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AWARD OF THE MASTER OF LAWS (LL.M) DEGREE**

**COURSE: GPR 699-RESEARCH PROJECT**

**HARNESSING ALTERNATIVE DISPUTE RESOLUTION MECHANISMS TO  
ENHANCE ACCESS TO JUSTICE IN WAJIR NORTH CONSTITUENCY**

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**DECLARATION**

I, **AHMED ISMAIL ADAN**, do hereby declare that this thesis is my original work submitted in partial fulfillment of the Masters of Laws (LL. M) at the University of Nairobi, School of Law (Parklands Campus); and has not been submitted or is not pending submission for a diploma, degree or PhD in any other university. Moreover, references made to texts, articles, papers and journals, and other pertinent materials, have been fully acknowledged.

**Signature**..........**Date:**15<sup>th</sup> November, 2021

**AHMED ISMAIL ADAN**

**(G62/13529/2018)**

This thesis has been submitted for examination with my knowledge and approval as the University of Nairobi (School of Law) supervisor.

**Signature**..........**Date:** 15<sup>th</sup> November, 2021

**DR. NANCY BARAZA**

## **DEDICATION**

I dedicate this research project to my lovely wife Amina for her great support even when things were so tough for, she constant kept on encouraging me to work extra hard, my Dear son Aadhil for showing me the beauty and opposite site of life and making my mind relax during hard time of my thesis and finally my Dear Mama and my late Dad for their wonderful support and proper upbringing.

## **ACKNOWLEDGEMENT**

I thank my supervisor, Dr Nancy Baraza, for her resolute support, guidance and clarifications in the course of writing this research.

## **LIST OF DOMESTIC LAW MATERIALS**

The Arbitration Act, 1995, Laws of Kenya

The Civil Procedure Act, Cap. 21, Laws of Kenya

The Civil Procedure Rules, 2010, Laws of Kenya

The Constitution of Kenya, 2010, Laws of Kenya

The Court Annexed Mediation Manual of Kenya

The Employment Act, No. 11 of 2007, Laws of Kenya

The Intergovernmental Relations Act, 2012, Laws of Kenya

The Judiciary Mediation Manual

The Labour Institutions Act, No. 14 of 2007, Laws of Kenya

The Labour Institutions Act, No. 14 of 2007, Laws of Kenya

The Labour Relations Act, Laws of Kenya



## **LIST OF INTERNATIONAL LAW MATERIALS**

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention, 1958.

## **LIST OF CASES**

Infocard Holdings Limited v AG & 2 Others [2014] eKLR

## **LIST OF ABBREVIATIONS**

ADR	Alternative Dispute Resolution
CIC	Commission for the Implementation of the Constitution
IDLO	International Development Law Organization
IJS	Informal Justice Systems
NFD	Northern Frontier Districts
TDR	Traditional Dispute Resolution

## **ABSTRACT**

*Article 48 of the Constitution guarantees the right of access to justice to every person in Kenya. This includes the residents of the Wajir North Constituency in Wajir County in the North Eastern Region. In Kenya access to justice is perceptively limited to formal institutions that are Courts of Law. However, in this constituency, access to justice is restricted due to geographical factors, institutional limitations, demographic biases, cultural differences and economic factors.<sup>1</sup> Other factors that may hinder access to justice are mode of delivery of legal services and the nature of Court proceedings, including procedural requirements and language used in Court.*

*The constitution of Kenya, as a progressive instrument, came to remedy these injustices. However, Wajir County has not caught up to its counterparts located in areas that were categorized as highly productive areas by the colonial government. The literacy levels are still low across the county with constituencies averaging less than 20 per cent. The community in Wajir North lead a nomadic lifestyle. This therefore means that building infrastructure to access ADR mechanism may still be rendered inaccessible. To fully harness ADR, traditional dispute resolution mechanisms must be integrated to formal channels and mainstreamed.*

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<sup>1</sup> Caleb Atemi (ed), Justice At City Hall: A Joint Report by ICJ Kenya and TI Kenya on Municipal and City Courts (ICJ Kenya Strengthening Judicial Reforms Series XIV 2013) 1.

## **CHAPTER ONE: INTRODUCTION**

### **1.1 Background to the Study**

Access to justice as a terminology can be loosely referred to as an avenue that is created where an individual(s) can seek redress for wrongs or omissions and injustices occasioned against them. Article 48 of the Constitution guarantees the right of access to justice to every person in Kenya.<sup>2</sup> This includes the residents of the Wajir North Constituency in Wajir County in the North Eastern Region. The outcome, however, is that in Kenya access to justice is perceptively limited to formal institutions that are Courts of Law.<sup>3</sup>

Access to justice would ordinarily mean improving the functioning of the justice institutions and it requires broadening their accessibility and legitimacy while simultaneously making them more cost and time effective.<sup>4</sup> While dispensing justice, the concept and doctrine of the principles of natural justice should be applied in decision making processes dealing with matters touching on rights and liberties of persons.<sup>5</sup> It safeguards against any judicial or administrative order or action, adversely affecting the substantive rights of the individuals. 'Natural justice' is an expression of English common law.

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<sup>2</sup> The Article provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice

<sup>3</sup> Kariuki Muigua, *Improving Access to Justice: Legislative and Administrative Reforms under the Constitution*, Workshop on Access to Justice, Nairobi (Sankara Hotel, Westlands) Tuesday, October 23, 2012, 1.

<sup>4</sup> Open Society Justice Initiative, 'Legal Empowerment: An Integrated Approach to Justice and Development' (2012) Draft Working Paper, 5, available at <http://www.opensocietyfoundations.org/sites/default/files/lep-working-paper20120701.pdf>, accessed on June 2, 2021.

<sup>5</sup> Ibid.

Although the drivers and distribution of the justice gap are different from one context to the next, the overwhelming message is that the formal justice system, due to its exorbitant costs, distance, time demands, inflexibility and alien procedures and concepts, is out of reach for many people, especially those living in rural areas. The inaccessibility of the formal justice system is particularly prominent in conflict-affected or fragile countries, where the central legal system often does not have reach beyond the national capital and/or remains highly dependent on donor support.

The impact of this justice gap, not only on the achievement of SDG 16 but also on the achievement of all SDGs, must not be underestimated – impediments to justice create vacuums of authority, erode the stability of national governance institutions and undermine social harmony.

In realizing the challenges ahead, alliances have formed at the national, regional and international level to promote a ‘people-centered justice’ approach to the implementation of SDG 16 targets. Such an approach focuses on responding to pragmatic needs and creating capacity at the subnational level to solve the problems people care about most.

This is evidenced by the adoption of target SDG 16.3.3 on access to dispute resolution mechanisms. Moving away from institutions, legislation and formal procedures, this approach examines justice from the end user perspective, and is grounded in a conceptualization of justice that is concerned with people’s lived experiences and unmet justice needs.

Considered the most widespread justice forums used by individuals in the developing world, engagement with customary and informal justice systems have the potential

to contribute to the elusive goal of inclusive and equal access to justice for the poor and marginalized, notwithstanding the significant operational challenges that arise when engaging with such systems. Such systems emphasize restorative justice, flexible rules and procedures and consent-based negotiated solutions based on social and religious norms. Often, the users are disproportionately marginalized – the poor, women and remote and minority populations<sup>6</sup>

Globally, alternative dispute resolution (ADR) or informal justice services focus on resolving disputes through means other than litigation or a full-scale formal court process. With ADR, disputes are often handled through mediation or arbitration. Many customary and informal justice mechanisms complement formal justice institutions and support local dispute resolution.<sup>7</sup>

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<sup>6</sup>International Development law organization report on priority action 6: engage with alternative dispute resolution and customary and informal justice in line with international standard

<sup>7</sup><https://www.idlo.int/what-we-do/access-justice/customary-informal-justice>

Chapter 4 of the Constitution of Kenya 2010 provides for access to justice and procedures for administration of justice. The administration of justice should be conducted in a manner that maintains social fabric by integrating the offenders back in the community. Access to Justice is also one of the major objectives of Kenya's Vision 2030 which guarantees individual rights as stated in the Bill of Rights and the Property Rights in Kenya.

The constitution guarantees the right of every person to access justice and calls for the State to take appropriate policy, statutory and administrative interventions to ensure the efficacy of justice systems. In order to guarantee access to justice for Kenyans, the Constitution broadens the available mechanisms in the justice system by encouraging the utilization of formal and informal justice systems.<sup>8</sup> In this regard, Article 159 recognizes the use of Alternative Dispute Resolution (ADR) mechanisms and Traditional Dispute Resolution (TDR) mechanisms in addition to the court process. Article 159 (2) envisages the underlying principles for the exercise of judicial authority in Kenya which include promotion of ADR and TDR mechanisms.<sup>9</sup>

In Kenya, determination to access justice has been known to be a preserve of the law courts and various tribunals.<sup>10</sup> However, majority of Kenyans in the former North Eastern province use Informal Justice Systems (IJS) including ADR Mechanisms in

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<sup>8</sup> Constitution of Kenya 2010, Laws of Kenya, Article 159(2) (d).

<sup>9</sup> It stipulates that in exercising judicial authority, the courts and tribunals are to be guided by the following principles: justice is to be done to all, irrespective of status, (b) justice shall not be delayed and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3. Clause 3 thereof provides that TDR mechanisms shall not be used in a way that (a) contravenes the Bill of Rights, (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or (c) is inconsistent with the Constitution or any written law.

<sup>10</sup> Jeffah Ombati, Examining the Relationship Between ADR Mechanisms and Litigation in Enhancing Access to Justice in Kenya, (2019) 7(2) Alternative Dispute Resolution, 128-173, 130-131.



their quest to access justice.<sup>11</sup> This necessitates an assessment of the effectiveness of the mechanisms for dispensation of justice in this region. I particularly narrow down to Wajir North Constituency. In this constituency, access to justice is restricted due to geographical factors, institutional limitations, demographic biases, cultural differences and economic factors.<sup>12</sup> Other factors that may hinder access to justice are mode of delivery of legal services and the nature of Court proceedings, including procedural requirements and language used in Court.<sup>13</sup>

Despite the formal recognition coupled with a constitutional mandate for their promotion in appropriate dispute resolution strategies, ADR mechanisms and other community justice systems are yet to be institutionalized by way of putting in place supporting adequate legal and policy measures that would ensure effective utilization of the same in access to justice. There exists no substantive policy or legislative framework to guide the promotion and use of these mechanisms despite their constitutional recognition and limitations set out under Article 159(2) and (3). This reality necessitates research into how ADR Mechanisms can be used to improve access to justice in Wajir North Constituency. Enhancing access to justice via ADR Mechanisms has been recommended by other researchers<sup>14</sup> and enshrined in the Constitution of Kenya 2010 under Article 159.<sup>15</sup>

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<sup>11</sup> Mumbi, MS, *Analyzing the Effectiveness of Informal Access to Justice in Kajiado North and Kajiado West Constituencies* (2015) (Doctoral dissertation, University of Nairobi).

<sup>12</sup> Caleb Atemi (ed), *Justice At City Hall: A Joint Report by ICJ Kenya and TI Kenya on Municipal and City Courts* (ICJ Kenya Strengthening Judicial Reforms Series XIV 2013) 1.

<sup>13</sup> Open Society Justice Initiative, 'Legal Empowerment: An Integrated Approach to Justice and Development' (2012) Draft Working Paper, 5  
<<http://www.opensocietyfoundations.org/sites/default/files/lep-working-paper20120701.pdf>> accessed 05 January 2015.

