LAND DISPUTES SETTLEMENT THROUGH ALTERNATIVE DISPUTE RESOLUTIONS IN TANZANIA: A CASE STUDY OF BAGAMOYO DISTRICT

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A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS OF THE OPEN UNIVERSITY OF TANZANIA

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CERTIFICATION

The undersigned certifies to have read and hereby recommends for the acceptance by The Open University of Tanzania a Dissertation titled, ***"Land Disputes Settlement Through Alternative Dispute Resolutions in Tanzania: A Case Study of Bagamoyo District"*** in partial fulfilment of the requirements for the award of a Degree of Master of Laws.

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Dr. Rindstone Bilabamu Ezekiel

(Supervisor)

.....

Date

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DECLARATION

I, **Alkard Machumu Alfred**, do hereby declare that this dissertation is the result of my own investigation and findings except where otherwise stated, and this paper has not been and is not being presented to any University for a similar or any other award.

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Signature

……

Date

DEDICATION

This work is dedicated to my beloved wife Ester Machumu and my sons Brian and Collin Machumu. Also to my daughter Charity Machumu for encouraging me and being my fountain of inspiration with their heartfelt love and closeness, thus making me hereby declare my feeling of being highly indebted to them.

ACKNOWLEDGEMENT

Let me begin expressing my gratitude to everyone whose cooperation made it possible for me to complete this research. I cannot mention the name of all of them, given the limited space for this document. However, on their behalf, I am convicted to mention at least some, on behalf of others. To start with, immense thanks are directed to Dr. Rindstone Bilabamu Ezekiel who as my supervisor and whose guidance, encouragement and criticism gave me confidence of doing this work. He was indeed very a devoted, committed, efficient and constructive supervision. Honestly, I declare openly that without his support, I could complete this work with much trouble if at all I could have managed to do so.Next, I am very pleased to applaud the high cooperation and assistance rendered by the Office of the District Land Department of the Bagamoyo District. I was not turned back without data when I asked for information through interviews and documents requested for review.

Last but not least, I could not have concentrated on this study and the whole academic commitment program if I had not received love, care and support full of deep heart feelings accompanied with high encouragement from my wifeEster and our two sons - Brian and Collin, without forgetting my daughter Charity. These siblings and their mother were with me all the time during my fight to accomplish this research and the whole study program. Therefore, I will keep remembering them as a role model in me strive for life achievements with remarkable successes and wish to share with others my determination to extend their example by serving others beyond my own family.

ABSTRACT

This study was conducted with the main aim of examining the effectiveness of the Alternative Dispute Resolution (ADR) legal framework in Tanzania and how useful it is in resolving land disputes, taking the Bagamoyo District as a Case Study. Data and other relevant information were collected using interviews with key informants and review of relevant official documents. A thematic analysis of the data was executed by adopting a qualitative content analysis technique. The findings indicate t that despite the specialized court system for land disputes settlement, there has so far been not a distinct legal regime for use of ADR at all levels of the land dispute settlement machinery. The only method of ADR in use at the High Court level is mediation through court annexures as practiced in any other civil cases even though there are no procedural rules guiding the same. Most of the ADR cases are not used at the district level. In other words, Court annexed mediation is not applicable at the District Land and Housing Tribunal, save for some few cases in which parties resolve the matter out of court and file a deed of settlement. The legal framework provides for the use of mediation at the level of Village Land Council and Ward Tribunal. However, there is lack of skills and competency to facilitate mediation process for land disputes resolution at those levels. In light of these findings, the study prompts the present author to recommend for a review of the legal framework for Land Disputes Settlement in Tanzania with a view to making ADR become more realistic and effective in resolving the existing and emerging land disputes. This can be achieved by ensuring that appropriate changes in ADR Legal Framework are made without wasting more time

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LIST OF CASES

[1] Ibid at 300.

LIST OF ABBREVIATIONS

LLM	Master of Law Degree
NGO	Non-Governmental Organization
TLR	Tanzania Law Reports
V.	Versus/against
NLP	National Land Policy
CPC	Civil Procedure Code
NCC	National Construction Council
MLHSD	Ministry of Lands Housing and Human Settlements Development.
VLC	Village Land Council.
WT	Ward Tribunal
DLHT	District Land and Housing Tribunal
MCT	Media Council of Tanzania
LRC	Legal Resource Centre (LRC)

CHAPTER ONE

INTRODUCTION

1.1 Background

It has been suggested that the only way to resolve existing conflicts, mitigate consequences and reduce risks of their reoccurrence is to have efficient instrument for justice delivery. Evidence and experience continue to show that in many weak states and areas across the globe factual absence of a state's infrastructure, corrupt court system and unbearable litigation costs leave conflicting parties with no other option, but to resort to violence.

According to Barrett, J.T. the ADR existed also during the Middle Ages when the king was called to make justice. Even if essentially ADR is a non-violent process, in these early stages this was a matter of degree. Duels or trial by combat were viewed as a means to obtain God's judgment, especially by the noblemen. In this case God is not seen as a judge but as the most impartial arbitrator of all. For the common people, other forms of trial were also available, including placing the burning iron into the hands of the disputants, plunging a child from each side in cold water or the process of extracting a tiny ring from boiling cauldron[2]. Later in the Middle Ages, arbitration became widely used in commercial matters. Although no official law was involved, in many European cities, it was known as the law of merchant since the ADR process was developed and enforced by merchants. The legitimacy of the arbitration was given by understanding that in commercial relations, mutual benefits, fairness, and

[2] Barrett, J.T., & Barrett, J.P. *A history of alternative dispute resolution: the story of a political, cultural, and social movement.* San Francisco, CA: Jossey-Bass. 2004.pg 23

reciprocity where profitable for all sides. However, these first steps in arbitration established some rules that are still in use to day: the disputants could choose their own arbitrator, arbitration results were recorded in a state court, and the court was involved in enforcing the arbitrated outcome[3].

