped to manage land rights to the communities for activities such as “the construction of shelter, farming, grazing, hunting and gathering”.²⁶⁵ The elders assisted in settling disputes arising from territorial claims. The colonial administration distorted the traditional tenure systems which resulted into disorganization of the African customary land tenure system and laws.

Since 1901 the Europeans in Kenya relished the benefits of secure land tenure till formation of RoD Act which was followed by CLO in 1902. This led to whites securing title to land while Africans had insecure ownership which the whites could obstruct.²⁶⁶ From 1923, the dual land ownership system become recognized largely after the controversial ruling by Chief Justice Berth that “African were merely tenants of the state and that their absolute claim on the land they occupied had been annulled by the Crown Lands Ordinance 1915, the Kenya Annexation Order-in-Council 1921 and Kenya Colony Order-in-Council 1921”. This ruling resulted into displacement of Africans from their lands and raised a lot of controversies from all spheres.²⁶⁷

²⁶³ Ghebretikle, T. B. (2017). Traditional natural resource conflict resolution vis-à-vis formal legal systems in East Africa: The cases of Ethiopia and Kenya. *African Journal on Conflict Resolution*, 17(1), 29-53.

²⁶⁴ Daniels, S., & Walker, G. (2017). Rethinking public participation in natural resource management: concepts from pluralism and five emerging approaches. *FAO Working Group on Pluralism and Sustainable Forestry and Rural Development Rome*, 9-12.

²⁶⁵ Humphreys, M. (2005). Natural resources, conflict, and conflict resolution: Uncovering the mechanisms. *Journal of conflict resolution*, 49(4), 508-537

²⁶⁶ Kellert, S. R., Mehta, J. N., Ebbin, S. A., & Lichtenfeld, L. L. (2000). Community natural resource management: promise, rhetoric, and reality. *Society & Natural Resources*, 13(8), 705-715.

²⁶⁷ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In *Global e-Conference on Addressing Natural Resource Conflict through Community*

Based on the Justice Berths ruling, the Devonshire White Paper, 1923, indicated that Kenya is owned by Africans and respect of their rights was important. The Hilton Young Commission established in 1927, recommended distinction between Africans and Europeans which should be free from encroachment. This was implemented by the 1930 NLTO. The Governor provided leases which would take up to 33 year as well as licenses to the reserves.²⁶⁸ The main advantage with this legislation is that the Governor would reimburse the natives after giving their reserve for public purposes. However, this was only done in on paper; the reality was experienced after discovery of gold in Kakamega Reserve where the government took land rich in gold without compensating the locals.

One of the agricultural policies is the Swynnerton Plan of 1954 which was formulated with an aim of managing agricultural practices.²⁶⁹ The colonial administration had introduced Cash crops with a purpose of increasing the scale of farming by upgrading the infrastructure; expanding markets weather and ensuring secure land tenure methods. This strategy helped the natives to secure land titles and led to individualization of tenure as well as adjudication of native land in Kenya.²⁷⁰ The EARC together with the Swynnerton Plan were allowed to change the customary land tenure into individual titles.

Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy

²⁶⁸ Yerian, S., Hennink, M., Greene, L. E., Kiptugen, D., Buri, J., & Freeman, M. C. (2014). The role of women in water management and conflict resolution in Marsabit, Kenya. *Environmental management*, 54(6), 1320-1330.

²⁶⁹ Ombara, I., Nzomo, M., & Maluki, P. (2020). Cross Border Natural Resource Management in Kenya: How Role and Responsibilities of Actors Influence Sustainable Peace in Eastern Africa Region. *European Journal of Conflict Management*, 1(1), 1-22.