<sup>14</sup> Patricia Kameri Mbote and Migai Aketch, *Kenya: Justice Sector and the Rule of Law* (Open Society Initiative for East Africa 2011).

<sup>15</sup> Article 159(3) recognizes and provides for the use of traditional dispute resolution mechanisms.

## **1.2 Statement of the Problem**

In Kenya access to justice is a mandate bestowed on the Judiciary of which judiciary has for a long time limited the scope to formal institutions through courts of law and tribunals. This has also been reflected as such in Article 159 of the Constitution. Putting this in the context of Wajir North Constituency, courts have been inaccessible to many due to the high court fees, geographical location, complexity of rules of procedures, use of legalese, understaffing, lack of financial independence, lack of effective remedies, a backlog of cases that delays justice, lack of awareness on ADR mechanisms and TDR Mechanisms.<sup>16</sup> This reality has posed a challenge to access of justice for the greater majority in Wajir North Constituency.

As such, for a long time, people in Wajir North Constituency have resorted to informal justice system which tends to be immediate in resolution of disputes and problems. Similarly, the formal justice systems especially in criminal matters are punitive as compared to IJS which are restorative and affordable. It is against this background that this study investigates how ADR Mechanisms can be harnessed to enhance access to justice in Wajir North Constituency.

## **1.3 Justification of the Study**

The main justification and significance of this study is to make recommendations on the need for appropriate policy, statutory and administrative measures that will ensure that the ADR strategies and other informal justice systems find their rightful place in

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<sup>16</sup> ICJ Kenya and USAID, 'Strengthening Judicial Reform in Kenya; Public Perceptions and Proposals on the Judiciary in the New Constitution' (2002 vol III < [http://pdf.usaid.gov/pdf\\_docs/pnacw006.pdf](http://pdf.usaid.gov/pdf_docs/pnacw006.pdf)> accessed 06 January 2015; Jackton Ojwang, 'The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development' (2007) 1 Kenya Law Review Journal 19, 29.

the conventional judicial system and that the same are meaningfully actively utilized in facilitating access to justice especially for the poor Kenyans.

It will inform the government and especially the Kenyan judiciary with regard to ensuring that access to justice is available to all persons who would eventually benefit the poor and marginalized people in rural areas who cannot access justice through formal court systems in Wajir North Constituency. It will enhance establishing ways in which informal access to justice can be legitimized and incorporated as a system of justice.

#### **1.4 Objectives of the Study**

##### **1.4.1 General Objective**

1. Harnessing ADR mechanisms to enhance access to justice in Wajir North Constituency.

##### **1.4.2 Specific Objectives**

1. To study ADR Mechanisms and access to justice in Kenya.
2. To analyse the legal framework on ADR Mechanisms and access to justice in Kenya.
3. To study how ADR mechanisms can be harnessed to enhance access to justice in Wajir North Constituency.

#### **1.5 Research Questions**

This study answers the following questions:

- i. Whether ADR Mechanisms enhances access to justice in Kenya.
- ii. What is the legal framework on ADR Mechanisms and access to justice in Kenya?

- iii. How can ADR mechanisms be harnessed to enhance access to justice in Wajir North Constituency?

## **1.6 Research Hypothesis**

This research proceeded on the presumption that informal justice system is effective in dispensing justice in Wajir North Constituency and ought to be recognized as a means through which people access justice.

## **1.7 Theoretical Framework**

In order to understand the grassroots movement for justice and access to justice, one must better understand the concept of justice itself.<sup>17</sup> John Rawls has arguably written the seminal piece on justice from a Western perspective.<sup>18</sup> He theorized a vision of the world where actors, behind a 'veil of ignorance' rendering all parties equal, determined the principles of the institutions governing their social relations.<sup>19</sup> Rawls' institution-focused theory of justice essentially led to two central principles.<sup>20</sup>

First, each person has the right to the same liberties as those received by others. Second, if there are to be social and economic inequalities, they must be attached to offices predicated on fair and equal hiring and must be advantageous to the worse off.<sup>21</sup>

In as much as he acknowledges that each person has the same liberties as those received by others, he does not consider how those liberties would be enjoyed by each

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<sup>17</sup> Siena Anstis, 'Access to Justice in Cambodia: The Experience of Grassroots Networks in Land Rights Issues' (2012) Legal Working Paper Series on Legal Empowerment for Sustainable Development <<http://cisdl.org/public/docs/Anstis.pdf>> accessed 30 March 2015.

<sup>18</sup> John Rawls, *A Theory of Justice* (Harvard University Press 1971).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

person in the view of social and economic inequalities. A solution to balance the social and economic inequalities by legitimizing informal justice system shall be offered.

Howard Zehr proposes the restorative justice as a new paradigm of justice.<sup>22</sup> He believes that it is past time for society to move away from retributive justice, which considers the imposition of pain to be normative and weighs the harm caused by an offender against the harm done to him or her.<sup>23</sup> In advancing his argument, he opines that restorative justice sees restoration and reparation as a norm and balances harm resulting from an offence by putting things right.<sup>24</sup> Restorative justice is a movement in the fields of victimology and criminology that acknowledges that crimes cause injury to people and communities. It insists that justice repairs those injuries and that the parties be permitted to participate in that process by enabling the victim, the offender and affected members of the community to be directly involved in responding to the crime.<sup>25</sup>

The restorative process of involving all parties, often in face-to-face meetings, is a powerful way of addressing not only the material and physical injuries caused by crime, but the social, psychological and relational injuries as well. Restorative justice views criminal acts more comprehensively rather than defining crime as simply law breaking, it recognizes that offenders harm victims, communities and even themselves and measures crime by taking into account how much harm is repaired or prevented

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<sup>22</sup> Zernova, M., Aspirations of Restorative Justice Proponents and Experiences of Participants in Family Group Conferences (2007) *the British Journal of Criminology*, 47(3), 491-509, 493.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Centre for Justice & Reconciliation at Prison Fellowship International, 'What is Restorative Justice' (2005) Restorative Justice Briefing Paper, 1  
<<http://www.d.umn.edu/~jmaahs/Correctional%20Assessment/rj%20brief.pdf>> accessed 01 April 2015.

as opposed to how much punishment is inflicted.<sup>26</sup> This paper applies restorative justice when examining how ADR Mechanisms can be used to improve access to justice in the Wajir North Constituency.

## **1.8 Literature Review**

Catherine Albiston and Rebecca Sandefur write that access to justice needs to foster innovative original approaches by considering not only individuals but also institutions, not only resources but also social meaning, not only how civil legal services are provided, but how demand, for those services is shaped in a bid to address poverty and inequality.<sup>27</sup> They cite various studies that have laid emphasis on formal access to justice which is attributed to accessing the laid down judicial systems (courts of law) for dispute resolution. This has over time resulted to a movement of calling for independence of the judiciary and putting into place mechanisms of reforming the judicial sector that would enable more people to access justice.

Albiston and Sandefur's observation above is particularly relevant considering that in Kenya, like in many other African countries, dispute resolution amongst various communities was not subjected to the 'formal' systems of justice as the formal system was perceived to be the preserve of the rich in society. Formal systems of justice have been marred by complaints of high litigation costs, resolution of problems taking long and above all inaccessibility to the court system based on geographical location, thus hampering the prevalence of justice. Due to the challenges, overtime researchers have been led to consider the supply side system of access to justice which considers what

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<sup>26</sup> Ibid.

<sup>27</sup> Catherine Albiston and Rebecca Sandefur, 'Expanding the Empirical Study of Access to Justice' (2013) *Wisconsin Law Review* 101.

services are being provided to ensure justice, by whom, and under what restrictions and limitations.<sup>28</sup>

Access to justice should be interpreted in light of its effectiveness; supply and demand taking into consideration societal needs and how systems of justice are put into place and whether they are accessible to citizens of any given country with ease. Access to justice requires evaluating service delivery models, institutional designs which affect sustainability, independence, effectiveness and inequality in access to representation.<sup>29</sup> How a society perceives their problems will determine how they react to resolving the issues at hand. As such the development of access to justice is associated with equity, equality, human rights, fairness, respect, integrity, trust, empowerment, dignity, kindness, appreciation, people development, community development, contribution, dialogue, democracy and participation by a society.<sup>30</sup>

The research seeks to apply the standards identified by Albiston and Sandefur in interrogating the place of informal justice system among the rural communities of Wajir North Constituency in relation to Kenya's formal justice system

The research also adopts Siena Anstis' definition of access to justice which, according to her, means supporting improvement of justice service delivery at the local level focusing on the rights of women, ethnic groups and the rights of the most vulnerable and empowering those groups to claim and have rights adjudicated and grievances

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

remedied.<sup>31</sup> This can be realized by supporting informal/traditional justice systems and understanding how they interface and interact with formal justice systems.<sup>32</sup>

Kariuki Muigua in collaboration with the Commission for the Implementation of the Constitution (CIC) and the International Development Law Organization (IDLO) in Kenya, acknowledges that Courts have been inaccessible to many, especially the poor and vulnerable groups. The report highlights that hindrance of access to justice is inaccessibility to courts of law.<sup>33</sup> The report further highlights lack of resources, negative attitudes towards the judiciary, few advocates in rural areas and marginalization of certain groups of people and the legal system has been the main obstacles to access to justice for all in Kenya.<sup>34</sup> The report further proposes the enactment of an 'Alternative Dispute Resolution Act' so as to incorporate ADR and TDRM in conformity with Article 159 of the Constitution of Kenya 2010. The report does not expound on what comprises of TDRM and the extent to which TDRM has contributed to access to justice and has in fact resolved disputes amongst communities in Kenya.

Kameri Mbote and Migai Aketch<sup>35</sup> state that many Kenyans remain unaware of their basic right which is a major hindrance to access to justice especially among the poor, vulnerable and uneducated people. The writers also propound that due to the structuring of the Courts where they are found in urban areas as opposed to rural areas where the majority of Kenyans reside, does not facilitate equal access to justice for all.

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<sup>31</sup> Anstis, S. *Access to Justice in Cambodia: The Experience of Grassroots Networks in Land Rights Issues*, (2012) Montreal, Centre for International Sustainable Development Law, 13.

<sup>32</sup> *Ibid.*

<sup>33</sup> Kariuki Muigua, *Framework for the Consolidation and Harmonization of National Policies, Strategies and Legislative Instruments Relating to Access to Justice in Kenya* (CIC and IDLO 2012).

<sup>34</sup> *Ibid.*

<sup>35</sup> Patricia Kameri Mbote and Migai Aketch, *Kenya: Justice Sector and the Rule of Law* (Open Society Initiative for East Africa 2011) 156 and 174-177.



As a result, many Kenyans resolve their grievance and conflicts in alternative forms, including traditional or informal systems.

The authors highlight traditional systems to include peace or reconciliation forums, and interventions of local chiefs. As such, they recommend that the government should encourage and institutionalize alternative dispute resolution to ease the backlog in Courts and ensure expedient solution of justice and ensure that traditional justice systems adhere to the Constitutional norms of equality and non-discrimination and also implement the provisions of the Constitution on alternative forms of dispute resolution.<sup>36</sup>

Virtus Chitoo Igbokwe analyses the IJS among the Ibo-Speaking people of Nigeria to determine its impact on social order and social interactions and also its impact on law and formal legal institutions. According to him, IJS purposes to achieve common cultural identity, kinship and collectivism. He finds that IJS has a deep history and significance for social order and organization in African societies and despite modernization, this system is not about to be discarded entirely. In this regard, he opines that modern society should consider an effective way of making IJS complementary to formal justice systems.<sup>37</sup>

He argues that this will promote the elevation of shared responsibilities above individualism and moderate adversarial tendencies. As such, he emphasizes the need to incorporate IJS within acceptable rights parameters in order to discourage resort to court for matters where reconciliation is possible. In conclusion, Igbokwe argues that

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<sup>36</sup> Ibid.