The other forms of ADR, namely negotiation and mediation, were developed as an alternative to war by the evolving class of diplomats. Initially, the diplomats were merely special messengers, but by the 15th century the medieval Venice established a network of permanent embassies abroad and the other Italian states followed, including papalnunciatures.[4] As papacy assumed more and more a political role and with no army of its own the popes used frequently diplomats to negotiate agreements, mediate or arbitrate disputes between European leaders, gather information and seek political allies[5]. The end of the Cold War saw a recommendation to African states, adoption of ADR mechanisms as a remedy for their governance, economic and judicial crises management. Thus, the ADR was now seen as a pre-requisite for attracting foreign direct investment into the sub-region to jump-start its economic development. It was judged that West African traditional courts were often choked with unresolved cases for years. The perception was that the orthodox court system was largely inefficient and was often manned by corrupt personnel. The court system was judged as unattractive to investors who often wanted transparent, speedy, just and reconciliatory mechanisms for resolving business conflicts. Politically, ADR was

[3]Barrett, J.T., & Barrett, J.P. *A history of alternative dispute resolution: the story of a political, cultural, and social movement.* San Francisco, CA: Jossey-Bas. 2004.

[4] Brown, H.J., & Marriot, A.L. *ADR Principles and Practice* (3 ed.). Sweet & Maxwell. 2012.pg 12

[5]Ibid

prescribed mainly as a conciliatory mechanism for West African society, which was riddled with political, ethnic and communal conflicts. The idea was that while conflicts are inevitable and ever present, new and more conciliatory means of managing them were necessary.

Today, the ADR has gained international recognition and is widely used to complement the conventional methods of resolving disputes through courts of law. Basically, ADR simply entails all modes of dispute settlement/resolution other than the traditional approaches of dispute settlement through courts of law. Mainly, these modes include the following: negotiation, mediation, conciliation, and arbitration.

The modern ADR movement began in the United States (US) as a result of two main concerns for reforming the American justice system: the need for better-quality processes and outcomes in the judicial system; and the need for efficiency of justice. It came later that the ADR system was transplanted into the African legal systems in the 1980s and 1990s. This was a result of the liberalization of the African economies, which was accompanied by such conditionalities as reform of the justice and legal sectors, under the Structural Adjustment Programmed. However, most of the methods of ADR that are promoted for inclusion in African justice systems are similar to pre-colonial African dispute settlement mechanisms that encouraged restoration of harmony and social bonds in the justice system. In Tanzania, the ADR was introduced in 1994 through Government Notice No. 422, which amended the First Schedule to the Civil Procedure Code Act (1966), and it is now an inherent component of the country's legal system.

Moreover, land is dispute-prone in Tanzania as elsewhere around the world. This is due to, inter alia, competing demands over the same which call for judicial and non-judicial methods of dispute resolution. The problem is fueled by the fact that land does not expand while people and other living organisms relying on it for survival, keep on increasing, putting pressure on the limited available land. In awareness of these premises, it is overt that land disputes if not dealt with swiftly and equitably especially where there is inefficient means of dealing with land disputes can result to devastating effects on individuals, groups and even the entire society and sometimes loss to life.

The Government of Tanzania, therefore, has taken measures in attempt to come up with solutions to land problems by undertaking major National Land Policy Reform in 1995 with the view to streamlining the institutional arrangements in land administration and disputes settlement. The National Land Policy (NLP) of 1995 resulted in the enactment of two important laws, and these are the Land Act No. 4 of 1999 and the Village Land Act No. 5 of 1995. These two legislations as well as the Land Disputes Court Act No. 2 of 2002 evolved a new system for adjudication on land disputes, the aim being to adopt a procedure which is fast and not tied to legal technicalities meanwhile not being strictly bound by the rules of practice or procedure with the quest for delivering substantial justice. This is reflected in section 51 of the Land Disputes Courts Act, Cap.216 R.E. 2002 and section 180 of the Land Act, Cap.113 R.E.2002. No wonder these legislations incorporate some forms of ADR.

1.2 Statement of the Research Problem

ADR is increasingly becoming a major component of effective dispute resolution in East African countries. One can take cognizance that the effective implementation of

any dispute resolution approach mainly depends on the legal framework of a particular country where it is subjected.[6] Apart from having the laws to govern the procedures of allowing the parties concerned to access justice machineries to assert their rights, the institutional framework also play a great role in considering what the system can deliver to its stakeholders. In most developing countries like Tanzania, the familiarity of ADR techniques usage for resolving land disputes is lacking. Although under the existing land laws, some forms of ADR have been incorporated[7], there is a lacuna in evidence on the manner and extent to which this system (ADR) is being practiced and whether it bears the fruits it is expected of, and purported to. The gap in knowledge or evidence can be bridged or narrowed through systematic investigations in different parts of the country, using at least case studies at district or regional level.

As the literature may confirm, few legal authors have attempted to discuss about the use of ADR in resolving land disputes in Tanzania and the world in general. The following literature has been considered in bringing this scholarly work into exposition. This study is, therefore, important to help generate the evidence and update current knowledge or thinking about the existing legal framework's seemingly failure to support the settlement of land disputes through ADR system.

1.3 Literature Review

In his book titled 'Alternative Dispute Resolution in Tanzania Law and Practice', published in 2004, Clement Mashamba notes that the ADR system is not natural in Tanzania as in many other African countries. In Tanzania, it was transplanted from the

[6]Chipeta B D Civil Procedure in Tanzania, A students Manual 2002
[7]Civil Procedure Act (Cap 33 RE 2002), Arbitration Act Cap 15 R.E 2002,

West. The latter author, traces the origins and ideology of ADR and examines reforms of the USA justice system in favour of ADR and the spread of ADR beyond the USA and the benefits of ADR. He examines ADR approach in African cultural contexts and the role of Ubuntu in dispute resolution in Africa, then makes a comparison between formal ADR and traditional justice system in Africa. As he laments, the ADR approach was introduced in Tanzania by GN No. 422 of 1994, amending the 1st schedule to the Civil Procedure Code introducing three new orders: Order VIIIA; Order VIIIB; and Order VIIIC. As he depicts, the implication of the 1994 amendment for the CPC is that all civil cases filed in courts must be referred to ADR in the form of mediation. In putting the law into practice, this legal position was buttressed in Fahari Bottlers Ltd & Another vs. Registrar of Companies & Another[8]. In this legal matter, the Court of Appeal of Tanzania held that the requirement for a suit to be referred to mediation first before full trial begins is a mandatory one under the CPC.