²⁷⁰ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153

Some agricultural experts viewed the customary land as a hindrance to development, partly because the traditional rules which were connected to allocation and inheritance of land led to disintegration of holdings that had occurred.²⁷¹ Thus, the Swynnerton Plan suggested that “the African farmer be provided with such security of tenure through an indefeasible title as will encourage him to invest his labour and profits into the development of his farm and as will enable him to offer it as security for financial credits”. The Swynnerton Plan presents the key aim of the land adjudication as the intensification of agricultural practices promoted security of tenure ensured by individual titles.²⁷² It led to introduction of the adjudication and individualization of titles.²⁷³ It also resulted to ownership of private property and allowed people to control and manage their property and this hindered them from engaging in the Mau Mau rebellion. Thus it was viewed as a political apparatus for pacification instead of an approach for promoting agricultural development among Natives in Kenya.²⁷⁴

Introduction of land adjudication in Kenya changed the manner in which the natives perceived and related on land issues. It led to individuation of land rights from community land which existed before colonial period.²⁷⁵ The LCRK (1965-66) was formed after independence with a purpose of hastening land consolidation. It proposed

²⁷¹ Hagedorn, K. (2013). Natural resource management: the role of cooperative institutions and governance. *Journal of Entrepreneurial and Organizational Diversity*, 2(1), 101-121.

²⁷² Imana, D. K., & Mmbali, O. S. (2016). Envisioning incentives for community participation in natural resource management: A case study of northwest Kenya. *Journal of Community Positive Practices*, (1), 3-18.

²⁷³ Alao, A. (2007). *Natural resources and conflict in Africa: the tragedy of endowment* (Vol. 29). University Rochester Press

²⁷⁴ Kairo, J. G., Kivyatu, B., & Koedam, N. (2012). Application of Remote Sensing and GIS in the Management of Mangrove Forests Within and Adjacent to Kiunga Marine Protected Area, Lamu, Kenya. *Environment, Development and Sustainability*, 4(2), 153

²⁷⁵ Mwanika, P. A. N. (2011). *Environmental Conflict Management in Africa: The Natural Resource Conflict Debate and Restatement of Conflict Management Processes and Strategies in Africa*.

that assurance of land rights should be conducted through the process of land adjudication -which led to creation of LA Act in 1968 to with an aim of implementing these recommendations. Cap 284 was revived so that it could manage group rights for pastoralists and nomadic.²⁷⁶ The Land (Group Representatives) Act, cap 287 ensured governments efforts in equitable land sharing and utilization.

4.6 Adjudication in Mwea Settlement Scheme

The adjudication of Mwea Settlement Scheme started in 1980, but stalled until the period from 2013 to 2016, when the Embu County government decided to settle the matter once and for all. Residents have been waiting for resolution, subdivision, and issuance of title deeds in the 44,000 acres Mwea settlement scheme. Another 72,000 acres are under adjudication in Wachoro, Riakanau, Makima and Karaba. Embu Mwea Peace Makers Forum chaired by Nyangi Ndiiriri Council of Elders said they have realized that the dispute over the two areas might not be resolved soon hence decided to organize the meeting. Some of the residents live in the disputed land and have allotment letters. Others were evicted after receiving allotment letters. They say past and current leaders have taken too long to solve the disputes.

The residents said that most of the people who were originally claiming ownership of the land in the two areas have died. Their children have been pursuing the issue in vain.

Nyangi Ndiiriri Council of Elders chairman Andrew Ileri said the problem in the adjudication sections was created by government officers who over the years allocated each piece of land to different people at a fee using the agricultural law. The law required

²⁷⁶ Chandrasekharan, D. (1996). Addressing natural resource conflicts through community forestry: The Asian perspective. In Global e-Conference on Addressing Natural Resource Conflict through Community Forestry. Forests, Trees and People Programme of the Food and Agriculture Organization of the United Nations, Rome, Italy.

one to develop the land for six months or it would be allocated to another person. He said the disputing parties live under tension and occasional fights and that many other people with allotment letters were ejected out of the land by others. Ileri said people settled in the Mwea settlement scheme from different areas. An attempt to solve the dispute was made in 2016 before it was distributed into 1,732 parcels.

The resettlement was suspended after clashes sparked by people claiming to have been left out, resulting in the death of one person and the maiming of nine others. Ileri urged the leaders to attend the meeting so that a permanent solution to the issue can be found. Nicolas Nyamu, 73, said his father Gachurie Kiune was allocated 10 acres in the Wachoro area on October 4, 1979, but were evicted. Despite reporting to Kiritiri police station and other relevant offices his father never got it back. Antony, another victim, said they live at Kamuthanga slums in congested shanties in Kirinyaga county after they were evicted from their land in 1980. He said several commissions of inquiries and task forces have been unable to solve the land issue, leaving disputing parties in a permanent stand-off. The council said it has written a letter to President Uhuru Kenyatta to intervene in the disputes before the end of his final term.