<sup>37</sup> Virtus Chitoo Igbokwe, 'Socio-Cultural Dimensions of Dispute Resolution: Informal Justice Processes Among the Ibo-Speaking People of Eastern Nigeria and Their Implications for Community/Neighbouring Justice System in Justice System in North America' (1998)10 African Journal of International & Comparative Law 446.

the overall purpose of IJS is not determination of who is right or wrong, but the achievement of an acceptable solution for all parties involved.<sup>38</sup> The findings of Igbokwe's study are particularly relevant to this study as it provides a comparative perspective to the researcher while investigating IJS among the pastoralist communities.

### **1.9 Methodology of the Study**

This paper adopts qualitative research methodology. It relies on desktop methods, that is, library research and internet searches. I have used the library approach to look for the information on the various ADR provisions in Kenyan laws that is various statutory and Constitutional law framework. This information will be used to establish the justification of this study. I will thoroughly examine judicial decisions, textbooks, and scholarly work, specifically those analysing enhancements of access to justice through ADR Mechanisms, in order to prove or disprove the hypothesis of this paper while laying the groundwork for its objectives.

### **1.10 Scope of the Study**

The scope of this study will be informal access to justice in rural Kenya. However, the main focus will be Wajir North Constituencies in Wajir County. The focus of the study will be on all the levels of dispute resolution in the area to determine the effectiveness of the system by determining how the system works.

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<sup>38</sup> Ibid.

## **1.11 Chapter Breakdown**

This study contains entail five chapters as follows:

Chapter one is an outline of the whole aim of the study. It has an introduction outlining the background of the research study which addresses the issue of access to justice. It further outlines the problem the research purposes to address as a result of difficulties experienced with regards to access to justice. It includes the objectives, research question, and significance of the study, theoretical framework, research methodology, hypothesis and limitations identified.

Chapter Two is a discussion on the concept of access to justice generally and what it means to have access to justice. Access to justice is analysed taking into consideration the constitutional requirement of every citizen to access justice. It forms the genesis and platform of the research by analysing various opinions and understandings of access to justice and what it entails in detail. Further, this chapter analyses various ADR Mechanisms that have been entrenched in the Kenyan legal system. It briefly discusses the features of these ADR Mechanisms in establishing their effectiveness for access to justice in Kenya.

Chapter Three entails the legal framework in Kenya on ADR Mechanisms and access to justice. Its purpose is to show how ADR Mechanisms have been entrenched in the Kenyan legal system highlighting recognition by parliament and the people of Kenya of the importance of these mechanisms in the access to justice. Dispute resolution and access to justice are concepts that are widely governed by the law in democratic jurisdiction like Kenya. This necessitates the analysis of the various legal provisions in

Kenya in establishing the recognition and entrenchment of these mechanisms in Kenya.

Chapter four studies how ADR Mechanisms can be harnessed to enhance access to justice in Wajir North constituency. It also briefly describes the circumstances of Wajir North constituency in a bid to determine how the concept plays out in this area. It also establishes the problems that are currently bedevilling access to justice in Wajir North constituency which necessitate the application of ADR Mechanism in enhancing access to justice.

Chapter five gives the conclusion and recommendations for the study by identifying the ways in which ADR Mechanisms can be harnessed to enhance access to justice in Wajir North constituency.

## **CHAPTER TWO: ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND ACCESS TO JUSTICE IN KENYA**

### **2.1 Introduction**

Alternative Dispute Resolution (ADR) refers to all decision-making methods other than litigation that includes among others: negotiation, mediation, conciliation, expert determination and arbitration.<sup>39</sup> Alternative forms of dispute resolution, such as reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms, are all incentivised under Article 159 of the Constitution, as long as they do not violate the Bill of Rights, are not unjust, or are inconsistent with the Constitution or any written law.<sup>40</sup> ADR mechanisms have a close nexus with access to justice because they are used as a means of access to justice.

Mediation, negotiation, and conciliation are examples of alternative dispute resolution procedures that provide greatest party autonomy, are flexible, informal, and allow parties to discover their own long-term solutions to their difficulties.<sup>41</sup> As a consequence, ADR methods enable the public to participate in improving access to justice by adding a layer of efficacy, affordability, versatility, autonomy, timeliness, and consent to conflict resolution.<sup>42</sup> Mediation and negotiation, for example, are informal and not subject to the same procedural rigors as the court system.<sup>43</sup> They

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<sup>39</sup> Kariuki Muigua, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies'

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<sup>40</sup> *ibid.*

<sup>41</sup> *ibid.*

<sup>42</sup> *ibid.*

<sup>43</sup> *ibid.*

therefore are efficient in the sense that they will be quicker and less expensive than litigation.<sup>44</sup>

## **2.2 Access to Justice**

### **2.2.1 Concept of Access to Justice**

Access to justice implies individuals are capable of seeking and receiving a remedy in accordance with the human rights standards through formal and informal judicial institutions.<sup>45</sup> Access to Justice is focused on two fundamental purposes of the legal system; firstly, the system ought to be equally accessible for everyone and, secondly, it should give rise to individual and socially just results.<sup>46</sup>

Both procedural justice and substantive justice are included in the concept of access to justice.<sup>47</sup> In many occasions, the litigation process has failed to achieve one or both forms of justice.<sup>48</sup> Obsessive focus on procedural details at the expense of the substance of the issues has frequently resulted in injustice being perpetuated.<sup>49</sup>

### **2.2.2 Fundamental Elements of Access to Justice**

There is access to justice when individuals particularly the poor and disadvantaged, who are victims of injustices, have the opportunity to have their concerns heard and to have their concerns treated properly, by government or non-governmental

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<sup>44</sup> *ibid.*

<sup>45</sup> A Bedner and J Vel, 'An Analytical Framework for Empirical Research on Access to Justice' [2010] [undefined </paper/An-Analytical-Framework-for-Empirical-Research-on-Bedner-Vel/02c75693a86b5fdeb910ab5396ed5d77b8715970>](https://paperkit.net/paper/An-Analytical-Framework-for-Empirical-Research-on-Bedner-Vel/02c75693a86b5fdeb910ab5396ed5d77b8715970) accessed 29 May 2021.

<sup>46</sup> *ibid.*

<sup>47</sup> Kariuki Muigua and Kariuki Francis, 'ADR, Access to Justice and Development in Kenya' 25.

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

institutions resulting in remedy for these injustices in conformity with the rule of law.<sup>50</sup>

Access to justice is a fundamental and inalienable right protected by international human rights treaties and national constitutions.<sup>51</sup> Access to justice, as a fundamental right, necessitates interpretation beyond the text of the law. As a result, it serves as both a reaction to and a defense against legal formality and absolutism.<sup>52</sup> As a result, procedural access (a fair hearing before an impartial judge) and substantive access (a fair and just remedy for a violation of one's rights) appear to be two crucial characteristics of access to justice.<sup>53</sup>

The scope of this right has been described as broad and includes, among other things: the acknowledgment of fundamental rights and freedoms; safeguarding fundamental right and freedoms; access to all judicial tools for any such safeguard on an equal footing; knowledge and grasp of the law; within the judicial system, the determination of disputes in a respectful, fair, impartial, and timely manner; information on one's rights is readily available; equal access to legal enforcement authorities to preserve one's rights; simple entry into the judicial justice system; the cost-effectiveness of the adjudication engagement; handling of claims in a timely manner; and prompt implementation of judgments.<sup>54</sup>

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<sup>50</sup> Bedner and Vel (n 36).

<sup>51</sup> Muigua and Francis (n 38).

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

<sup>54</sup> Muigua, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' (n 30).

## **2.3 Alternative Dispute Resolution Mechanisms**

### **2.3.1 Re (Conciliation)**

Conciliation is a procedure in which a neutral third party, known as a conciliator, helps disputing parties repair broken relationships by bringing them together, clarifying perspectives, and pointing out misunderstandings.<sup>55</sup> The distinction between mediation and conciliation is that in mediation, the mediator is required to be neutral, whereas in conciliation, the conciliator may or may not be completely impartial to the parties' interests.<sup>56</sup>

Due to its evident benefits in enhancing access to justice, conciliation is becoming more popular as an alternative to other formal and informal techniques of dispute settlement.<sup>57</sup> It provides a more flexible option for a wide range of issues, both small and major; It prevents the parties from going to court;) It preserves the parties' right to withdraw from conciliation at any time during the proceedings without prejudice to their legal position inter se; It is committed to maintaining the security and privacy of the dispute, the information exchanged, and the offers and counter offers of solutions throughout the proceedings and afterwards; It is both cost-effective and expedient in resolving disputes; and it permits the continuation of the parties' relations even after the settlement or, at the very least, during the period during which the settlement is tried.<sup>58</sup> This aspect is especially important for parties who must maintain their relationship despite the dispute, such as parties involved in construction contracts,

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<sup>55</sup> Mbori H Otieno, 'Alternative Dispute Resolution (ADR): Enhancing Access to Justice in Kenya.' <[https://www.academia.edu/8880845/Alternative\\_Dispute\\_Resolution\\_ADR\\_Enhancing\\_Access\\_to\\_Justice\\_in\\_Kenya](https://www.academia.edu/8880845/Alternative_Dispute_Resolution_ADR_Enhancing_Access_to_Justice_in_Kenya)> accessed 2 June 2021.

<sup>56</sup> *ibid.*

<sup>57</sup> Dr Ujwala Shinde, 'Conciliation as an Effective Mode of Alternative Dispute Resolving System' (2012) 4 IOSR Journal of Humanities and Social Science 1.

<sup>58</sup> *ibid.*



family relationships, family properties, or disagreements among members of any business or other organization.<sup>59</sup>

### **2.3.2 Negotiation**

Negotiation can be described as any form of direct or indirect communication in which people with opposing interests discuss the shape of any action they might take jointly to manage and eventually settle their issue.<sup>60</sup> Negotiations can serve as a basis for a solution to a current problem or to establish the foundation for a future relationship.<sup>61</sup>

Many disagreements are settled by parties through negotiations or recourse to a forum that is an integral element of the social milieu in which the disagreement began.<sup>62</sup>

Many employment issues, for example, are addressed by managers, administrators, and other officials before going to court.<sup>63</sup>

The parties are given the capacity to speak and negotiate for themselves during mediation.<sup>64</sup> Negotiation is therefore a central tenet of mediation practice. Negotiation has the potential to relieve overburdened court dockets while also providing parties with a faster settlement. Negotiation, mediation, and party conciliation are examples of ADR procedures that could provide disputants increased influence over the resolution process.<sup>65</sup>

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<sup>59</sup> *ibid.*

<sup>60</sup> 'Negotiation as a Form of Alternative Dispute Resolution | VIA Mediation Centre' <<https://viamediationcentre.org/readnews/NDI1/Negotiation-as-a-form-of-Alternative-Dispute-Resolution>> accessed 2 June 2021.a

<sup>61</sup> *ibid.*

<sup>62</sup> Muigua and Francis (n 38).

<sup>63</sup> *ibid.*

<sup>64</sup> Kariuki Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' 26.

<sup>65</sup> Muigua and Francis (n 38).