Mashamba discusses deeply the significance of ADR in civil courts in Tanzania in that the demand for alternative ways to deal with legal disputes other than conventional courts arose out of the ever-increasing heavy caseloads and backlogs in Tanzania civil cases. So, the primary rationale for the introduction of ADR in Tanzania was to reduce the heavy caseloads as well as the backlogs. He adds that the ADR system was also meant to avoid resort to unnecessary procedural technicalities prevalent in traditional courts as well as reducing expenses involved in pursuing litigation in courts of law. In this regard, the court-annexed ADR system in Tanzania

[8] Civil Revision No. 1 of 1999, Court of Appeal of Tanzania at Dar es Salaam (unreported)

was designed in an informed way to allow parties to participate easily in this process and ensure that the relationship between the parties is preserved after they had undergone the ADR process. However, the author addresses nothing on the challenges faced in the implementation of the ADR system in land issues in Tanzania, this is a research gap.

George Mandepo[9] explains various issues relating to arbitration, citing the Arbitration Acts the principal legislation regulating arbitration in Tanzania. He makes a comparative analysis of the arbitration carried out under this Act and its rules and the one carried out under the National Construction Council (NCC) Rules. He also addresses issues of arbitration under the Civil Procedure code, pointing to the NCC is a statutory body that was established in 1979 through the National Construction Act 1979, Cap 162, as amended in 2007.

Pursuant to section 4 of the Act, among functions of NCC include promoting and providing strategic leadership to the stakeholders for the development of the construction industry as well as advice the government on all matters relating to the construction industry in Tanzania. Apart from the main statutory mandates in the Act of its establishment, the Council is also engaged in facilitating construction dispute settlements through adjudication and arbitration under the NCC Arbitration Rules.

[9]George Mandepo, Resolving Construction Disputes through Arbitration: An overview of Tanzania Legal Framework, Dissertation submitted for the Degree of LL.M in Construction law at University of Strathclyde Law School, 2010 available at https://www.scribd.com/doc/104535724 accessed on Mach 23,2017

Mandepo further observes that currently the Rules applicable in the arbitration are the Arbitration Rules, 2001 Edition. These replaced the old Rules of 1984. The Rules are in the form of guiding procedures for regulating arbitration between parties who seek to resolve their construction dispute through NCC. NCC is the only semi-government institution facilitating arbitration of construction disputes in Tanzania. Under the NCC Arbitration Rules, 2001, the role of NCC on issues of arbitration is only to facilitate the appointment of arbitrators and coordination of all proceedings as the parties may agree. However, even the present author does not address anything concerning the challenges faced in the implementation of ADR in resolving land dispute in Tanzania. This is another knowledge/evidence gap that can be filled or narrowed through systematic research.

Nuhu S. Mkumbukwa[10] provides a broad knowledge on the categories and scope of ADR by giving the meaning, merits and demerits of various ADR mechanisms such as arbitration, conciliation, negotiation, early neutral evaluation, mediation, partnering, expert determination and mini-trials. He also addressed other hybrid ADR models such as litmed, medlit, med-arb, arb-med, conc-arb and arb-conc; and argued that categories of ADR are not closed as there is room for parties or courts to be innovative by coming up with new ways of settling disputes out of court or aside from litigation by virtue of the phrase "such other means not involving trial" in order VIIIA Rule 3(1) of the CPC, and that by this phrase the mechanisms of ADR mentioned herein above are invokable in Tanzania. This author's observations and remarks are

[10]Nuhu S. Mkumbukwa, *the impact of pre-trial protocols and Alternative Dispute Resolution (ADR) mechanisms in the expeditious disposal of civil suits* – the case study of Dar es Salaam Region, LL.M Dissertation submitted at UDSM, 2009.

relevant to my research as it provides a detailed account of the ADR mechanisms that are invokable in Tanzania. The added advantage of my study is that it is specific by addressing models of ADR currently in use in Tanzania by looking at their actual practice including case laws. The latter author has not discussed the strengths of the legal framework for ADR in Tanzania in promoting use of ADR in land matters, and this is a knowledge gap the present researcher wished to fill.

According to Olson[11], the traditional ADR holds no clear distinction regarding the elements of the process and the roles of the facilitator. The boundaries are elusive, and the rules are dynamic. For example, in the case of the *Semai Senoi*, it is unclear if bechara is mediation, facilitation or arbitration. Often there is also no difference between informal and formal processes because traditional ADR does not always function within the framework of a structured legal system. However, the author does not comment anything regarding the challenges faced in the implementation of ADR in resolving land dispute inTanzanian tribunals, courts and outside these premises, and this is another reason why the present researcher decided to look into in his exploration for this study.

Winnie Sithole Mwenda[12] traces the development of ADR internationally. Although the author assesses the impact of ADR on the justice delivery system particularly in Zambia, her work has contributed greatly to my study as it contains very useful

[11]Olson, E.G. Leaving Anger outside the Kava Circle: A Setting for Conflict Resolution in Tonga. In D.P. Fry, & K. Björkqvist (Eds.), *Cultural Variation in Conflict Resolution:* 1997.

[12]Winnie Sithole Mwenda, *Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia*, Thesis submitted for the Degree of Doctor of Laws at the University of South Africa, 2006 available at uir.unisa.ac.za/handle/10500/2163/thesis.pdf? sequence=1, accessed on July 26,2017

information on the use and benefits of ADR. In her words, the ADR was developed as another option besides the traditional dispute resolution mechanism - namely 'litigation' which was found to be costly, time consuming, not giving parties control over the outcome of their disputes, and was generally cumbersome. The author describes ADR as referring to a variety of techniques for resolving disputes without resort to litigation in the courts. However, like the above cited authors, she does not address the challenges faced in the implementation of ADR in resolving land dispute in Tanzania.

It is obvious to take note that the piece of the literature accounted for above for this study is not exhaustive of all the works done before in this area of dispute settlement for land related matters, but the selected articles shed light to motivate the current author to use them for reference purposes while making his study case justification.

