Court Annexed Mediation: Dawn of a New Era in the Kenyan Judicial System

By: Joy Kubai Namachi

Mediation is a concept of dispute resolution that is as old as human civilization. However it is until recent times that the model has been recognized and formally adopted in Kenya as an alternative to court method of resolving disputes.

Designed with a perspective to look at and fix the bigger picture in disputes as opposed to adopting the somewhat narrow perspective of the courts, Mediation is fast gaining popularity as the preferred method of dispute resolution in the formal sector.

Mediation is different from Arbitration. While in both cases a neutral third party is involved; the solutions to conflict in Arbitration come from the Arbitrator while in Mediation the disputants themselves generate the solution.

The Mediator takes the role of an independent and impartial expert in facilitating a negotiated settlement between disputants.

Why Mediation?

The tractability of Mediation as a non-adversarial process guarantees WIN - WIN situation where both parties walk away with something. This happens in a flexible and fairly informal setting conducive for parties to bring up the real issues behind the case; issues that would otherwise not be considered relevant in court. For example, the **emotional considerations of parties**, the past present and future **relationship concerns**. This is why successful Mediation has the value addition of not just resolving the conflict but also **restoring relations post-dispute.**

In Mediation, disputants are afforded an opportunity to **generate their own solutions** to their own problems. This way, parties achieve a more satisfactory outcome with less likelihood of dishonoring the agreements. This is unlike the imposed court judgments and decrees that require force of law to be implemented.

Mediation steps into the role of courts while operating at **flexible time schedules**. This has the added advantage of **saving precious time and money** for the disputants and for the courts in **clearing the backlog of cases**.

Family and commercial matters are unique in their intricate and often intimate details and therefore **confidentiality** for the disputants is paramount. The mediation process is conducted in private setting conducive for parties to air their issues freely. The entire process is **confidential and binding** to parties as well as the Mediator. Information shared during a mediation process **cannot be used as evidence in a court** of law neither can it be used in any other way against the either party.

Private sessions within the Mediation process further promote confidentiality by giving each disputant a chance to explore his or her position privately with the Mediator.

The relaxed setting, informality and privacy eliminates the inherent courtroom paranoia that plagues many a litigant due to the technicalities in procedure, manner of dress and address in the courts. In the absence of an intimidating court environment parties are comfortable to lay bare the real issues behind their dispute. In doing so they have a greater chance of resolving their dispute.

The process of Mediation is entirely **voluntary**. However this is not to say that it has no effect. Parties agree to submit themselves to the process. Their commitment to resolving their dispute through Mediation lies within themselves. Should the parties **decide to leave the process before it is completed**, there is no penalty attached. However the **decision** arrived at the end of the Mediation process can be taken to **court for endorsement**. **Upon such endorsement, the decision takes the form of a court order, which is enforceable.**

How does it work?

The Constitution under Article 159 (2) mandates the Judiciary to embrace the principle of Alternative forms of Dispute Resolution (ADR) including reconciliation, Mediation, Arbitration in the administration of justice.

The Civil Procedure Act Cap 21 of the Laws of Kenya gives effect to this Constitutional provision through the enactment of Mediation (Pilot Project) Rules 2015 gazetted under Legal Notice No. 197. The coming into force of these rules on 4th April 2016 heralded the beginning of Court Annexed Mediation.

According to Rule 4 of the said rules, every civil suit filed in court is to undergo **mandatory screening by the Mediation Deputy Registrar**. The screening process is simply an assessment of whether the case fits the criteria for settlement through Mediation. If a case qualifies for Mediation it is then **referred to a Mediator** from the Judiciary panel of accredited Mediators (MAC).

The role of a Mediator under the Mediation Rules (2015) governs among others, confidentiality and filing of a Mediator's Report within ten (10) days of conclusion of the mediation copies of which are provided to the parties.

Where parties have reached an agreement, the same is filed by either of the parties **within ten (10) days** with the Mediation Deputy Registrar whereupon it is adopted by court and becomes **enforceable as a judgment of the court.** Rule 15 clearly states that a person **cannot appeal against such order arising from mediation.** This gives

Mediation the finality akin to an Arbitrators Award, which gives credence to the process.