Through a procedure that does not force any solution that is not mutually acceptable, negotiation allows parties to fully control both the process and the outcome.<sup>66</sup> Mediation and negotiation promote inclusion and public participation in decision-making for all members of the public.<sup>67</sup>

### **2.3.3 Mediation**

Mediation is a type of alternative dispute resolution in which disputing parties are assisted in voluntarily finding mutually acceptable settlements of the matters in dispute by an agreeable, impartial, and neutral third party with no authoritative decision-making power. Negotiation naturally leads to mediation. It occurs when parties to a dispute have attempted but failed to resolve their differences through negotiation.<sup>68</sup> The parties thus agree to enlist the help of a third party to help them continue the negotiations and break the impasse.<sup>69</sup>

Mediation provides ultimate party liberty, is flexible and informal, and allows parties to come up with their own long-term solutions to their conflicts.<sup>70</sup> Mediation, for example, fosters public engagement and "environmental democratization" in the management of environmental resources in environmental disputes. Mediation, for example, promotes "win-win" scenarios in which parties discover their own remedies, and it tries to bring all parties on board.<sup>71</sup> Public participation is a key tenet of mediation. As a result, the inclusion of ADR processes as one of the methods to be used

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<sup>66</sup> Muigua, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' (n 30).

<sup>67</sup> *ibid.*

<sup>68</sup> Dr Kariuki Muigua, Ph.D, 'Enhancing The Court Annexed Mediation Environment in Kenya' [2020] SSRN Electronic Journal <<https://www.ssrn.com/abstract=3833291>> accessed 1 June 2021.

<sup>69</sup> *ibid.*

<sup>70</sup> Muigua, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' (n 30).

<sup>71</sup> *ibid.*

by courts in the exercise of judicial authority reflects the importance of public engagement in achieving access to justice in Kenya.<sup>72</sup>

Court Annexed Mediation is a form of mediation that takes place in Kenya under the auspices of the court. The project began in 2015 with legislative and policy changes to allow mediation to be used in the official judicial system.<sup>73</sup> Court Annexed Mediation has contributed a lot in improving access to justice.<sup>74</sup> The courts recognise that matters that have been referred to mediation take less time to resolve on average than cases that go through the traditional court process.<sup>75</sup> This demonstrates the speed with which mediation takes place and the need to improve the setting in which it takes place in Kenya.<sup>76</sup>

#### **2.3.4 Arbitration**

Arbitration is a form of dispute settlement in which parties agree to submit their disagreement to impartial third parties who, after having heard from all sides, make a binding decision or award.<sup>77</sup> Participants prefer arbitration to litigation, in theory, as it uses expedited procedures to obtain a conclusion based on principles of law, equity, custom, and customs peculiar to a given industry.<sup>78</sup> Arbitrators get their authority to resolve disputes solely from the parties' agreement to forego formal, adjudication in a court of law in exchange for a more efficient and equitable approach.<sup>79</sup> Arbitration is

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<sup>72</sup> *ibid.*

<sup>73</sup> Muigua, Ph.D (n 59).

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> *ibid.*

<sup>77</sup> Jill Gross, 'ARBITRATION ARCHETYPES FOR ENHANCING ACCESS TO JUSTICE' 88, 19.

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

based on the ideas of party autonomy and consent, which allow the parties to play a larger role in decision-making and dispute settlement.<sup>80</sup>

Arbitration improves access to justice by giving the parties the freedom to choose their own arbitrator. Arbitration has been touted as being adaptable, cost-effective, private, and quick.<sup>81</sup> Its cost-effectiveness has recently been called into doubt, as many arbitral proceedings have proven to be more costly to litigation.<sup>82</sup> Because of its confidentiality, arbitration is an extremely successful method for resolving commercial conflicts.<sup>83</sup> Commercial arbitration is preferred by parties who want to protect their commercial and trade secrets.<sup>84</sup>

## **2.4 Conclusion**

Through a variety of programs, Kenya's judiciary has attempted to increase access to justice.<sup>85</sup> Among the initiatives are the hiring of additional judicial officers, the adoption of efficient case management practices, the opening of new court stations, the amendment of existing laws and the enactment of new laws with provisions for ADR, the incorporation of technology in court processes such as digital filing of cases, and improved inter-agency and government coordination, among others.<sup>86</sup> In the integration of ADR mechanisms in the Court conflict resolution process, as much as efforts have been made to improve access to justice, the entrenchment of ADR mechanisms in court processes is of critical relevance.<sup>87</sup> ADR mechanisms should not

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<sup>80</sup> Muigua, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' (n 30).

<sup>81</sup> Otieno (n 46).

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*

<sup>85</sup> Josephine A Oyombe, 'Court Annexed Mediation in Kenya: An Examination of the Challenges and Opportunities.' 87.

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*

hinder access to courts and should not compete with the court system in settling most disputes, as they do not and cannot replace it in all circumstances.<sup>88</sup> ADR mechanisms have been previously used to resolve criminal matters.<sup>89</sup> Other forms of disputes that can be resolved through ADR include commercial, land, intellectual property, familial, succession, and political problems.<sup>90</sup> This goes to demonstrate that ADR can be effectively harnessed in Wajir North Constituency.

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<sup>88</sup> Elena Nosyreval, Translated Douglas Carman and Dana Tumenova, 'ALTERNATIVE DISPUTE RESOLUTION AS A MEANS OF ACCESS TO JUSTICE IN THE RUSSIAN FEDERATION' 12 13.

<sup>89</sup> Republic v Mohamed Abdow Mohamed [2013] eKLR

<sup>90</sup> Muigua and Francis (n 38).

## **CHAPTER THREE: LEGAL FRAMEWORK ON ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND ACCESS TO JUSTICE IN KENYA**

### **3.1 Introduction**

This chapter assesses regulation of alternative dispute resolution in Kenya intricately. Kenya's 2010 Constitution contemplates a diverse, pluralistic legal system that acknowledges the presence of alternative conflict resolution and alternative justice systems both within and beside the conventional court system.<sup>91</sup> Kenya's current constitutional regime acknowledges the symbiotic and egalitarian value of both the judicial system and the plethora of alternative dispute resolution systems that have existed in Kenya for centuries at the grassroots level.<sup>92</sup> Resolving all issues through litigation is unworkable, especially because it may overload the conventional judicial system needlessly.<sup>93</sup> Despite the benefits, a lack of uniformity and standardization of processes across ADR procedures might discourage private sector participation, and more coordination between parties is required.<sup>94</sup> Rationalisation and standardisation of ADR in Kenya has been carried out through statutory and policy framework which flow from the Constitution of Kenya 2010.

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<sup>91</sup> 'Enhancing access to justice through alternative dispute resolution in Kenya' (*IDLO - International Development Law Organization*, 20 April 2018) <<https://www.idlo.int/fr/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya>> accessed 2 June 2021.

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid.*

<sup>94</sup> *ibid.*

## **3.2 Constitutional Framework**

### **The constitution of Kenya 2010**

Alternative forms of dispute resolution, such as reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms, are all encouraged under Article 159 of the Constitution, as long as they do not violate the Bill of Rights, are not unjust, or are inconsistent with the Constitution or any written law.<sup>95</sup> With Article 189 (4) of the Constitution of Kenya 2010 saying that national legislation shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation, and arbitration, the scope for the application of ADR has been greatly expanded. These are the key clauses that create the constitutional underpinning for the use of ADR in Kenyan dispute resolution.<sup>96</sup>

Access to justice is a right guaranteed under the Constitution of Kenya 2010. The state is obliged by Article 48 of the constitution to ensure that all people have access to justice, and if a fee is imposed, it must be reasonable and not obstruct access to justice.<sup>97</sup> The acknowledgment of public interest litigation in environmental concerns, which bypasses the limits on proving locus standi, has improved access to justice even further. In an application to court, an applicant who alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being, or is likely to be denied, violated, infringed, or threatened has been, is being, or is likely

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<sup>95</sup> Constitution of Kenya 2010, Laws of Kenya.

<sup>96</sup> Kariuki Muigua, “Alternative Dispute Resolution and Article 159 of the Constitution” <<http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf>> accessed 6 June 2021.

<sup>97</sup> Muigua, ‘Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies’ (n 30).

to be denied, violated, infringed, or threatened does not have to show that any person has suffered loss or injury.<sup>98</sup>

### **3.3 Statutory Framework**

The following statutes regulate ADR mechanisms in Kenya:

#### **3.3.1 The Civil Procedure Act**

The Civil Procedure Act, Cap. 21, Laws of Kenya, has various provisions on the use of ADR in dispute resolution.<sup>99</sup> The overarching goal of the Civil Procedure Act, according to Section 1A (1), is to make the resolution of civil disputes governed by the Act more just, speedy, proportionate, and affordable.

Sections 59, 59B, and 59C of the Civil Procedure Act allow the court authority to refer any issue to alternative dispute resolution (ADR) processes if the parties consent or the court deems it acceptable.

#### **3.3.2 The Civil Procedure Rules 2010**

The Civil Procedure Rules set out the mechanisms for putting the Civil Procedure Act's Alternative Dispute Resolution provisions into action.<sup>100</sup> According to Order 46 Rule 20, the court has the authority to use any form of alternative dispute resolution in order to achieve the overarching goal set out in Sections 1A and 1B of the Act.<sup>101</sup>

#### **3.3.3 The Arbitration Act, 1995**

In Kenya, the Arbitration Act regulates the use of arbitration. Preliminaries, general provisions, composition and jurisdiction of the arbitral tribunal, conduct of the

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<sup>98</sup> *ibid.*

<sup>99</sup> Muigua, “Alternative Dispute Resolution and Article 159 of the Constitution” (n 87).

<sup>100</sup> Oyombe (n 76).

<sup>101</sup> *ibid.*



procedures, award and termination of arbitral proceedings, recourse to the High Court against an arbitral award, and recognition and enforcement are all covered by the Act.<sup>102</sup>

### **3.3.3.1 The Arbitration Act's Most Fundamental Provisions**

#### **3.3.3.1.1 The Court's Role in Arbitration**

Section 10 of the Arbitration Act 1995 lays out the basic approach to the court's role and involvement in arbitration. The section expressly limits the court's jurisdiction to only those topics covered by the Act. This section exemplifies the acceptance of the policy of party autonomy that underpins arbitration in general and the Arbitration Act of 1995 in particular.<sup>103</sup> To give effect to such goal, the section articulates the necessity to limit the court's role in arbitration.<sup>104</sup> The notion of party autonomy is widely acknowledged as a crucial component for ensuring that parties are satisfied with arbitration outcomes.<sup>105</sup> It also aids in the achievement of arbitration's significant goals, namely, the timely and cost-effective resolution of disputes between parties.<sup>106</sup>

#### **3.3.3.1.2 Stay of Judicial Action**

In most cases, courts do not have the authority to compel arbitration directly on their own initiative.<sup>107</sup> Courts, on the other hand, can do so indirectly, on the request of a party to an arbitration agreement.<sup>108</sup> This can happen if the court refuses the claimant's audience and/or remedy through the judicial procedure after an application

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<sup>102</sup> Muigua and Francis (n 38).

<sup>103</sup> Muigua, "Alternative Dispute Resolution and Article 159 of the Constitution" (n 87).