1.4 Research Objectives

1.4.1 General Objective

The general objective of this study was to examine in detail the alternative dispute resolution (ADR) as practiced in the land law for settling land disputes in Tanzania using the Bagamoyo District as a study case.

1.4.2 Specific Objective

The study has three specific objectives:

(i) To identify the enforcement mechanism dealing with administration of justice in land matters in Tanzania in general and in Bagamoyo District in particular.

(ii) To analyze the strengths of the legal framework for ADR in Tanzania in promoting the use of ADR in land matters, with particular focus interest in Bagamoyo District.

(iii) To identify the challenges faced in the implementation of ADR in resolving land dispute in Tanzania, and in Bagamoyo District in particular.

1.5 Research Questions

The questions guiding this research were:

(i) What are the enforcement mechanisms that deal with administration of justice in land matters in Tanzania, and particularly in Bagamoyo District?

(ii) What are the strengths of the legal framework for ADR in Tanzania and particularly in Bagamoyo District in promoting the use of ADR in land matters?

(iii) What are the legal challenges faced in the implementation of ADR in resolving land dispute in Tanzania, and particularly in Bagamoyo District?

1.6 Significance of the Research

The importance of this study is that the achievement of the aim and objectives of this study looking at the application of ADR in the national land law and its practice in land disputes settlement provides a room for providing lessons to learn about what can be done to improve the methodologies used in land problem solving issues and the interpretations arising out of the decisions made in the implementation of the law in Tanzania.

As observed by analysts, the ADR approach is widely acceptable as consensual, cost effective and binding method of resolving disputes with fewer procedures and technicalities compared to cumbersome court processes[13]. No wonder reforms of land laws in Tanzania incorporated some forms of ADR, little is known regarding its practice on the ground in different socio-economic and legal contexts. The significance of this study, therefore, is justified since it critically examines the legislative and institutional bottlenecks that make inhibit the land disputes settlement process through ADR and use the lessons learned to suggest possible ways for improvement for realization of best practices at district and other levels. The study findings act as a catalyst, calling upon the responsible authorities to make necessary interventions or changes to improve the statutes of land dispute settlement, with a view to promoting use of ADR in land issues and ensure effectiveness, efficiency and justice.

In addition, this research will be used in other social services by providing inputs to the government authorities and any other interested parties who may ultimately come up with suggestion on how to establish a sound land policy that would be effective to address the chronic land related problem in the country as a whole.

1.7 Research Methodology

1.7.1 Research Design

This research was cross-sectional and exploratory in design, having adopted a qualitative data collection and content analysis approach.

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[13]Burhani Kishenyi , *Resolving land disputes through alternative dispute resolution (ADR).* An overview of Tanzania's legal framework, pg 23 of 2017

1.7.2 Study Area

The research was done at Bagamoyo District in Pwani Region, Tanzania. Given the constraints of finance and time resources available for this study that was part of the current author's academic commitments, only one district was selected, taking into account of its easy accessibility and virginity in terms of the topic selected for study that has not been carried out before in the same district.

1.7.3 Sampling and Sampling Procedures

1.7.3.1 Sampling Procedures

Two methods of sampling were employed, and these are 'purposive' and 'simple random'. Purposive sampling was applied because the nature of the information needed could be obtained by approaching key informants such as members of staff working at the Ministry of Lands, Housing and Human Settlements Development as well as staff working at the courts. These were included because of their positions or designations and knowledge. The simple random sampling technique was used for picking the advocates of The High Court and students from various universities to respond to the interviews.

1.7.3.2 Sample Sizes

In total, the study covered the only one available High Court of Tanzania, five advocates from this Court, twelve advocates working with courts found in Temeke and Kinondoni Districts/Municipalities, one prominent lawyer from The Open university of Tanzania (OUT) and fifty students from Tumaini University, Ardhi University and the University of Dar es salaam were selected.

1.7.4 Methods of Data Collection and Ethical Considerations

1.7.4.1 Data Collection Methods

The study involved various methods of data collection, targeting both qualitative and quantitative information, traced from primary and secondary sources. Primary sources include making interviews with the targeted respondents using structured interview guides, with questions seeking to gather the respondents' knowledge on the subject under study, and their opinions, experiences and suggestions. Secondary sources of information were documents for review which were obtained from the offices approached, including Court-based and University-based (e.g. OUT) libraries, advocates' offices, website of various legal institutions, journal articles published online, just to mention key.

Thus, the data collection methods used depended on the type and purpose of the data needed. The documents obtained were read at depth to review the key messages, critically analysing their strengths and weaknesses in presenting and discussing the critical issues of interest for this research. The interviews made were supported by the interview guides prepared in advance, pretested and then refined by the current author.

Structured Questionnaire

A standard questionnaire with questions prepared in advance was used to collect data from the individual respondents. The questionnaire was written in two languages - English and Kiswahili for easy use depending on the language preferred by the respondents. Respondents were told in advance that they were allowed to use the language they felt they could be free to express themselves and in case there was a language mix, the information was recorded accordingly and then translated in the

uniform language that is English for final reporting purpose. The questionnaire was self-administered in that it was distributed to the respondents during the working days for each respondent to fill in responses at their convenience during break times within the official working hours.

In particular, the targeted respondents were staff members of the Ministry of Lands, Housing and Human Settlements Development, district courts for Temeke and Kinondoni Districts, and prominent lawyers from the OUT. Contact with the respondents via mobile phones and physical visits made to them to confirm the time they had completed filling in the questionnaire as per appointment were made and in case one has not another appointment was reset.

Oral and Face-to-face Interviews

Further, face-to-face interviews were made with some of the targeted respondents among those mentioned in the preceding section who expressed preference to be investigated that way rather than responding through the self-administered questionnaire. The advantage of this was acknowledged as giving interviewer chance to add additional questions probing for clarity or supplementary information to the main questions and at the same time giving chance the interviewee to ask any question if clarity was needed to make it clearer for responding appropriately. Thus, using this technique was found realistic for it allowed more information to be collected in greater depth, with greater flexibility through allowing additional probes or rephrasing the same questions for better understandability by the respondent, and giving the researcher/interviewer a greater control of the interview/interviewees.