4.7 Objectives of Land Adjudication in Mwea Settlement Scheme

Land adjudication in Mwea Settlement Scheme is connected with colonial approach of divide and rule, however, the socio-economic purpose of land adjudication in Mwea Settlement Scheme was to avail individuals with security of tenure over the land they owned with an aim of promoting increased agricultural productivity, land use

management as well as minimize conflicts arising for land use.²⁷⁷ Enhanced tenure security was anticipated to result into transformation of land.

4.8 Process of land adjudication in Kenya in Mwea Settlement Scheme

The basis for Land Adjudication in in Mwea Settlement Scheme is the LA Act chapter 284 of the Laws of Kenya. The adjudication officer appointed by the Minister oversees the whole process. He also nominates the “demarcation officers, survey officers and recording officers” to assist in facilitating the process.²⁷⁸ The Adjudication Officer divides the land into adjudication with help of the county Commissioner of the area. He then forms a board using the panel of officers nominated by the regional coordinator. The board drafts a register which involves the rights and interests to the land in the adjudication section. Any person with a claim of the land must provide the demarcation boundaries. Also any person who feels their rights were abuse can table a complaint to the adjudication committee. The arbitration board handles complains made to the LEO while the MoL provides a final decision though it’s subject to a challenge.²⁷⁹

The process of land adjudication involves demarcation and marking of the borderlines. Tracings of the boundaries led to PID are which are utilized as starting point for land registration documentation and titled through the RLA, Chapter 300. There are three systems for adjudication of areas of customary tenure which include system recommended for areas with high population density, system for medium to sparsely

²⁷⁷ Bryan, TX. Barrett, J. T., & P. Barrett. J. P. (2004). A history of alternative dispute resolution: The story of a political, cultural, and social movement. Jossey-Bass A Wiley Imprint: San Francisco

²⁷⁸ Bennet, M. D., & Hughes, S. (2005). The Art of Mediation (2nd ed.). N.p.: The National Institute for Trial Advocacy, INC.

²⁷⁹ Chesi, A. S. (2012). Factors influencing land related conflicts in MT. Elgon District, Bungoma County. Unpublished MBA thesis University of Nairobi.

populated arable areas system of assuring rights and interests of the community. They depend on the local committee system in adjudicating ownership.

4.9 Effectiveness of Adjudication in Natural Resource Management in Mwea Settlement Scheme

Adjudication in Mwea Settlement Scheme has led to increased agricultural productivity, wealth creation and investments.²⁸⁰ It has also resulted into attaining of formal and informal land rights for individuals, which in turn has led to enhancing of the livelihood of poor people in the rural areas of Mwea. Most of the land occupied by natives in rural areas of Mwea is either “adjudicated community land” or land secured by use of settlement process.²⁸¹ The land is faced by myriad of challenges which hinders transfer processes and succession. It was perceived that the community land policy and legislation would help in addressing this threats but it focused more on land owned by groups ranches located in marginal areas and ignore land in former native reserves. The results of handling this type land is that it will be taken by discredited land control boards, and issues of inheritance and intestate succession will involve long process and expensive court processes.²⁸²

The new constitution provides that any community land that is not registered is managed by the county governments on behalf of the communities which is supported to held it. The Constitution describe community land to include: “land lawfully registered in the name of group representatives under the provisions of any law; land lawfully transferred

²⁸⁰ Hornby A.S. (2006). Oxford Advanced Learner’s Dictionary. India: Oxford University Press.

²⁸¹ Fisher, R., & William, U. (2011). Getting to yes: Negotiating agreement without giving In. Penguin Books Ltd: London

²⁸² Moore, C. W. (2003). The mediation process: Practical strategies for resolving conflict. 3rd Edition. Jossey-Bass: San Francisco

to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; and land that is lawfully held as trust land by the county governments”.²⁸³

Based on the above findings the the constitution and the CL fails to acknowledge adjudicated and registered freehold rights on community land which defines the community land in Kenya; nevertheless, it provides a room for creation of more legislation which will initiate more bodies in the definition of community land.