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*

for a stay of proceedings to send the case to arbitration. An order for stay of proceedings, under the Act, means that if an aggrieved party wants to continue his claims, he must do so through arbitration.<sup>109</sup>

When the parties have a valid arbitration agreement and a disagreement arises on an issue covered by it, one party goes to court in violation of the arbitration agreement, a stay of proceedings is required.<sup>110</sup> If the opposite party wishes to give effect to the arbitration agreement, it must file an application for a suspension of legal proceedings under Section 6 of the Arbitration Act.<sup>111</sup>

### **3.3.3.1.3 Protective Measures in the Short Term**

Interim orders for the purpose of maintaining the status quo pending and during arbitration are made by the courts with broad powers.<sup>112</sup> Section 7 of the Act restricts parties' ability to enter into any arbitration agreement that limits or prohibits seeking interim relief in court.<sup>113</sup> The High Court of Kenya has exclusive jurisdiction to issue such orders.<sup>114</sup> The courts have the authority to issue orders that maintain the status quo of the arbitration's subject matter.<sup>115</sup> Giving orders for preservation, such as attachment before judgment; interim custody or sale of goods (e.g. perishables) the subject of the reference; detention or preservation of any property or thing concerned in the reference; appointing a receiver; and interim injunctions are just some of the powers that could be exercised.<sup>116</sup>

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<sup>109</sup> *ibid.*

<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.*

<sup>113</sup> Arbitration Act 1995

<sup>114</sup> Muigua, "Alternative Dispute Resolution and Article 159 of the Constitution" (n 87).

<sup>115</sup> *Ibid*; Infocard Holdings Limited vs AG & 2 Others [2014] eKLR.

<sup>116</sup> *ibid.*

#### **3.3.3.1.4 Interim Protection Orders During Arbitration**

Unless the parties have agreed otherwise, the arbitral tribunal may, at a party's request, instruct any party to take any interim measure of protection that the arbitral tribunal deems necessary in relation to the subject of the dispute.<sup>117</sup> In this regard, the tribunal may order a party to give security for the proposed measure, or any party to provide security in respect of any claim or any sum in dispute, or a claimant to give security for costs.<sup>118</sup>

The Act empowers the High Court to enforce the arbitral tribunal's preemptory orders of protection.<sup>119</sup> The tribunal or a party with the agreement of the arbitral tribunal may apply to the High Court for help in enforcing such protective measures or generally exercising the power associated with interim protective measures.<sup>120</sup> In terms of interim measures of protection under the Act, the High Court has the same powers as the arbitral tribunal.<sup>121</sup> The High Court's power shall be equivalent to that which it exercises in civil actions before it.<sup>122</sup> Regardless of whether such an application is pending at the High Court, the arbitral proceedings will continue unless the parties agree otherwise.<sup>123</sup>

#### **3.3.3.1.5 An Arbitral Award being Set Aside**

The Arbitration Act of 1995 allows for this as the only remedy in the High Court against an arbitral award under Section 35. The statute specifies the circumstances in which the High Court may set aside an arbitral judgement.<sup>124</sup> They encompass proof of

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<sup>117</sup> *ibid.*

<sup>118</sup> *ibid.*

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.*

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

<sup>123</sup> *ibid.*

<sup>124</sup> Sec 35(2), Arbitration Act 1995

incapacity of a party to the arbitration agreement, invalidity of the arbitration agreement under the laws governing the dispute, failure to provide proper notice of the appointment of an arbitrator or arbitral proceedings, dealing with a dispute not contemplated by or falling within the scope of the arbitration terms of reference, and the composition of the arbitration panel.<sup>125</sup> The award will not be set aside if the agreement was in conflict with a section of the Act that the parties were not entitled to derogate from, or if there was no agreement on derogation.<sup>126</sup>

### **3.3.3.1.6 Arbitral Awards: Recognition and Enforcement**

In general, regardless of the state in which it was issued, an arbitral award is considered binding.<sup>127</sup> A domestic arbitral ruling will be enforced on application to the High Court, subject to the requirements of the Arbitration Act of 1995.<sup>128</sup> In line with the terms of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) or any other convention to which Kenya is a signatory and related to arbitral awards, an international arbitration award shall be recognized as binding and enforceable.<sup>129</sup> An arbitral award can be enforced by any party.<sup>130</sup> However, the party in whose favour the arbitral award was made will frequently file an application for enforcement, and the opposing party will respond.<sup>131</sup>

A legally authenticated original arbitral award, or a duly certified copy thereof, is required by law to be presented to the High Court.<sup>132</sup> The parties should also provide the superior court with the original arbitration agreement or a certified copy of it.

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<sup>125</sup> Muigua, “Alternative Dispute Resolution and Article 159 of the Constitution” (n 87).

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid.*

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid.*

<sup>130</sup> *ibid.*

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*

Where a party asks indulgence in exchange for compliance with these requirements to produce certain papers, the High Court may order otherwise.<sup>133</sup> The arbitration award must be written in English, and if the original was not written in English, the law mandates that a fully certified translation be provided to the court.<sup>134</sup>

### **3.3.4 The Intergovernmental Relations Act of 2012**

Any agreement between the national government and a county government, or among county governments, must provide for an alternative conflict resolution procedure, with court proceedings as a last resort, according to section 32 of the Intergovernmental Relations Act of 2012. This obligation, enacted by the Intergovernmental Relations Act 2012, is based on Articles 189 (3) and (4) of the Constitution of Kenya 2010, which require parties in a conflict to employ ADR by attempting to resolve the situation amicably before filing a complaint or proceeding to court.

### **3.3.5 The Employment Act No. 11 of 2007**

Complaints of summary dismissal or wrongful termination are addressed under Section 47 of the Employment Act.<sup>135</sup> According to subsection 2 “A labour officer who is presented with a claim under this section shall, after giving the employee and the employer every opportunity to state their case, recommend to the parties what, in his opinion, would be the best means of settling the dispute in accordance with the provisions of section 49.”<sup>136</sup> The practice hinted to in Section 47(2), but not explicitly stated, is conciliation.<sup>137</sup>

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<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*

<sup>135</sup> Employment Act Act No. 11 of 2007

<sup>136</sup> Sec 47(2) Employment Act No. 11 of 2007

<sup>137</sup> Muigua, “Alternative Dispute Resolution and Article 159 of the Constitution” (n 87) 1.

### **3.3.6 The Labour Institutions Act No. 14 of 2007**

“The Industrial Court may refuse to determine any issue before it, other than an appeal or review, if the Industrial Court is not satisfied that an attempt has been made to resolve the disagreement through conciliation,” states Section 12 (9) of the Labour Institutions Act. This Act, as can be seen, invites parties to conciliate their disputes.<sup>138</sup>

### **3.3.7 The Labour Institutions Act No. 14 of 2007**

“An employer, group of employers, or employers' organization and a trade union may conclude a collective agreement providing for: (a) the conciliation of any category of trade disputes identified in the collective agreement by an independent and impartial conciliator appointed by agreement between the parties; and (b) the arbitration of any category of trade disputes identified in the collective agreement by an independent and impartial arbitrator appointed by agreement between the parties,” according to Section 58(1) of the Labour Relations Act.

Furthermore, “Within twenty-one days of a trade dispute being submitted to the Minister as stipulated under section 62, the Minister shall appoint a conciliator to endeavour to mediate the trade dispute...” reads section 65 (1) of the Labour Relations Act. A public officer, any other individual picked from a panel of conciliators, or a conciliator from the conciliation and mediation commission may be appointed as conciliators.<sup>139</sup>

The conciliator's powers to resolve a disagreement are outlined in Section 67 of the Act.<sup>140</sup> “If a trade dispute is concluded in conciliation, the contents of the agreement

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<sup>138</sup> Muigua, “Alternative Dispute Resolution and Article 159 of the Constitution” (n 87).

<sup>139</sup> The Labour Institutions ACT No. 14 of 2007

<sup>140</sup> The Labour Institutions ACT No. 14 of 2007

shall be: (a) documented in writing; and (b) signed by the parties and the conciliator,” according to Section 68 (1) of the Act.<sup>141</sup>

A trade dispute is considered unresolved after conciliation if the following occurs: (a) the conciliator issues a certificate stating the disagreement has not been resolved by conciliation; or (b) the thirty-day period from the conciliator's appointment, or any longer time agreed to by the parties, ends.<sup>142</sup>

According to Section 70 of the Act, the minister may appoint a conciliator or conciliation committee in the public interest to prevent or resolve a conflict. The minister has the authority to create a committee of inquiry to look into any trade dispute and report back to him.<sup>143</sup>

### **3.4 Policy Framework**

#### **3.4.1 The Judiciary Mediation Manual**

By establishing it on a trial basis in the Family and Commercial Divisions of the High Court, the judiciary took the first step toward institutionalizing and operationalizing Court annexed mediation.<sup>144</sup> “The two Divisions were chosen with care. The lawsuits at the High Court's Commercial Division are worth billions of shillings, and if they are handled quickly, they will release significant resources into the economy.<sup>145</sup>

The Judiciary Mediation Manual was released by the Judiciary as a practice guideline in the implementation of the Court Annexed Mediation roll-out to additional courts after the pilot phase.<sup>146</sup> The Judiciary Mediation Manual establishes standards, best

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<sup>141</sup> The Labour Institutions ACT No. 14 of 2007

<sup>142</sup> Sec 69, The Labour Institutions ACT No. 14 of 2007

<sup>143</sup> Sec 71, The Labour Institutions ACT No. 14 of 2007

<sup>144</sup> Oyombe (n 76).

<sup>145</sup> *ibid.*

<sup>146</sup> *ibid.*

practices, sound foundations, and expectations for the implementation of Court Annexed Mediation in the administration of justice.<sup>147</sup> Registry staff, Deputy Registrars, Magistrates, Judges, Parties, Advocates, and Mediators can utilize the manual to help them process files referred to Court Annexed Mediation.<sup>148</sup>

Parties were obliged to indicate their chosen mediators from a list of three suggested mediators in the previous guidelines.<sup>149</sup> This clause has now been repealed, and the Deputy Registrar now has the authority to designate a Mediator to handle the issue. This action has both advantages and disadvantages.<sup>150</sup> The advantages are that the Mediation timelines are followed and the procedure is concluded quickly.<sup>151</sup> The disadvantages are that the characteristics of mediation are harmed because parties no longer have the power to choose the mediator who will handle their case.<sup>152</sup>

### **3.5 Conclusion**

This chapter has analysed the legal regulatory frameworks governing ADR and access to justice in Kenya. Based on the foregoing analysis it is clear that Kenya's legal structure has adopted and continues to promote alternative dispute resolution, notwithstanding its shortcomings. However, it is clear that there are substantial gaps in the regulation of ADR in Kenya that were discovered in the preceding analysis.

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<sup>147</sup> *ibid.*

<sup>148</sup> *ibid.*

<sup>149</sup> *ibid.*

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*

<sup>152</sup> *ibid.*



## **CHAPTER FOUR: HARNESSING ALTERNATIVE DISPUTE RESOLUTION MECHANISMS TO ENHANCE ACCESS TO JUSTICE IN WAJIR NORTH CONSTITUENCY**

### **4.1 Introduction**

The social and cultural context of ADR and access to justice is discussed in this chapter of the study. The preceding chapters have expounded the regulation and practice of ADR mechanisms and access to justice in Kenya. However, a consideration of ADR mechanisms would be incomplete without taking into account the importance of culture and social context in dispute resolution when using ADR procedures.<sup>153</sup>

### **4.2 Brief Description of Wajir North Constituency**

Wajir North is situated in Wajir County. It forms part of the six constituencies in the county. Wajir County lies in the North Eastern part of Kenya bordering Mandera County to north and north-east; to the east Somalia; Isiolo and Marsabit Counties to the west; Ethiopia to the north; and Garrissa County to the south.<sup>154</sup> Wajir is Kenya's third-largest county.<sup>155</sup> Wajir North Constituency is the second largest constituency in Wajir County which comprises of 7 wards.<sup>156</sup> It is reported to cover an area of 8,303.80 Km Square.<sup>157</sup>

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<sup>153</sup> Muigua, “Alternative Dispute Resolution and Article 159 of the Constitution” (n 87).