Telephone Interviews

To minimize the inconvenience that could be faced by attempting to reach/access the targeted interviewees physically for face-to-face interviews, interview through telephone was found another option as long as the targeted interviewees consented or proposed it to be adopted, with care being taken to avoid speaking any sensitive information over the phone for ethical reasons.

Documentary Review

As mentioned before, official visits were made to search for documents for review such as statutes, case laws, books, journals, articles, internet materials and other publications in relevant sources, including University libraries, Courts, Advocates' Offices, Government Offices in the Ministry of Land, Housing and Settlements, as well as over the internet. These documents helped the researcher in getting the useful data in the study. The Universities visited include the OUT and others surrounding the Dar es Salaam Region.

1.7.4.2 Data Processing and Analysis

Data Processing

Data was looked into for their completeness and relevance in terms of quality immediately after their collection. Cleaning was done by leaving away all the details found not being less or not relevant for answering the study objectives. Key messages were from the questionnaires filled in by the respondents and those from notes written by hand during face-to-face interviews with key informants using a standard guide were types electronically using personal laptop for each storage and additional word processing and later analysis.

Data Analysis

A qualitative content analysis technique was adopted to identify the key messages emerging from each of the questions posed as responded to by the interviewees, and those obtained in the documents reviewed. Consideration was relevance of the response in relation to the study's specific or main objective(s) and each topic/theme explored. Similarities and differences in the messages presented by different respondents or authors were figured out based on the opinions given on the study topic, as recommended in social related research methodologies. The ultimate conclusion as regards to knowledge and practice of ADR in the respective study district and Tanzania as a whole depended on the contents of the messages collected and the corresponding interpretations as presented in the last chapter of this document.

1.7.4.3 Ethical Issues

The individuals approached to respond to the study were all informed adequately about the study – its purpose, expected legal and policy benefits, a non-paid participation for those who were willing to take part as respondents, and confidentiality in case one could give any confidential information. Appointment for interviews was arranged in advance of the interview day with each individual targeted to respond to the study.

1.8 Scope of the Study

The study was done mainly with dual purposes, namely, for academic purposes as a requirement for the award of a master's degree at the OUT and for official use in the government institutions and even private sector entities dealing with land issues in one way or another, given the analysis and recommendations presented from it. The

limited scale of this study as explained above was influenced by the time and resource shortage for covering more districts in the country. However, the contents presented from this single district case study sheds light to inform the readers of what has been, and is still, happening as regards to application of the ADR mechanisms in land dispute settlements in other places with the same governance structures and a legal system in country.

1.9 Limitation of the Study

In connection to what was mentioned in the preceding paragraph, this study had several limitations including shortage of funds and time for a wider coverage. Another key limitation was the interpretation of certain legal words into Swahili for easy picking up by the respondents of what was being asked about, and therefore, without the presence of the researcher, for example in the self-administered questionnaire case, responses different to what were expected/intended were given, and some questions were left partly or totally unfilled.

As such, some responses were biased, others were hiding the truth because of the seemingly sensitiveness unless the researcher was there to clear the doubt. There also seemed an element of some respondents giving biased or partial opinions knowing that the study was mainly for academic purposes. Of course, the researcher had attempted to minimize the biases by emphasizing on the importance of respondents' honesty and assuring them there is no need to doubt because the information given could not end in the academic circles and that all sensitive messages could be treated confidential.

1.10 The Organization of the Research

This document is divided into six chapters. The first one provides a background to the problem under study. The second one provides the conceptual and theoretical framework of the study, describing various concepts and definitions underlying the subject of this study which revolves around land disputes. Chapter three examines the legislative framework for ADR in Tanzania, the aim being to establish their effectiveness in facilitating resolution of Land Disputes. It also examines the forms of ADR in use in Tanzania in order to find out how they are relevant to land dispute resolution. Chapter four analyses the case law development on ADR in Tanzania. Chapter five highlights on the challenges faced in the implementation of ADR in Tanzania, starting with procedure technicalities. The last Chapter finally presents and then gives a detailed analysis of the overall study findings, followed by the conclusion and recommendations.

CHAPTER TWO

CONCEPTUAL FRAMEWORK

2.1 Introduction

In this chapter, the conceptual and theoretical framework of the study is presented. The chapter presents a description of various concepts and definitions underlying the subject of this study – dispute settlement through ADR system. Some of the key concepts underlying ADR include land, dispute, land dispute, court, early neutral evaluation, negotiation, conciliation, mediation, and arbitration. These concepts are briefly presented in the next following sub-chapters.

2.2 Dispute

Dispute means a conflict or controversy, entailing a conflict or claim of rights or demand for a certain right by one party contrary to the claims or allegations from the other side/party. The dispute is usually found to be the subject of litigation; differences inherent in a dispute can usually be examined objectively. A third party can take a view on the issues to assess the correctness of one side or the other"[14].

In connection to the issue of Dispute, the term *Dispute Resolution* (also narrated further under section 2.4 below) refers to the methods of solving disputes employed by trained neutrals to help parties communicate clearer, negotiate effectively, and develop solutions for conflicts. Neutrals do not take sides or represent the parties, rather, it is the counsels who represent parties and participate in examining witnesses.

[14] Brown and Marriot, ADR Principles & Practice, 2nd Ed, Sweet & Maxwell, 2008, page 2

Notably, neutrals come from different backgrounds such as human resources, law and social work[15]. The term includes litigation, arbitration, mediation, conciliation and others[16]. Dispute resolution processes are categorized as falling into two major types, namely, Adjudicative processes (such as litigation or arbitration in which a judge, jury or arbitrator determines the outcome) and consensual processes (such as collaborative law, mediation, conciliation, or negotiation in which the parties attempt to reach agreement). However, it is not necessarily that all disputes end in resolution[17]. Dispute resolution in practice offers a private and voluntary option beyond Court[18].

2.3 Land

Under section 2 (ii) of the Conveyancing and Law of Property Act (1881)[19] it was provided that land unless the contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal and incorporeal, and houses and other buildings, also and undivided share in land. The Interpretation Act 1889 UK also states *inter alia* that the expression land include tenement, houses and buildings of any tenure.