The policy gap in regard to enhanced governance and administration for adjudicated private land owned by natives especially in the rural areas of Kenya requires an extensive policy dialogue which aim at attaining workable land administration system which will function in all spheres. The issues of ownership of the adjudicated land should also be addressed so as to enhance agricultural productivity and food security, eliminate poverty as well as foster growth and development in the rural areas.²⁸⁴ A special vehicle approach should be adopted to resolve the issues of land ownership documentation. The government should also establish credible institutions which will help in transfers, documentation among other functions.²⁸⁵ Despite the failures of the community land Act

²⁸³ David, J. F. (2006). Peace and conflict studies: An African Overview of Basic concepts.

²⁸⁴ Umunadi, E. K. (2011). The Efficacy of Mediation and Negotiation Methods for Dispute Resolution in Delta State, *Sacha Journal of Policy and Strategic Studies*, Volume1Number 2, pp. 64-73

²⁸⁵ Uwazie, E. E. (2011). Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability. *African Security Brief*, 1-6.

discussed above, it has helped in availing a credible substantial leeway on handling of freehold land.²⁸⁶

4.10 Summary of Key Findings

The study revealed that adjudication is adopted in resolving conflicts about natural resources and that it permits conflicting parties to a dispute to maintain privacy. Adjudications very seldomly involve protracted verbal deliberations or legal submissions and it produces a final decision which parties are urged to comply with. The parties have the leeway to appoint the adjudicator they desire to use. In addition, the conflicting parties together with the adjudicator can accept to abide to a rapid, versatile and smooth procedures during the adjudicative proceedings. It was noted that adjudication influences natural resource management.

In the Mwea conflict Adjudication has been employed in a bid to end the conflict. The process was started in 2013 with the help of the Embu county government. Groups of elders from the Embu County comprising of *Nyangi Ndiriri council of elders* representing Embu community and *Ngome council of elders* representing Mbeere community agreed to have the land subdivided to the three communities of Embu County namely Aembu, Ambeere and Akamba with Embu and Mbeere communities acquiring most of the land and the Kamba and other communities sharing a small percentage. The land was surveyed using aerial survey and sub divided in 2016 and 7232 title deeds issued to beneficiaries without any ground survey. The adjudication procedure requires anyone

²⁸⁶ Zumeta, Z. (2000). Styles of mediation: Facilitative, evaluative, and transformative mediation’.

with a land issue to present themselves and show the demarcation officers their boundaries. This was not the case in the Mwea conflict.

The demarcation officers cited hostilities on the ground as the reason why they could not conduct a physical ground survey. The results of the Adjudication were contested. *Ngome council of elders* felt they had been short-changed by *Nyangi Ndiiriri* council of elders and cited fraudulent Sub-division of land with political leaders and other influential persons getting big portions of land than the agreed five acres per beneficiary. The Adjudication procedures provide that anyone who believes that their rights were violated in the adjudication procedure must file a complaint with the adjudication committee.

The Minister of Lands shall be responsible for any dispute about the completeness or validity of the Adjudication Register. However, the decision of the minister is not final and can be contested in court. In the Mwea conflict the *Ngome council of elders* went to court to seek redress against their counterparts the *Nyangi Ndiiriri council of elders* whom they felt had shortchanged them. In 2018, politicians also waded into the dispute led by Ann Waiguru, Governor of Kirinyaga County who dismissed the sub-division of the land saying that Kirinyaga people should be primary beneficiaries together with the current settlers on the land. They called for a repeat of the process and with full public participations. The Kamba political leaders led by Makima and Mwea wards MCA's joined the call for repeat of the process and ensure every settler benefits from the land to ensure no evictions. In February 2020, EMBU Environment and Lands Court nullified the issued title deeds citing irregularities in the process and ordered a repeat of the Sub-division process with full adherence to the law.

