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Kenya Branch

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DOES JUSTICE TAKE A VACATION?

EXPLORING THE 'ALTERNATIVE' IN ADR

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THE WAKE UP CALL

In an almost sudden, yet expected turn of events, the global world is facing a foe like no other. Various sectors that we have placed heavy reliance on as the 'served' population are currently in a battle to keep afloat. The justice sector is one of these areas that require prudent and intentional action with great urgency.

In the preceding weeks following the outbreak, the Court-systems across different jurisdictions have taken steps to ascertain their service delivery, which is to ensure justice to all without discrimination, as part of the protection of basic human rights. However, in achieving this mandate, even the nations considered more developed in the provision of judicial services have encountered obstacles and have also been forced to adapt to the current situation.

Similarly, our courts have slowly begun to upscale judicial activity by coming from a complete standstill of all services to only hearing urgent matters online and currently hearing of all online compatible matters. This is with respect to civil matters. A similar approach is being adopted with respect to criminal matters as well.

It is clear from the above that this is an opportunity to consider alternatives to the court system. Prior to this pandemic, the courts were already facing major obstacles to service delivery. The increasing backlog of cases will continue to act as an impediment to the Judiciary's service delivery. Going forward, the ability of the courts to deliver will depend on how the Judiciary adapts to the current situation.

In exercising judicial authority, the courts and tribunals are guided by various principles. Specifically, Article 159(2) of the Constitution of Kenya outlines the principle that Alternative forms of Dispute Resolution (ADR) including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

The generally accepted practice is that the wording used is including hence this gives leeway to more ADR forms such as negotiation, early neutral evaluation, conciliation, adjudication and hybrid forms such as med-arb, which involves a combination of both mediation and arbitration.

WHY ADR?

To answer this, focus will be given to Mediation and Arbitration as the avenues of choice to demonstrate the applicability of the merits of ADR.

1. ADR acts to preserve the relationship between the parties in the dispute.
 - For instance, mediation is structured in such a way that the third party facilitates the negotiations between the disputing parties. The third party (the mediator) acts as a buffer for positive reinforcement preventing the dispute from escalating further and seeks to find common ground as opposed to a win-lose situation.
 - Although arbitration is argued to be polarizing by the fact that there is indeed a winner and a loser at the end, due to its party driven nature, it provides parties with more opportunities to come to a settlement with respect to some issues leading to consent awards on all or some of the issues.

2.You are in control (party-autonomy) as compared to the courts where the judge and the court rules are the order of the day.

- The mechanisms allow the parties to decide on the third party who resolves the dispute as well as the rules that guide the processes. In addition to this, the parties are in control of the time taken to resolve their dispute.
- Specifically, mediation allows the parties to go over and above in resolving disputes in the absence of reliance of anyone else other than the parties themselves regarding the decisions they make in the process.
- The common parlance in mediation is, if it is not illegal, then it is creative and such creative solutions serve the interests of the disputants.
- It is clear in the case for arbitration that there are various instances where party autonomy is seen such as the appointment of the arbitrator as well as the choice of the applicable rules. This autonomy is partially expressed in contractual engagements between the parties while the rest may be expressed in the arbitration process itself.

3.The mechanisms are based on confidentiality. This allows the parties to determine how, when, why and to whom information flows.

- Information presented in court is open to the public and litigants have consistently revealed sensitive information from the parties perspective however essential information in the progression of the case itself. This is the compromise parties make when they take a matter before a court.

- In ADR, information is only disclosed between the disputants and the and the neutral party unless decided otherwise by the parties.
 - In arbitration, the award (final judgment) is private to the parties unless both parties agree that it be made public while the same case applies to mediations where the information disclosed within the proceedings and the corresponding mediation agreement is private.
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4. ADR is cost-effective. You get to tag your price for justice.
- Cost-effective means that the costs of the process are determinate from the beginning.
 - Litigation can result in huge unexpected costs due to inconsistencies in the time taken to conclude the matter as well as the issues raised in court. This can make the process comparatively expensive.
 - Mediation is, in a word, cheaper in every way compared to court litigation. The low costs of mediation flow from withdrawn complexities in the process as well as the breadth of leeway between the parties in the manner in which they choose to resolve their dispute
 - Cost-effectiveness is best seen in arbitration where complex cases which would have traditionally incurred higher costs at the court and taken a longer period to resolve due to the lack of control of the scheduling of the matter as well as the larger volume of cases in the Court system. This risk is hedged on the determinate nature of arbitration where the parties agree on the cost at the beginning of the process as well as the schedule and timeline of the proceedings.

5. The mechanisms are consensual. The parties have to agree to it unlike the courts where appearance is compelled at the risk of the matter being determined in your absence.

- The practice of ADR flows from the disputing parties agreeing to use the mechanisms either contractually or through ad-hoc means.
- Parties may agree either contractually or through ad-hoc means to opt for mediation and/or arbitration.
- Where the parties have contractually agreed to submit a dispute for instance ADR, the courts will stay the proceedings for the parties to first attempt the ADR procedure as agreed between them.

6. ADR is flexible.

- Litigation is limited to jurisdictions and to the rules that govern a specific court.
- Nevertheless, litigation can be coupled with conflict of laws issues such as forum-convenience.
- ADR allows to the parties to agree on how to resolve international disputes, which acts as a solution to the jurisdictional and conflict of laws laws.
- Processes such as mediation and arbitration are also flexible in terms of procedure and the overall progression of the dispute. This is greatly aided by party autonomy.

CONCLUSION

The increase in practice of mediation and arbitration has revealed how ADR in fact supplements the court processes and does entirely present itself as only distinct alternatives. Justice is enhanced when multiple avenues supplement each other. Nothing comes without its limitations. ADR does not offer a one size fits all solution. However, in some instances, it comes close. Mediation and arbitration are embraced as the prevalent ADR methods globally with mediation being the more popular of the two. This prevalence can be partially attributed to the compatibility of both ADR methods with the litigation process. It is therefore important to note that in light of all the challenges, that come with the court process now and in the future, ADR can come in to supplement this system and courts should therefore continue to encourage the use of ADR and overcome the awareness challenge associated with ADR mechanisms in Kenya.