<sup>154</sup> ‘Wajir County | County Trak Kenya’ <<http://countytrak.infotrakresearch.com/wajir-county/>> accessed 3 June 2021.

<sup>155</sup> ‘Children, Youth and Women Sensitive Planning and Budgeting in Kenya: Wajir County Brief, 2014/15-2017/18’ ([www.unicef.org](http://www.unicef.org)) <<https://www.unicef.org/esa/media/7031/file/UNICEF-Kenya-Wajir-County-Budget-Brief-2020.pdf>> accessed 3 June 2021.

<sup>156</sup> Malka gufu, Batalu, Bute, Danaba, Gurar, Ogomdi and korondile ward

<sup>157</sup> Independence electoral and boundaries commission

The number of court cases filed in Kenya's arid counties, which primarily span the north and northeast of the country, is arguably fewer than in the rest of the country.<sup>158</sup> When it comes to judicial services, there are few courts, distances are wide, and the fees of submitting a lawsuit are rather high for a poor people.<sup>159</sup> The formal laws and legal systems, on the other hand, do not appear to correlate with the notions of the local nomadic societies, which tends to be the fundamental reason for the small number of cases in court.<sup>160</sup>

### **4.3 Challenges Facing Access to Justice in Wajir North Constituency**

The citizens' understanding of their rights as contained in the Constitution's Bills of Rights, as well as their capability and empowerment to seek redress through the various legal systems, are important to Kenya's access to justice framework.<sup>161</sup> According to Article 22(1) of Kenya's Constitution, anybody has the right to file a claim alleging that a right or freedom has been violated, infringed, or denied.<sup>162</sup>

Several issues have hampered access to justice, particularly for the disenfranchised, impoverished, illiterate, and disadvantaged in society.<sup>163</sup> Lack of infrastructure, exorbitant advocacy fees, illiteracy, inadequate information, large distances to the courts, and the length of time it takes to resolve disputes are just a few of these reasons.<sup>164</sup> The following are some of the challenges I witnessed in Wajir North Constituency:

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<sup>158</sup> Tanja Chopra, 'Reconciling Society and the Judiciary in Northern Kenya' 60.

<sup>159</sup> *ibid.*

<sup>160</sup> *ibid.*

<sup>161</sup> Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (n 55).

<sup>162</sup> *ibid.*

<sup>163</sup> *ibid.*

<sup>164</sup> *ibid.*

#### **4.3.1 Lack of knowledge of rights**

The ability to enjoy and enforce one's rights is based on one's knowledge and comprehension of the right's existence.<sup>165</sup> Most of the constituents of Wajir North Constituency did not have sufficient knowledge and understanding of the fundamental rights and freedoms guaranteed to them under the Constitution of Kenya 2010. Only 4 percent of people living in Wajir County have a high school education or higher.<sup>166</sup> The lack of formal education to understand and enforce the rights guaranteed to them impedes their access to justice.

#### **4.3.2 Physical access to the court system has been hampered**

The country's current courthouses and judicial officers are insufficient to accommodate the country's growing population, which is expected to reach 63.9 million by 2030.<sup>167</sup> Furthermore, those who can afford to use the formal court systems are still unable to locate physical courts and are inexperienced with the complexities of the judicial process.<sup>168</sup> Wajir County is expansive with only one court house serving an estimated area of 55,841 km<sup>2</sup>. Accessing this court house is cumbersome from Wajir North Constituency due to poor infrastructure coupled with the distance needed to be covered to reach the Court house. The constituents are also not well informed on judicial processes. This factor greatly denies constituents of Wajir North Constituency from enjoying the right of access to justice guaranteed to them under Article 48 of the Constitution of Kenya 2010.

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<sup>165</sup> *ibid.*

<sup>166</sup> 'Exploring Kenya's Inequality "Pulling Apart or Pooling Together"' (2013) <<http://inequalities.sidint.net/kenya/wp-content/uploads/sites/2/2013/09/Wajir.pdf>> accessed 3 June 2021.

<sup>167</sup> Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (n 55).

<sup>168</sup> *ibid.*

### **4.3.3 Inadequate funds to use in pursuing justice through the formal justice systems**

One of the most significant factors restricting Kenyans' access to justice is the monetary cost of resolving disputes.<sup>169</sup> With more than 60% of Kenyans living in poverty, legal costs such as court fees and advocate fees have severely restricted access to Kenyan court system.<sup>170</sup> In 2017, Wajir County contributed 0.5 percent of the national GDP.<sup>171</sup> Agricultural production continues to be a major contributor to the economy, accounting for 54% of GDP in 2017.<sup>172</sup> Income generated by constituents of Wajir North Constituency is not adequate for their basic needs, not to mention using it to solve disputes through the court system. Inadequate finances to institute and pursue legal proceedings by constituents of Wajir North Constituency is the greatest barrier to facilitating access to justice.

### **4.3.4 Unreasonable delay of court proceedings**

The fact that most disputes, particularly those of a commercial character, take a long time to be settled by the court system has restricted access to justice in Kenya.<sup>173</sup> This delay dissuades most Kenyans from pursuing disputes that lead to the prevalence of non-judicial means of dispute resolution.<sup>174</sup> Like the rest of Kenya, this nature of the Kenyan court system is prevalent in Wajir County. Effective access to justice is promoted when matters are settled promptly.

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<sup>169</sup> *ibid.*

<sup>170</sup> *ibid.*

<sup>171</sup> 'Children, Youth and Women Sensitive Planning and Budgeting in Kenya: Wajir County Brief, 2014/15-2017/18' (n 146).

<sup>172</sup> *ibid.*

<sup>173</sup> Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (n 55).

<sup>174</sup> *ibid.*

#### **4.3.5 Lack of personnel to resolve disputes through ADR**

Wajir North Constituency is characterised by inadequate personnel to resolve disputes utilizing ADR methods, as well as a poor understanding of how some processes, such as mediation, work. Entrenchment of ADR mechanisms in dispute resolution will be an uphill task without adequate and well-trained personnel.

#### **4.3.6 Inter clan conflicts**

There are conflicts relating to grazing rights and water resources in Wajir County by different clans. The result of these disputes is widespread underdevelopment and, as a result, slow or stagnant economic development in Kenya, notwithstanding the fact that the country has many potential socio-economic advancements.<sup>175</sup> Ownership of land and also its use, as well as the lack of it, have historically been associated with poverty and/or improved living for Kenyans.<sup>176</sup> It's hardly surprising, then, that land has been a source of contention since pre-independence inclusive of the colonial times.<sup>177</sup>

Land acquisition, ownership, and use issues can be traced back to the pre-colonial period in order to better understand the core causes of land-related disputes.<sup>178</sup> This is significant because only by comprehending the causes can one appreciate the current land-related problems.<sup>179</sup> Only then will Alternative Dispute Resolution procedures be effective in addressing land-related disputes.<sup>180</sup> Understanding the core

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<sup>175</sup> Geoffrey Nyamasege, Muhammad Swazuri and Tom Chavangi, 'ALTERNATIVE DISPUTE RESOLUTION AS A VIABLE TOOL IN LAND CONFLICTS: A KENYAN PERSPECTIVE' 21.

<sup>176</sup> *ibid.*

<sup>177</sup> *ibid.*

<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*

<sup>180</sup> *ibid.*

issues opens up more chances and space for the use of alternative dispute resolution (ADR) to thrive without substantial roadblocks from the legal system.<sup>181</sup>

#### **4.3.7 Absence of infrastructure**

ADR practice in Wajir North Constituency is faced by a myriad of infrastructural inadequacies. They include:

- I. There is no physical central place where communities in Wajir North can go to access justice within the constituency. The lack of ADR registries in Wajir North leads to the lack of desire by practitioners to undertake ADR processes in Wajir North. The community in Wajir North lead a nomadic lifestyle. Housing architecture in Wajir North is usually made of temporary houses.
- II. The road network is also poor. A good road network is essential to the success of ADR because it will open up Wajir North constituency which is located at the periphery of the country.
- III. Compounded to the problems listed above, communication infrastructure in the constituency is also poor. All these factors compounded present a dim future for the implementation of ADR in Wajir North Constituency.

#### **4.3.8 Inadequate funding of ADR mechanisms**

The pilot and nationwide rollout of Court Annexed Mediation have not attained financial independence from traditional dispute resolution processes.<sup>182</sup> During the pilot period, the Judiciary did not set aside any funds particularly for the initiative; instead, funding for payment of mediators, infrastructure, stationery, and operational expenditures were drawn from the Registrar of the High Court's budget.<sup>183</sup> The

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<sup>181</sup> *ibid.*

<sup>182</sup> Oyombe (n 76).

<sup>183</sup> *ibid.*

payment of the mediators was also aided by the Chief Registrar of the Judiciary.<sup>184</sup> The Judicial Performance Improvement Project and other partners, such as the International Development Law Organization, jointly fund the secretariat.<sup>185</sup>

The government's austerity measures guidelines, which are released from time to time, pose a threat to the entire Court Annexed Mediation process.<sup>186</sup> The budgets of ministries, public entities, as well as the judiciary, were recently slashed by the administration.<sup>187</sup>

#### **4.3.9 Lack of political goodwill**

Political climate in Wajir County is at times tense. Politics is dominated by clan politics. Minorities' interests are mostly ignored. ADR needs political and community goodwill to work properly. ADR will look to address the core issues of conflicting communities which will result in restoration of friendly and harmonious relationships. Politicians in Kenya thrive by creating divisions, us versus them narrative. Politicians choose to discourage use of ADR because a harmonious nation will result in them being judged and elected on merit, and their manifesto.

#### **4.3.10 Mandatory Mediation Referral**

As per the Mediation Rules, every lawsuit filed in court must be screened by the Mediation Deputy Registrar to establish whether it is suitable for mediation.<sup>188</sup> The fact that Court Annexed Mediation is obligatory has irritated certain parties. Mediation is usually regarded as a voluntary process in which the parties agree to

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<sup>184</sup> *ibid.*

<sup>185</sup> *ibid.*

<sup>186</sup> *ibid.*

<sup>187</sup> *ibid.*

<sup>188</sup> *ibid.*

participate without pressure or under the guidance of a third party.<sup>189</sup> In this scenario, voluntariness can be justified in two ways: the parties agree to join mediation and agree to reach a resolution.<sup>190</sup> The inability of Court Annexed Mediation to produce higher settlement rates among the parties has been attributed to its coercive nature.<sup>191</sup> The required aspect of the Mediation Rules, on the other hand, is claimed to be based on the choice of forum rather than the necessity to find an agreement.<sup>192</sup> That is, there are no required provisions in the Mediation Rules that require parties to settle their disputes through mediation.<sup>193</sup> In order to resolve their issue, the parties must use Court Annexed Mediation.<sup>194</sup> As a result, this does not constitute a "denial of access to justice," but rather merely a postponement of the decision until the matter is resolved through mediation.<sup>195</sup> As a result, the parties can still decide how their issue will be resolved.<sup>196</sup>

“The decision about mandatory referral is based on the Judiciary's goal and objective with respect to the project,” the Judiciary said.<sup>197</sup> In this scenario, the judiciary needs to reduce the backlog of cases and increase case turnover rate, and implementing consensual referral to mediation would necessitate extensive and far-reaching public awareness campaigns.<sup>198</sup>

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<sup>189</sup> *ibid.*

<sup>190</sup> *ibid.*

<sup>191</sup> *ibid.*

<sup>192</sup> *ibid.*

<sup>193</sup> *ibid.*

<sup>194</sup> *ibid.*

<sup>195</sup> *ibid.*

<sup>196</sup> *ibid.*

<sup>197</sup> *ibid.*

<sup>198</sup> *ibid.*



#### **4.4 Harnessing Alternative Dispute Resolution Mechanisms to Enhance Access to Justice in Wajir North Constituency**

The objective here is to entrench alternative dispute resolution mechanisms, by identifying and providing feasible solutions for effective adoption of ADR mechanisms leading to enhancement of the right of access to justice in Wajir North Constituency. For efficient harnessing of ADR, dispute resolution mechanisms should strive to resolve conflicts as swiftly as possible and as close to the source as practicable.<sup>199</sup> Parties should explore for workable solutions within the current legal, social, and economic boundaries rather than imposing a solution.<sup>200</sup>

Conflict resolution is at the center of legal practice.<sup>201</sup> However, litigation has been and remains being the primary means of conflict resolution across Africa and in Kenya to be precise for many years.<sup>202</sup> The prevalence of litigation is attributed to stakeholders in the formal justice structures as well as lay persons.