CHAPTER FIVE

FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter contains the summary, conclusion, and recommendations of the study. It will begin with the analysis and presentation of the data collected. Thereafter a summary of the findings of the study will be highlighted and subsequently the conclusion of the paper and its recommendations will be presented.

5.2 Summary of Findings

The first objective was to assess the influence of negotiation in natural resource management in Mwea settlement scheme in Kenya. The study found that negotiation is adopted to resolve conflicts about natural resource management; negotiation is flexible as it enables parties to agree and resolve what work for them in access and control of natural resources. It is also a cost-effective, timely and discreet process of resolving land conflicts. The research also showed that community involvement in decision-making via negotiation helps settle disputes since each side has a chance to express their issues in a shared platform. Further, in negotiation parties are collaborative and hence they can find a solution that is satisfactory. Negotiations also permits innovative solutions, encourages partnerships and improves control by competing parties. It was also evident that for negotiations to be successful all parties to the dispute need to be committed to the process. Any indication of a party in the dispute seeking an alternative process such as going to court can scuttle the negotiations as was the case in the Mwea conflict. In Mwea negotiation encompasses converging of parties in order to establish and discuss the issues at hand with an aim of arriving at an agreement without involving a third party. The parties strive to resolve their misunderstandings by utilizing different methods such as

concession and compromise to coercion and confrontation. Negotiation therefore grants party autonomy in the process and over the results. It does not use force and this provides a suitable platform for the parties to devise long term solutions.

The second objective was “to examine the influence of arbitration in natural resource management in Mwea settlement scheme in Kenya”. The study established that arbitration is effective in natural resource conflict management. The study also found that arbitration has been adopted to resolve conflicts on natural resources. In arbitration conflicting parties shall be free to consent on settling the disputes. The objective of arbitration shall be to obtain fair resolution without undue expense or delay by a non-partisan third party. During arbitration, the proceedings may be segmented, streamlined or simplified according to the circumstances. Arbitration proceedings are also short and takes short time as compared to court proceedings that takes longer periods for cases to be heard and determined. It was also highlighted that arbitration proceedings may take place in locations suitable for all parties including the referee (arbitrator) and witnesses. In arbitration, disputing parties are allowed to agree on ways in which conflicts are handled. The purpose of arbitration is to have an unbiased third party to fairly settle disputes without excessive costs or delays.

However, most of the informants in Mwea Settlement Scheme had different results in regard to the efficacy of the arbitration process. The levels of contentment on the results from an arbitration process possess a subjective measure based on what happened during the respective sessions and the type of dispute that was being settled. This therefore resulted to arbitration as a method of dispute resolution being effectual. The arbitration process had the initial advantage of helping to solve the dispute at hand in a way that led to mutual agreement among all the parties. However, some parties were not satisfied

opting to go to court. This is because the clients often want to resolve their issues through the courts where they are sure justice will be served.

However, some of the informants disagreed that, arbitration is not a means to an end in the dispute settlement. They disregarded arbitration due to involving the court after a decision was reached and again difficulties in following through the implementation of the arbitration award. This view was supported by some advocate who asserted that “clients typically prefer to litigate in court for a final determination while some clients are not agreeable to the same and prefer the normal court process”. This indicates that the clients wish to resolve their issues utilizing the best platform that will lead to amicable solutions. However, arbitration process is challenged by lack of no appeal and the challenges raised to challenge arbitration are few.

The respondents who adopted arbitration argued that it’s a very expensive process which can only be used for big claims. If the client cannot afford the fee he or she cannot use it to small claims. For one to secure a good arbitrator in Kenya he or she has to part with an approximately Kenya shillings 200,000. This is different from the court which charges an estimate of Kenya shillings 10,000.00 for a dispute which is non-liquidated.

The third objective was “to determine the influence of adjudication in natural resource management in Mwea settlement scheme in Kenya”. The study revealed that adjudication is adopted in resolving conflicts about natural resources. It also established that adjudication permits conflicting parties to a dispute to maintain privacy and that there are very seldom prolonged verbal deliberations or legal presentations in adjudications. In adjudication, all parties to the dispute are entitled to nominate an adjudicator as well as agreeing together with their referee to adhere to a rapid, versatile, and simplified process. Adjudications also leads to a final decision which the stakeholders are advised to respect.