Furthermore, the term 'Land' as defined in section 2 of the Land Act[20] includes 'the surface of the earth and the earth below the surface and all substances other than minerals and petroleum forming part of or below the surface, things naturally growing

[15] http://www.nysdra.org/whatisdr/whatisdr.aspx
[16] http://www word IQ.com
[17] Dispute Resolution in International Trade, "Global Business Environment" 5th, 2006, FITT Pages 301-303

[18] http://www.nysdra.org/whatisdr/whatisdr.aspx
[19](44 & 45 Vict. C. 41) of U.K.
[20] (1999) Cap 113 R.E 2002

on the land, buildings and other structures permanently affixed to land.' It can thus be noted that although it includes surface and subsurface substances, land does not include mineral such as Gold, Diamond, Tanzanite, Copper etc. The reason for this is somehow historical. At common law mines and minerals below the surface of the earth moved with the ownership of the soil above except gold and silver, which were vested in the Crown by virtue of Royal prerogative. In Tanganyika by then (and currently Tanzania mainland), the colonial masters vested all mines and minerals in the state[21], and that has been the terms to date.

Even after attaining her independence this concept was retained, and all resources continued to be public property vested in the president including minerals. With this interpretation, however, land includes all that has permanent attachment to the land. A building for instance cannot be taken in isolation from the land on which it is built and vice versa. For objects other than buildings the degree of their attachment determines whether they form part of the land or not. As it has been observed above, the degree of annexation and the purpose of annexation are vital in deducing whether an object forms part of the land or not. Mere resting on the soil is not adequate. Also, if the purpose was to improve the quality or was for better enjoyment of the land it can form part of the land. So, this has to be dealt with depending on the case at hand.

In the case of *Virji v. Abdulrahman*[22] the court when considering whether an object formed part of the land had the following to say when examining the definition of the term land and immovable property under the Kenyan Interpretation and General

[21]Consider section section 8 of the Tanganyika Order- in-Council 1920.
[22] (1950) 24 K.L.R. 24.

Provisions Act and the Indian Transfer of Property Act, that the expressions used are attached to what is so embedded for the beneficial enjoyment of that to which it is so attached and permanently fastened to anything so embedded and again permanently to anything attached to the earth.[23]

2.4 Land Dispute

As many authors in the field note, the concept of land disputes worldwide is not new. Land disputes have been in place due to various circumstances, which have now been the determinant of the mechanism to be employed to settle a particular dispute in Tanzania. These include boundaries over the village land[24], issues emanating from land adjudication in the course of granting a certificate of customary right[25], or in any matter, which the parties deem a controversy over land, which may include any other interest over the village land[26]. This position was also shared in Tanzania, in the case of *Attorney General Vs Lohay Akonaay and Joseph Lohay*[27]. Now, having such conflicts in any community, there must be legally binding instruments to resolve the said disputes by declaring the rights of each party to the controversy, either on ownership or any related interest to the property. In Tanzania it is well confirmed that the categories of land disputes at a village level involve villagers amongst themselves, villagers against the investors and villagers against the government authorities[28]. This

[23]See also *Saleh bin Hadi v. Eljofri* (1950) 24 K.L.R. 17, *Shaw v. Devshi* (1923) 17 K.L.R. 20, *Singh v. Singh* 11 E.A.C.A. 48, *Commonwealth v. N.S. Wales* (1923) 33 C.L.R.1, *Francis v. Ibitoye* (1936) 13 N.L.R. 11.

[24] See Section 7(2) of the Village Land Act
[25] See Section 48 ibid See Section 48 ibid
[26] See Section 62 ibid
[27] Attorney General Vs Lohay Akonaay and Joseph Lohay (1995) TRL 80 (CAT)
[28] Speech of the Minister for Lands, Housing and Settlement Development issued in June 2015 before the National Assembly when debating on the Annual Budget of 2015/2016, pp. 26 and 27

means, the existence of land disputes at a village level is not in dispute. The issue at hand is whether the inaccessibility of the set legal machineries is one of the causes for the persisting land conflicts at a village level.

In *Rashidi bin Ali v. Bakari bin Kayanda*[29], the dispute concerned an area of land under rice cultivation which formed part of a larger area over which the appellant exercised the rights of a 'Mzengakaya' in Tabora. The portion in dispute was part of the area which had been appropriated by the Mzengakaya and had been cultivated by his sister. About eight years before the dispute occurred the respondent married that sister and the appellant then permitted him to occupy the area. It was common ground that during that period the respondent had remained in effective occupation and had improved its agricultural value.

In *Silanga Kimenanga vs. Mevongori mosoni*[30] it was also stated that under local customary law, land belonged to the first' person who, actually cleared it unless he had abandoned his rights thereto completely.

In *Ishaku vs. Hadejia*[31]according to Islamic Law, if a person brought into cultivation any uncultivated land, that place belonged to him and even an Emir could not take it from him.

In the case of *Mariam bin Chaulembo* vs. *Hamisi Waziri*[32] Involving Rufiji law the plaintiff claimed the disputed land by inheritance. There were 400 coconut trees on

[29] *(1941) James RW & FimboG M at 298.*
[30] James R. W and Fimbo G.M at 299.
[31] Ibid at 300.
[32] Ibid at 301

the land and it was established that these were planted by the defendant who had been on the land for a long period, including a period during the lifetime of the deceased owner. At the time when the defendant took possession there were eight coconut trees on the land. The plaintiff claimed that the defendant was a trespasser and must vacate the land on receiving compensation for the improvements, which he had affected. Held *under native law and custom in this part of the Territory, land can only be acquired by effective cultivation, and cultivation to the extent only of eight trees cannot be permitted to establish a claim to an area containing four hundred*. The judgment was that the plaintiffs in this case claimed ownership of an area of land to which they say they are entitled by inheritance from Mwana-isha bint Mwichande. The area has never been demarcated but was described as a fairly large one on which some four hundred coconut trees have been planted and, except for these trees, there was no other material cultivation upon it.

2.5 Alternative Dispute Resolution

As highlighted before, *ADR* refers to any means of settling disputes outside of the courtroom. In other words, Alternative Dispute Resolution (ADR) is the procedure for settling disputes without litigation. The procedures involved include arbitration, mediation, or negotiation. ADR typically includes early neutral evaluation, negotiation, conciliation, mediation, and arbitration. Mediation is also an informal alternative to litigation.