The role of ordinary people in litigation prevalence can be regarded from two perspectives.<sup>203</sup> First, most people are unaware of ADR or have only a limited understanding of it; second, the bulk of public perceptions are based on ignorance of ADR and the belief that litigation is the most effective means of resolving disputes.

As evidenced by the Judiciary's Pilot Project on Court Annexed Mediation, which was rolled out by the Commercial and Tax Division of the High Court, Milimani Law

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<sup>199</sup> De Bruyn A.J. and Sotshononda N., 'Harnessing Dispute Resolution in a Metropolitan Bargaining Council of South Africa' (2017) 9 African Journal of Public Affairs 135.

<sup>200</sup> *ibid.*

<sup>201</sup> Edmund Nelson Amasah, Elizabeth Hassan and Monica Naa Sarku Nettey, 'Alternative Dispute Resolution an Examination of the Challenges and Opportunities for Conflict Resolution in Ghana' (2015) 7 KNUST Law Journal 54.

<sup>202</sup> *ibid.*

<sup>203</sup> *ibid.*

Courts, ADR is a beneficial tool that can promote access to justice in numerous sectors, both formal and informal.<sup>204</sup> The following strategies are advocated to fully harness the potential of ADR for expeditious dispute resolution in Wajir North Constituency:

- I. In terms of the general public, government institutions and non-governmental organizations (NGO's) should generate widespread knowledge of the availability of ADR as a viable dispute settlement option in Wajir North Constituency.<sup>205</sup> As a result, the general public should be made aware of the different advantages of using ADR to resolve disagreements.<sup>206</sup>
- II. The community in Wajir North Constituency should be able to easily access the ADR facilities by disseminating information about their locations, operating hours, and other details required by the public to do so.<sup>207</sup>
- III. Getting consent to use ADR mechanism to solve disputes in the community. This will enhance collaboration and acceptance of use of ADR mechanisms in Wajir North Constituency. Those in favour of consensual involvement in ADR say that conciliation or mediation is primarily a consensual process that involves the parties' collaboration and consent.<sup>208</sup> Because the aspect of 'good faith,' which is frequently present in consensual ADR, is not guaranteed in compulsory ADR, states and courts have created regulations requiring parties to engage in ADR in good faith.<sup>209</sup> The primary objective should be to ensure that everyone has meaningful access to justice.<sup>210</sup> Courts

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<sup>204</sup> Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (n 55).

<sup>205</sup> Amasah, Hassan and Sarku Netey (n 190).

<sup>206</sup> *ibid.*

<sup>207</sup> *ibid.*

<sup>208</sup> Kariuki Muigua, 'Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future' 24.

<sup>209</sup> *ibid.*

<sup>210</sup> *ibid.*

may sometimes compel parties to the negotiation table in order to ensure that justice is done, particularly when one of the parties declines to do so with the intent of impeding justice.<sup>211</sup> If required, the third-party umpire, in partnership with the court, may devise new techniques to deal with power dynamics and bad faith in order to ensure that justice is served.<sup>212</sup>

IV. ADR mechanisms employed in Wajir North Constituency should foster confidentiality. Confidentiality is essential to ADR because it allows parties to have open, honest discussions about their concerns in order to seek the highest suitable resolution of their dispute.<sup>213</sup> The impartial party has a duty not to reveal to a third party what a party has informed him in confidence, as well as not to reveal to the other party what a party has told him in private.<sup>214</sup> The question for legislators is whether confidentiality should be enshrined in law, and if so, what penalties will be imposed in the event of a violation.<sup>215</sup> They should also analyze the instances in which a confidentiality exception to the general rule applies.<sup>216</sup> Confidentiality limitations apply in a variety of situations, including when the parties agree; when the law requires it; and when a crime is committed or a threat to perpetrate one is made.<sup>217</sup>

The government's aim is to promote ADR in order to develop a more conciliatory attitude to conflict resolution.<sup>218</sup> It's also crucial that parties have the option of using

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<sup>211</sup> *ibid.*

<sup>212</sup> *ibid.*

<sup>213</sup> *ibid.*

<sup>214</sup> *ibid.*

<sup>215</sup> *ibid.*

<sup>216</sup> *ibid.*

<sup>217</sup> *ibid.*

<sup>218</sup> *ibid.*

an effective ADR mechanism.<sup>219</sup> The common law's insufficiency to govern ADR in Kenya is obvious.<sup>220</sup> The goal of conflict resolution in many non-Western traditions is often not the determination of legal rights and the allocation of blame and entitlement, as it is in the West; rather, the goal is a resolution, and hopefully reconciliation, whatever the outcome.<sup>221</sup> Diversity, flexibility, and dynamism should be fostered in conflict management approaches and processes by policymakers.<sup>222</sup> They should also keep in mind that ADR is not a stand-alone process.<sup>223</sup> The parties' autonomy permits them to create a hybrid process by combining several strategies and processes to satisfy their own needs.<sup>224</sup> As a result, they must be viewed in the context of ADR as a whole.<sup>225</sup>

#### **4.4.1 Is ADR a viable alternative to traditional conflict resolution methods such as litigation?**

Article 159 can be interpreted as supporting the use of traditional court systems, as well as ADR, in the quest of justice.<sup>226</sup> As previously stated, ADR consists of a number of mechanisms, each with its own set of benefits and applications.<sup>227</sup> Litigation is categorized as a dispute settlement method, whereas ADR is regarded as a conflict resolution process.<sup>228</sup> A settlement is an accord on the conflict's dispute(s) that often entails a concession.<sup>229</sup>

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<sup>219</sup> *ibid.*

<sup>220</sup> *ibid.*

<sup>221</sup> *ibid.*

<sup>222</sup> *ibid.*

<sup>223</sup> *ibid.*

<sup>224</sup> *ibid.*

<sup>225</sup> *ibid.*

<sup>226</sup> Kariuki Muigua, 'Effective Justice for Kenyans: Is ADR Really Alternative?' 18.

<sup>227</sup> *ibid.*

<sup>228</sup> *ibid.*

<sup>229</sup> *ibid.*

Litigation frequently results in damaged relationships, and there is a risk that the conflict will resurface in the future, or, even worse, the unsatisfied party may want to get 'justice' in ways they believe are most suitable.<sup>230</sup> Resentment may drive one or both parties to seek vengeance in order to resolve issues that the courts have never addressed.<sup>231</sup> However, it is important noting that when it comes to ensuring the protection and enforcement of human rights, litigation is the most effective means of doing so.<sup>232</sup> In addition, when an injunction is required, litigation is the best option. Litigation could be effective in this situation, especially if there is little motivation to keep ties intact.<sup>233</sup>

Dispute resolution leads to a solution reciprocal problem-sharing, wherein disputing parties work together to rethink their dispute and relationship.<sup>234</sup> Dispute resolution produces long-term, non-coercive, mutually gratifying results that address the fundamental cause of the conflict and reject power-based resolutions.<sup>235</sup> By aiming for a post-conflict relationship that is not based on control, a resolution delves further into determining the underlying cause of the disagreement between the parties.<sup>236</sup>

ADR techniques are mostly used to resolve conflicts, and its key selling points are their flexibility, low cost, absence of complex procedures, collaborative conflict resolution, relationship restoration, and familiarity with the general public.<sup>237</sup> For example, using a procedure that does not enforce any solution that is not mutually acceptable,

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<sup>230</sup> *ibid.*

<sup>231</sup> *ibid.*

<sup>232</sup> *ibid.*

<sup>233</sup> *ibid.*

<sup>234</sup> *ibid.*

<sup>235</sup> *ibid.*

<sup>236</sup> *ibid.*

<sup>237</sup> *ibid.*

negotiation enables participants to directly influence both the procedure and the result.<sup>238</sup>

The efficiency of conflict resolution procedures in addressing the core tensions and obviating the need for potential conflict or conflict management makes them preferable to settlement.<sup>239</sup> They are appropriate for specific types of conflicts, particularly those that include strong emotions while still requiring the preservation of relationships.<sup>240</sup> Litigation as a means of resolving disputes is improper in such circumstances.<sup>241</sup> Only conflict resolution techniques like ADR are capable of dealing with such situations.<sup>242</sup> This poses the issue of whether ADR is a more suitable method of resolving the disagreement in this situation than litigation.<sup>243</sup>

ADR mechanisms are a crucial component of Kenya's and Africa's conflict resolution strategies.<sup>244</sup> The implementation of Article 48 of the Kenyan Constitution, which guarantees everyone access to justice, necessitates the use of a variety of mechanisms and structures.<sup>245</sup> This comprises of both formal and informal conflict resolution and access to justice systems.<sup>246</sup> Article 48 states that the state must ensure that all people have access to justice and that, if a price is required, it must be reasonable and not obstruct access to justice.<sup>247</sup> Despite these provisions, access to justice, particularly through litigation, is frequently impeded.<sup>248</sup>

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<sup>238</sup> *ibid.*

<sup>239</sup> *ibid.*

<sup>240</sup> *ibid.*

<sup>241</sup> *ibid.*

<sup>242</sup> *ibid.*

<sup>243</sup> *ibid.*

<sup>244</sup> *ibid.*

<sup>245</sup> *ibid.*

<sup>246</sup> *ibid.*

<sup>247</sup> *ibid.*

<sup>248</sup> *ibid.*

As an informal dispute resolution mechanism, negotiation gives parties ultimate control over the process of evaluating and discussing their difficulties, allowing them to negotiate a mutually acceptable solution without the involvement of a third party.<sup>249</sup> It focuses on the parties' similar interests rather than their respective power or position.<sup>250</sup> Mediation has many of the same benefits as negotiating. However, because mediation has no enforcement mechanism and relies on the goodwill of the parties, it suffers from its non-binding nature, which means that if compliance is necessary, one must go to court to acquire it.<sup>251</sup> Conciliation contributes to the reduction of tension, the opening of communication channels, and the continuation of negotiations.<sup>252</sup> As a result, where there are already damaged ties that need to be restored, conciliation would be preferable to litigation or any other procedure that would aggravate the issue.<sup>253</sup>

Considering the preceding analysis, it is difficult to reject ADR mechanisms as merely a substitute for litigation.<sup>254</sup> They can't be done away with just yet due to their ultimate appropriateness in dealing with specific types of societal disputes.<sup>255</sup> As a result, the question of whether ADR processes are truly alternatives to formal legal systems continues to be debated.<sup>256</sup>

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<sup>249</sup> *ibid.*

<sup>250</sup> *ibid.*

<sup>251</sup> *ibid.*

<sup>252</sup> *ibid.*

<sup>253</sup> *ibid.*

<sup>254</sup> *ibid.*

<sup>255</sup> *ibid.*

<sup>256</sup> *ibid.*

## 4.5 Conclusion

This chapter has contextualized dispute resolution in Wajir North Constituency. It has gone further to give proposals on how ADR can be effectively harnessed to enhance the right of access to justice of the constituents. Increased use of alternative dispute resolution (ADR) is seen as one of the methods that will lead to faster dispute resolution, particularly in tribunals and traditional judicial systems.<sup>257</sup> There are numerous ADR mechanisms that can be used. Kenya's ADR legislative, policy, and strategic framework, as well as intentions to develop ADR, are in line with current global trends.<sup>258</sup> Alternative Dispute Resolution Mechanisms and Access to Justice are inextricably linked.<sup>259</sup> ADR, if properly implemented, can increase Wajir North Constituents' access to justice.