It was also noted that adjudication influences natural resource management. In the Mwea conflict although adjudication was done, the process was not fully followed and the outcome of the process only helped in fueling the conflict since parties to the conflict were aggrieved and ended up going to court.

Finally, the court nullified the whole process and ordered for a fresh process that followed the laid down procedures and law.

5.3 Conclusion

The research showed that negotiations are versatile and allows parties to agree and resolve what is beneficial to them in the administration of natural resources. It also revealed that negotiations in natural resources conflicts is cost-effective, speedy and confidential. Further, negotiation parties are collaborative and hence they can find a solution that is satisfactory. The negotiation process allows parties to identify and address problems so that a mutually agreed solution may be found devoid of help of a third party. This is an approach in which parties strive to resolve their misunderstandings through use of different methods, from concessions and bargaining to intimidation and confrontations. It also enables two or more interest groups with equal or unequal authority to debate common and/or opposing interests amicably even as they pursue their vested interests.

A collaborative approach to negotiations leads to enhanced relationships, builds trust and respect, self-esteem, reduces stress and achieves more acceptable outcomes. During negotiation process it's paramount for all the parties to have contextual clarity of the different issues which will help in achieving acceptable outcomes.²⁸⁷ Separating people from the issues provides them with a good opportunity to respond to the issues without

²⁸⁷ Mabrouk, A. E.-S. (2018). *Community-based Water Law and Water Resource Management Reform in Developing Countries* (Vol. 37, pp. 1994). Madison: American Society of Agronomy.

distorting their relationship and also assists them to get a clearer view of the substantive problem. The study therefore, concludes that negotiation influences administration in natural resource management in Kenya and negotiation was used in the attempt to resolve the Mwea settlement scheme dispute in Kenya.

The research showed that the objective of arbitration is to provide a forum for a neutral third party to resolve disagreements in a fair manner without undue delay or cost and that arbitration may be segregated, expedited or simplified. Arbitration can generally be heard as early as possible, as appropriate. In arbitration, disputing parties are allowed to agree on ways in which conflicts are handled. Arbitration is advantageous because it is often heard in a shorter timeframe than it takes judicial procedures to be heard. In the arbitration proceedings parties, arbitrators and witnesses determines the time and venue (place) for conducting the hearings.

In Mwea Settlement Scheme it has been observed that despite arbitration being one of the methods of Alternative Dispute Resolution as envisaged under Article 159 (2) (c) of the Constitution, it has had several drawbacks especially with regards to courts' interference; and thus, may not accord the parties in case of community land disputes the benefits envisioned under the Constitution. Arbitration has received increasing criticism based largely on the contention that it closely resembles conventional litigation, producing undue burdens and costs. The implementation of arbitration awards is problematic because when delayed, it arouses other costly challenges thus reversing gains made through the arbitration process. The study therefore, concludes that arbitration influences natural resource management in Kenya and was applied in the Mwea settlement scheme conflict in Kenya.

The study found that adjudication is adopted in resolving conflicts on natural resources. It also showed that adjudication permits conflicting parties to a dispute to maintain privacy and that adjudications very seldomly involve protracted discussions or legal propositions. The adjudication process also produces a final decision which parties are expected to comply with. Parties to the conflict have powers to nominate the adjudicator they desire to use. Additionally, the parties together with the adjudicator can accept to abide to a rapid, versatile and smooth procedures during the adjudicative proceedings. It was noted that adjudication influences natural resource management. This is because the adjudication procedure ideally requires anyone with land issues to be present and to demonstrate to the demarcation officers their boundaries. The study therefore, concludes that adjudication influences natural resource management in Kenya and was employed in a bid to resolve the Mwea settlement scheme Conflict in Kenya. The adjudication results for Mwea were only annulled after dissatisfied parties challenged the outcome in court which is within their rights.