However not all Mediation is referred from the courts, parties can voluntarily submit themselves to **Private Mediation**. For instance most commercial contracts now have Mediation and Arbitration clauses. Mediation being a voluntary process is non-mandatory to the extent that parties are still free to abandon the process and pursue other forms of dispute resolution including arbitration and litigation.

What is the role of an Advocate in the Mediation process?

Given its informal nature one may wonder if Mediation has room for Advocates. In reality the input of an Advocate is useful throughout the process and cannot be undermined.

Advocates have been mediating disputes and reaching the so-called out-of-court-settlements long before the Judiciary formulation embracing Mediation. When an Advocate calls the other for leniency and/or to propose favorable terms of settlement on behalf of their clients they are engaged in ADR albeit without the expertise demanded of the actual process.

The Advocate's legal advice is indispensible at the initial stage of consultation and their counsel throughout the Mediation process is worthwhile. The Advocate's job is to prepare their client for the Mediation sessions and advise them on their legal rights. The Advocate also prepares the paperwork, which includes written statements and final agreement.

Having said that, I might add that picking the right lawyer for Mediation maybe the hard part for disputants.

It is a reality that the legal profession is currently experiencing saturation and a rising breed of underemployed Advocates who cannot say *no* to the litigation of any matter-particularly one that is ripe for Mediation. Such counsels may have an ulterior motive to sabotage attempts at mediation of the dispute. Therefore disputants must beware of such possibilities as they seek legal advice and representation.

However, a vast majority of the legal practitioners have an appreciation for ADR processes in general and ascribe a positive outlook towards successful outcomes.

What types of cases can be handled through Mediation?

A large percentage of the cases currently in our courts qualify for Mediation. Almost all family and commercial cases are capable of being settled through Mediation.

I dare say there is also room in Mediation even for non-violent criminal cases for example verbal harassment and personal disturbances.

Instances where a dispute raises legal claims in domestic, business and employment relations, Mediation is an available dispute resolution process; to preserve the ongoing relationship between the disputants.

Conclusion

Going by the global trend, the entry of Mediation into our judicial system could not have come at a better time. In Africa,

(a) South Africa embraced Mediation in 2014 under 'The Rules of Voluntary Court-Annexed Mediation (Chapter 2 of the Magistrates' Courts Rules).
(b) Nigeria customary ADR has evolved into legislation- The Nigerian Arbitration and Conciliation Act Cap A18 Laws of Federal Republic of Nigeria (LFN) 2004.

Out of the continent, the European Union has promoted the use of Mediation by EU citizens via Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on **mediation of cross border disputes in civil and commercial matters**. This has proven to be a milestone in the transformation of modern civil justice systems from the WIN – LOSE dispute resolution.

Besides the legal systems, Mediation has the potential to transform not just the justice system but also our economic and social spheres. The use of Mediation as a tool for organizational conflict management has its immense gains in promoting **profitability efficiency** and **productivity**.

Currently the role of Mediation in our legal system has been grossly understated. Lawyers being the potential and prime movers of the mediation agenda appear to have been ambushed and are at a loss on whether Mediation is a friend or foe. It doesn't help matters that some lawyers consider that in Mediation there is less money than in litigation and therefore it is not a worthy venture.

In essence the use of Mediation alongside court process creates an innovation space for law practitioners. Acquiring Mediation skills is a strategy to remain relevant in a world that is seeking **quicker simpler** and **cost effective solutions** to everyday problems. The universal trend in conflict resolution is leaning towards bringing down walls and building bridges, forging links and maintaining networks. These are gains that are hard to achieve through protracted court battles. The clients have been treated to the futility and sheer exhaustion that court battles present. It is obvious that very few will be willing to persist on that **upward trajectory** when an easier route is presented.

However, I acknowledge that we still have Constitutional matters and Criminal cases where the solutions lie in active Court litigation. This means that Mediation has essentially broadened not curtailed the playing field for Lawyers. Therefore my colleagues who are tigers in court can rest assured that their tiger-claws are still relevant.

Any trained professional can be a mediator, I believe Lawyers are the torchbearers in the field of dispute resolution. Therefore they should take up the leading role in acquiring the relevant competences and skills to spearhead the practice and create awareness for Mediation.

……The End……