Working with a current system that is based on community needs and values and norms, is the most likely path to a long-term desirable outcome.<sup>260</sup> Attempting to impose a foreign system, no matter how well constructed from the standpoint of a developed country, is seldom a route to success.<sup>261</sup> The Kenyan Constitution recognizes culture as the nation's cornerstone and as the people's and country's collective civilisation.<sup>262</sup> As a result, the state is obligated to support all kinds of national and cultural expression.<sup>263</sup> As a result, the employment of traditional dispute resolution mechanisms in the resolution of conflicts impacting the affected communities is

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<sup>257</sup> Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (n 55).

<sup>258</sup> *ibid.*

<sup>259</sup> *ibid.*

<sup>260</sup> Muigua and Francis (n 38).

<sup>261</sup> *ibid.*

<sup>262</sup> *ibid.*

<sup>263</sup> *ibid.*



endorsed.<sup>264</sup> This is supported by Article 44(1), which ensures that everyone has the freedom to use the dialect and engage in the cultural life of their choosing.<sup>265</sup>

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<sup>264</sup> *ibid.*

<sup>265</sup> *ibid.*

## **CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS**

### **5.1 Introduction**

This Chapter presents the conclusions based on the overview of the inferences and makes recommendations and reform proposals. This paper has analysed the realisation of access to justice in Wajir North constituency. In an attempt to promote this right under Article 48 of the constitution of Kenya, it has advocated for the adoption of ADR mechanisms as a tool of realisation of this right. However, we must note that the Northern Frontier Districts (NFD) were largely underdeveloped due to alienation by successive governments since independence. The constitution of Kenya, as a progressive instrument, came to remedy these injustices. However, Wajir County has not caught up to its counterparts located in areas that were categorised as highly productive areas by the colonial government. The literacy levels are still low across the county with constituencies averaging less than 20 per cent. The community in Wajir North lead a nomadic lifestyle. This therefore means that building infrastructure to access ADR mechanism may still be rendered inaccessible. To fully harness ADR, traditional dispute resolution mechanisms must be integrated to formal channels and mainstreamed.

While recognizing that not all circumstances are appropriate with the adoption and application of traditional African dispute resolution systems, including indigenous techniques and rules of dispute resolution, there are facets of these principles and practices that may be blended and synchronized with the formal legal and institutional framework, providing a comprehensive approach to access to justice.<sup>266</sup> They can be

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<sup>266</sup> Kariuki Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' 23.

evaluated against constitutional protection measures in order to eliminate the drawbacks.<sup>267</sup>

Traditional dispute resolution systems can go a long way toward increasing community access to justice, particularly for individuals who are alienated from formal systems due to the cost of justice and technical procedures.<sup>268</sup> To guarantee that Kenyans have full access to justice, a robust legal and policy framework for the effective use of TDR and ADR must be enacted.<sup>269</sup> Only by enacting such legal and policy steps can the ADR and TDR procedures be completely legitimized and their benefits fully realized.<sup>270</sup> This would make it easier for Kenyans to receive effective justice and, as a result, encourage the building of a just and peaceful state.<sup>271</sup>

## **5.2 Conclusion**

It is possible to realize the right to access to justice as envisioned by Article 48 of Kenya's 2010 Constitution.<sup>272</sup> To accomplish this, feasible options must be brought on board as a means of realizing the goal.<sup>273</sup> Adoption and implementation of ADR is one such strategy, as addressed in this study. As a result, the rule of law will be strengthened.<sup>274</sup> Wider use of ADR is thought to be one of the strategies that will lead to faster case resolution.<sup>275</sup> There are numerous ADR mechanisms that can be used.<sup>276</sup> For the residents of Wajir North Constituency, the study provided a status study of

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<sup>267</sup> *ibid.*

<sup>268</sup> *ibid.*

<sup>269</sup> *ibid.*

<sup>270</sup> *ibid.*

<sup>271</sup> *ibid.*

<sup>272</sup> Muigua and Francis (n 38).

<sup>273</sup> *ibid.*

<sup>274</sup> *ibid.*

<sup>275</sup> Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' (n 55).

<sup>276</sup> *ibid.*

ADR and broad recommendations for improving the use of ADR mechanisms in realisation of the right of access to justice.

It is possible to create awareness about ADR mechanisms for all, including the underprivileged who may be aware of their right to access to justice but lack the means to exercise it, as well as consolidate and harmonize the various statutes relating to ADR, including the Arbitration Act, with the constitution to ensure accretion. Continued training of important stakeholders in the government, the court, legal professionals, the corporate sector, and the general public is also required in order to support ADR processes in all feasible ways.<sup>277</sup> It is clear that ADR retains its relevance in society, and what it needed is popularization without necessarily structuring it in a way that removes all of the advantages with its use in conflict resolution.<sup>278</sup> It is obvious that ADR can play an important role in the realization of the human right to access justice to the constituents of Wajir North Constituency. When justice can be addressed effectively through ADR, it can no longer be seen as an alternative alone.<sup>279</sup>

### **5.3 Recommendations**

The following recommendations are possible ways of resolving the challenges identified in Chapter Four:

#### **5.3.1 Infrastructural development**

ADR requires physical resources such as stationery, computer hardware and software, registries, and records to be successful.<sup>280</sup> In Wajir North Constituency, the judiciary must identify a physical place dedicated to the conduct of ADR. There should be

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<sup>277</sup> Muigua, 'Effective Justice for Kenyans: Is ADR Really Alternative?' (n 215).

<sup>278</sup> *ibid.*

<sup>279</sup> *ibid.*

<sup>280</sup> Oyombe (n 76).

enough conference rooms, break-out rooms, a mediator's chamber, and a client care center in this space. In some jurisdictions, a separate mediation center is established within the courthouse.<sup>281</sup> This serves to build a barrier between the aggressive and combative courtrooms. An ADR registry should be developed for the safety and correct archiving of ADR case files.<sup>282</sup> The registry should be well staffed and equipped. This will make it possible to file ADR materials in court in a timely and effective manner.<sup>283</sup>

Stakeholders in the communication industry should also be encouraged to build communication infrastructure within the constituency. Effective relay of communication is at the heart of dispute resolution. Proper communication infrastructure will lead to timely resolution of cases as the internet can be incorporated to read experts who may not access the constituency.

### **5.3.2 Training of stakeholders**

The ADR's success depends on the project's management. As a result, training of the officers and staff involved is critical in ensuring the project's growth and attainment of its objectives.<sup>284</sup> Mediators, negotiators, conciliators, and arbitrators must be trained in the writing of settlement agreements, the ADR processes, and good case management. Judges must be educated about their role in mediation.<sup>285</sup>

A thorough curriculum for training at the Judicial Training Institute should be designed in order to carry out the training.<sup>286</sup> The training should be ongoing to keep ADR officers up to date on new advances in the field. Professional organizations should

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<sup>281</sup> *ibid.*

<sup>282</sup> *ibid.*

<sup>283</sup> *ibid.*

<sup>284</sup> *ibid.*

<sup>285</sup> *ibid.*

<sup>286</sup> *ibid.*

also educate their members about ADR and their participation in it.<sup>287</sup> The Mediation Accreditation Committee should be in the forefront of ensuring that the qualifications for being listed as a mediator are kept up to date so that mediators can continue to learn new skills.<sup>288</sup> Training and exchange programs with other jurisdictions would also be extremely beneficial to the personnel.<sup>289</sup>

### **5.3.3 Dealing with the issue of court-annexed mediation being obligatory**

Some parties have protested to the adoption of Court Annexed Mediation, claiming that it compels mediation on the parties, which is contradictory to the essence of mediation.<sup>290</sup> While this may be true, the judiciary has stated that it is important to achieve the goal of lowering the case backlog.<sup>291</sup> A robust public enlightenment program is required to ensure that the public is aware of this.<sup>292</sup> To give Court Annexed Mediation a better reception, the public needs to appreciate and grasp the judiciary's perspective.<sup>293</sup>

### **5.3.4 Enhancing political good will for the reception and implementation of ADR**

To gain support, the judiciary should educate members of the legislative and executive arms of government on the notion of ADR, its prospects, and advantages to the country. The judiciary might use this political goodwill to persuade the legislature to raise budgetary allocations for ADR mechanisms.

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<sup>287</sup> *ibid.*

<sup>288</sup> *ibid.*

<sup>289</sup> *ibid.*

<sup>290</sup> *ibid.*

<sup>291</sup> *ibid.*

<sup>292</sup> *ibid.*

<sup>293</sup> *ibid.*

### **5.3.5 Sensitization of the constituents of Wajir North**

To develop and expand the influence of ADR, civic education will be vital, particularly among the poor and vulnerable groups living in rural areas, where there are few legal clinics, advocacy groups, and civic educators.<sup>294</sup> Sensitisation can best be carried out through local vernacular radio stations and public *barazas*.

### **5.3.6 Funding should be secured for ADR programmes in Wajir North Constituency**

The Court Annexed Mediation Initiative is now funded through funds granted to other Judiciary organs, such as the Registrar of the High Court.<sup>295</sup> Both recurring and development budget monies must be put aside for the project in order to adequately fund its operations.<sup>296</sup> Given the potential of Court Annexed Mediation to reduce the backlog of cases in the courts, an argument might be made that funding should be allocated to Court Annexed Mediation instead of employing more judges.<sup>297</sup> The cash could come directly from the National Treasury or be set aside from the Judiciary's budget.<sup>298</sup>

Another option is to look for funding from development partners. Donors such as the World Bank and the International Development Law Organization (IDLO) have been instrumental in the project's dissemination phase.<sup>299</sup> This commitment can be observed in Lagos, where Development Partners have donated cash to the judiciary to support the success of ADR.<sup>300</sup>

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<sup>294</sup> Kariuki Muigua, “Improving Access to Justice: Legislative and Administrative Reforms under the Constitution” <<http://kmco.co.ke/wp-content/uploads/2018/08/A-Paper-on-Improving-Access-to-Justice-2.pdf>> accessed 6 June 2021.

<sup>295</sup> Oyombe (n 76).

<sup>296</sup> *ibid.*

<sup>297</sup> *ibid.*

<sup>298</sup> *ibid.*

<sup>299</sup> *ibid.*

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