5.4 Recommendations

The study recommends that the government of Kenya should amend its statutes to incorporate provisions on negotiation, arbitration and adjudication of natural resource management. This is because the dispute at Mwea settlement scheme has taken too long and no solution have been reached. Further, the government should ensure that the laid down procedures for negotiation, arbitration and adjudication are anchored on law for ease of the implementation of awards. This will help in speeding up the conflicts on natural resource management conflicts at Mwea settlement scheme in Kenya.

In order to address land disputes emanating from lack of clear ownership, the lands ministry needs to improve the quality of service delivery to the citizens of Mwea

settlement scheme. Rampant corruption perpetuated by officers at the lands office was cited as a major stumbling block in acquisition of land title deeds and must be stopped. Land allocations in Mwea settlement scheme have been infiltrated by political interests and this is the root cause of unrest in the region. The national and County government must take decisive action to address the land grievances to stop the inter tribal clashes and tensions that has led to deaths, displacement and destruction of property.

For the leaders especially those serving in the provincial administration to be more effective in conflict resolution they must be trained and equipped with skills and competencies necessary for this responsibility. There's need to address the quality of the trainings being provided at various government institutions especially the School of Government to include courses on alternative dispute resolution mechanisms. The County Governments especially in Embu and Kirinyaga should consider the establishment of arbitration structures at County level so that citizens can find assistance. This can be done through employment and training of arbitration personnel for the County.

Though not a novel concept in the country, most Kenyans may not be familiar with the idea of community land ownership. Land holding is primarily understood to be either private or public. The ideal starting point would be to create public awareness on matters related to community land such as ownership, utilization and administration. This should majorly focus in areas where community land ownership is practiced especially among the pastoralists communities in Kenya and in other areas where there is idle land. Once the populace has appreciated the issues related to community land, disputes will be mitigated since each person will appreciate his/her rights and interests in relation to those of other members of the community.

Part 8, of the Community Land Act “enshrines various dispute resolution mechanisms including internal dispute resolution, mediation, arbitration and judicial proceedings”. However, as discussed, community land disputes are “sui generis” in nature and there are existing issues that requires to be responded to in such disputes to ensure that unity and cohesion is maintained within the community. Some of these mechanisms such as judicial proceedings and arbitration may not achieve this ultimate goal due to the endless litigation that may ensue. It has also been identified that indigenous Kenyan communities had their own dispute resolution mechanisms premised on negotiation and mediation through institutions such as the Council of Elders. It is worth noting in the Mwea settlement scheme dispute, the elders have been playing a pivotal role in helping to ease tensions and inter-tribal clashes.

The advantages traditional dispute resolution mechanisms have been highlighted and include long lasting and mutually acceptable decisions. Management of Community Land disputes should thus be geared more on such internal dispute resolution mechanisms. However, there is need to streamline these mechanisms in tandem with Constitutional provisions by the formulation of an institution and regulatory framework to govern these mechanisms. The role of elders in dispute resolutions need to be recognized and anchored in law to insulate their decisions. This would ensure certainty in the application of these mechanisms and ensure that they abide by the constitutional provisions of equality and non-discrimination since these mechanisms may discriminate against women due to the patrilineal nature of most indigenous Kenyan communities.

Med-Arb is a hybrid method of settling disputes which encompass utilization of both mediation and arbitration. Disputing parties first subject their dispute to mediation and then resort to arbitration if mediation is not effective. Med-Arb recognizes the

weaknesses of these two processes and seeks to provide parties to a dispute a platform to gain from both mediation and arbitration. With the aid of relevant experts in the field of mediation and arbitration, this methods of dispute resolution can be embraced as a form of ADR in Kenya. In the context of community land disputes, this form can be adopted with focus being given on the mediation to resolve such dispute and arbitration being used only as a last resort. Med-Arb can be effectual in settling community land disputes largely by eliminating the impediments presented by both mediation and arbitration by offering long term solutions while still maintaining the relationship among the disputants.

5.5. Areas for Further Research

This study sought to assess the influence of conflict resolution mechanism in natural resource management in Mwea settlement scheme in Kenya. The study recommends that a study should be conducted on influence of conflict resolution mechanism in conflicting communities in Kenya.