2.5.1 Early Neutral Evaluation

Both the mediation and arbitration get the ink in the ADR press, although more and more "*neutral evaluation*" is becoming the ADR technique of choice. For certain

types of cases, or at certain points in the life of a case, neutral evaluation can often be a better choice than mediation or arbitration, However, it ultimately works best when used as a prelude to either of those processes. Neutral evaluation, which has nearly all the benefits of mediation and arbitration, albeit little of their downsides, is truly an ADR technique whose time has come.

"*Neutral evaluation*" (also known as "early neutral evaluation," and abbreviated as "ENE," and sometimes simply called "case evaluation") can actually be many different things. Just as there are many different 'styles' of mediation (directive or non-directive; caucus or non-caucus; evaluative or facilitative; etc.), and many forms of arbitration (e.g. binding or non-binding; high/low; baseball; and so on), so too there are many different things that happen under the general rubric of "neutral evaluation." The only difference is that since neutral evaluation is a comparatively new kid on the ADR block, these different 'styles' or forms of neutral evaluation don't have nicknames yet.

At its core, neutral evaluation is exactly what it says it is: a process in which a third party neutrally examines the evidence and listens to the disputants' positions, and then gives the parties his or her evaluation of the case. Nevertheless, it can be much more than that too. In other words, neutral evaluation can be an extraordinarily flexible, beneficial process, and in the hands of a skilled neutral evaluator it can go way beyond someone simply hearing the facts of a case, then pegging a number or outcome to it.

The development of neutral evaluation as an ADR technique came about in response to a reality we have all been confronted with many times: one of the main reasons

cases do not settle sooner than they ultimately do is that someone -- sometimes one of the parties in the dispute or an attorney or an adjuster – has misunderstood or mis-evaluated the case. That leads to unrealistic ideas about the probable outcome of the case, which in turn leads to unnecessary stubbornness, then to a trial date, courthouse steps, and so on.

There is nothing worse than getting down to the final few weeks before trial, then trying to tell a party who has spent the last year paying his lawyer $75,000 to get the case from point A to point B that even if he gets to his beloved point C, the most he can ever collect is $25,000 -- and to add insult to injury, he'll never get to point C anyway, no matter how much he spends, because it simply doesn't exist, and the only thing that really matters in the case is point D.If only that party and his attorney could have had some sort of 'reality check' earlier on in the litigation, they might not have become so enamored of their own mistaken notions about the value or viability of the case, and there might have been more money available to settle the case, or less invested and thus less required to resolve it.

Experience demonstrates that until recently, the primary sources of that reality check were either judicial arbitration or the mandatory settlement conference just before trial. The main problem with those techniques, at least from a case management perspective, has been that they either come too late in the case, when everyone is dug in (the settlement conference), or they are conducted so haphazardly that it's all too easy for the participants to shrug off the result as an aberration (judicial arbitration).

2.5.2 Negotiation

Negotiation is a process whereby parties attempt to personally reach a settlement without the use of an independent third party[33]. Negotiation is the most economical ADR mechanism used[34]. It is expedient, unstructured, and a voluntary process available to parties that often preserve their working relationship[35]. Experts in the field establish that the success of the negotiations rests entirely with the parties involved in the dispute, and the third party facilitates the negotiations. Sometimes negotiation is not successful in resolving disputes[36]. This is often caused by the parties' lacking objectivity during negotiations or parties being emotionally involved or a power imbalance between/among the parties involved in the negotiation process, or a lack of knowledge, just to mention some, among other factors of the like[37].

2.5.3 Mediation

Mediation is the process by which someone tries to end a disagreement by helping the two sides to talk about and agree on a solution[38]. In other words, mediation is a dynamic, structured, interactive process where a neutral third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques.[39]

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[33] Ramsden (2010). The Law of Arbitration, South African and International Arbitration, Juta Cape Town. P: 2

[34] Cotton J. The Dispute Resolution Review 2016: 59

[35] Bosch et al The Conciliation and Arbitration Handbook 2004: 8-9. 8-

[36] Ramsden (2010). The Law of Arbitration, South African and International Arbitration, Juta Cape Town. P: 37

[37] Gazal-Ayal O and Perry R Imbalances of Power in ADR: The Impact of Representation and Dispute Resolution Method on Case Outcomes 2014: 3.

[38] Trenczek, T & Loode, S.: Embedding Mediation and Dispute Resolution into Statutory Civil Law: The Example of Germany; in: Ian Macduff (ed.): Essays on Mediation – Dealing with Disputes in the 21st Century; Alphen and den Rijn 2016, chapter 12 (pp. 177 – 192)

[39] Trenczek, T., Berning, D., Lenz, C. (2013) (in German) Mediation und Konflikt management: Handbuch, Baden-Baden, Nomos Publishing House, p. 23.

2.5.4 Conciliation

Conciliation is an ADR process whereby the parties to a dispute use a *conciliator*. This agent meets with the parties both separately and together in an attempt to resolve their differences. In other words, the term 'Conciliation' refers to another form of ADR mechanism, used to resolve disputes between private parties[40]. It is a process where the conciliator or panelist meets with the parties in a dispute and seeks resolution of the dispute by mutual agreement[41]. Thus, it is a voluntary process where the parties concerned are free to agree in attempt to resolve their dispute by amicably among/between themselves[42]. This process is flexible, allowing the parties to define the time, structure and content of the conciliation proceedings.

2.5.5 Arbitration

Arbitration, a form of ADR, is a way of resolving disputes outside the courts. The dispute is being decided by one or more persons (the "arbitrators", "arbiters" or "arbitral tribunal") who render(s) the "*arbitration award*". The latter award is legally binding on both sides and enforceable in the courts[43]. However, experts have remarked that arbitration is a more formal process than conciliation, differing from conciliation in that it does not promote the continuation of collective bargaining and negotiations. Practically in its application, the commissioner listens and investigates the demands and counter demands of both parties and decides on a final settlement in

[40] Simokat C (n 13 above) at 3. Also see Cotton J. The Dispute Resolution Review 2016: 595.
[41] Pretorius P. Dispute Resolution 1993:
[42] Bosch et al The Conciliation and Arbitration Handbook 2004: 8-9
[43] Berner, Robert (2009-07-19). "Big Arbitration Firm Pulls Out of Credit Card Business". Business Week. Retrieved 3 March 2018.

a form of an arbitration award. The award is then imposed on the parties after hearing the evidence. This is legally binding on both parties[44].