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APPENDICES AND ANNEXES

Appendix I: Questionnaire

Dear Respondent,

My name is Patrick Thuo Mugo and I am a Masters student at the University of Nairobi, Institute of Diplomacy and International Studies. I am undertaking a study entitled as: The influence of conflict resolution mechanism in the natural resource management in east Africa Region: A case study of Mwea Settlement scheme in Kenya. The study is purely for academic purpose. Kindly, answer the questions as openly and truthfully as you can, as the process will be confidential. I appreciate you taking part in this study.

PART A: General information

State briefly on the following

1. your gender
2. Your age
 18-30 () 31-40 () 41-50 () 51-60 () 61 and above ()
 Others (specify).....
3. Your occupation
4. The highest level of education attained

PART B

Kindly tick appropriately on the provided spaces.

Section A: Negotiation

1. Rate how much you agree with the following assertions regarding negotiation's role in natural resource management. Making use of the scale 5-strongly agreement, 4-agreement, 3-moderate, 2-disagreement, 1-strongly disagreement.

Statements	1	2	3	4	5
Negotiation is adopted to resolve conflicts about natural resource management					
Negotiation is adaptable because it enables parties to agree on and					

decide on what works best for them in the management of natural resources.					
Negotiation is a cost effective, speedy and confidential					
In negotiation parties are collaborative and hence they can find a solution that is satisfactory					
Negotiation provides for innovative ideas, strengthens connections, and increases influence over opposing parties.					
Because each party is given a chance to express their concerns in a shared forum, disputes may be addressed via community participation in decision-making through negotiation.					

2. In your view, what the influence of negotiation in natural resource management?

.....
.....
.....

Section B: Arbitration

3. Rate how much you agree with the following assertions regarding arbitration’s role in natural resource management. Making use of the scale 5-strongly agreement, 4-agreement, 3-moderate, 2-disagreement, 1-strongly disagreement.

Statements	1	2	3	4	5
Arbitration has been adopted to resolve conflicts on natural resources					
In the case of arbitration, opposing parties may agree on the resolution of their problems					
The purpose of arbitration is to have an unbiased third party to resolve disputes without undue time or cost.					
Arbitration may be segregated, refined or expedited in accordance with the conditions					
Arbitration may generally be heard before judicial procedures take place					
At arbitration proceedings, witnesses, arbitrators and parties, are organized at times and locations.					

4. In your view, what is the influence of arbitration in natural resource management?

.....

Section C: Adjudication

5. Rate how much you agree with the following assertions regarding adjudication’s role in natural resource management. Making use of the scale 5-strongly agreement, 4-agreement, 3-moderate, 2-disagreement, 1-strongly disagreement.

Statements	1	2	3	4	5
Adjudication is adopted in resolving conflicts about natural resources					
Adjudication permits conflicting parties to a dispute to maintain privacy					
There are seldom long oral debates or legal briefs in adjudications					
Adjudication results in a final judgment encouraging the parties to respect					
The adjudicator you want to employ may be selected by opposing parties					
The arbitrator and the contentious parties are free to negotiate and adhere to a quick, flexible and simplified procedure					

6. In your opinion, what is the influence of adjudication in natural resource management?

Section D: Natural Resource Management

7. Rate how much you agree with the following assertions regarding n natural resource management. Making use of the scale 5-strongly agreement, 4-agreement, 3-moderate, 2-disagreement, 1-strongly disagreement.

Statements	1	2	3	4	5
Conflict resolution promotes conservation of the environment					
Conflict resolution ensures sustainable exploitation of natural resources in Communities					
Conflict resolution ensure sustainable utilization of natural resources					

THANK YOU FOR YOUR PARTICIPATION

Appendix II: Time Frame

Month /Activity	May 2021	June 2021	July 2021	July 2021	August 2021
Proposal Writing					
Corrections					
Data Collection					
Data Analysis					
Project Writing					
Submission of Project					

Appendix III: Budget

ITEM	TOTAL (KShs)
Stationery & photocopy	10,000
Field Data Collection & Transport	8,400
Data Editing, Analysis & Loading	15,000
Report writing, printing and binding	13,000
Contingency	10,000
Total	56,400