2.5.6 Court

In short, a *court* is a place where legal matters are decided by a judge and jury or by a magistrate. It is a body of people presided over by a judge, judges, or magistrate, and acting as a tribunal in civil and criminal cases.

2.6 Jurisdiction Over Land Disputes And Enforcement Mechanism

2.6.1 Village Land Council

Part V of the Village Land Act provides for the dispute settlement mechanisms, specifying that every village shall establish a Village Land Council (VLC) for assisting parties to settle their disputes amicably[45]. The VLC established consists of seven members with a role of a mediator to enable parties to reach at amicable solution. Principles of customary mediation will be paramount in mediation of those land disputes[46],[47]. The latter Act also provides for the methods to avoid and settle disputes between pastoralists and agriculturalists in case it arises. It provides that the Village Adjudication Committee (VAC) shall determine the rights of each part in land to occupy and in case where the parties can cooperate to use the land the Committee will prepare a draft for that purpose[48]. The latter Council is established subject to the Village Act to receive complaints from parties in respect of land, to convene meetings

[44] MWENDA, K.K. Principles of Arbitration. Brown Walker Press, Parkland, Fl. 2003.pg 6
[45] Section 60(1) 0f Act No. 5 of 1999, Cap. 114 [R.E 2002]
[46] bidi Section 60(2)
[47] Ibidi Section 61(4)
[48] Ibidi Section 58

for hearing of disputes from parties and to mediate between the parties and assist parties to arrive at a mutually acceptable settlement of disputes[49],[50]. Should any party to the dispute find being dissatisfied with the decision of the VLC, the step that can be taken is to refer the dispute to the ward Tribunal[51] in accordance with the Village Land Act[52].

2.6.2 The Ward Tribunal

This Tribunal is established under the *Ward Tribunal Act*[53] and its jurisdiction extends to the district in which it is established[54]. It has power to mediate and assist parties to reach at a mutual acceptable solution to land disputes using customary principles of mediation[55]. The pecuniary jurisdiction of the tribunal is limited to three million shillings[56], which is very low, hence increasing unnecessary cases to District land and Housing tribunal. This contributes to many land disputes remaining unresolved for a long time[57]. Moreover, the Ward Tribunal Act provides for the right of appeal to any party aggrieved by the decision of the ward tribunal to the District Land and Housing Tribunal within 45 days[58]. The Act confers power to the Minister responsible for land to make rules prescribing appeals to district land and housing tribunal, although no rules have been made till this time in Tanzania[59]. Appeal in practice is done by memorandum of appeal and the appellant is free to use any appeal procedure. For

[49]Section 62 of Act No. 5 of 1999, Cap. 114 [R.E 2002]
[50]Ibidi 88 Section 7
[51]Ibidi Section 9
[52] Section 62 of Act No. 5 of 1999, Cap. 114 [R.E 2002
[53] The Ward Tribunal Act No.7 of 1985, Cap 206 [R.E. 2002]
[54] Section 10 of Act No. 2 of 2002, Cap. 216 [R.E. 2002]
[55] Section 13 of Act No. 2 of 2002, Cap 216 [R.E. 2002]
[56]Ibidi Section 15
[57]Ibidi Section 19
[58]Ibidi Section 20
[59]Ibidi Section 21

instance, in the case of Seth Alipipi v Mathias Karugendo[60] Nyagarika, J. Held that the Minister has not made rules to prescribe procedure of appeals from Ward tribunal to District Land and Housing Tribunals per S.21 of Act No. 2 of 2002. Filling of appeal is complete when an appeal by whatever procedure is instituted in the appellate tribunal upon payment of requisite fees. It can also be done orally.

2.6.3 The District Land and Housing Tribunal

This Tribunal is established in each district, region or zone of Tanzania[61] and should be dully resided by a Chairman and not less than two assessors[62], taking responsibility for all the proceedings under the Land Act[63], Customary Leaseholds (Enfranchisement) Act[64], Rent Restriction Act[65], the Regulation of Land Tenure (Established Villages) Act[66], as well as any written law which confer power on it[67]. The pecuniary jurisdiction of the tribunal is limited to fifty million shillings for immovable property and 40 million shillings for subject matter capable of being estimated to money value[68]. Also, has got a jurisdiction to hear appeals[69] and revise records from the Ward Tribunal[70].

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[60] Land Case No. 31 of 2007, High Court Mwanza Registry.
[61] Ibidi Section 22
[62] Ibidi Section 23
[63] The Land Act No. 4 of 1999, Cap. 113 [R.E. 2002]
[64] The Customary Leaseholds (Enfranchisement) Act No.47 of 1968, Cap 377 [R.E. 2002]
[65] The Rent Restriction Act No. 17 of 1984, Cap. 339 [R.E. 20002]
[66] The Regulation of Land Tenure (Established Villages) Act No. 22 of 1992, Cap 267 [R.E. 2002]
[67] Ibidi 97 Section 33(1)
[68] Ibidi Section 33(2)
[69] Ibidi Section 34
[70] Ibidi Section 36

2.6.4 High Court (Land Division)

The term "*High Court* (*Land Division*)" has been deleted substituting it with "*High Court*"[71]. The High court has jurisdiction to hear and determine land disputes and has unlimited jurisdiction to hear and determine land disputes and appeals from District land and Housing Tribunal provided it is lodged within 60 days[72,73,74]. This court also has supervisory and revision power over District Land and housing tribunal[75]. Any aggrieved party of the High Court decision may appeal to the Court of Appeal of Tanzania[76].

2.6.5 The Court of Appeal of Tanzania

The above mentioned Court has the power to hear all appeals from High court[77], and shall apply the Appellate Jurisdiction Act in settling the matter presented to it by the aggrieved/appellants[78]. The latter Act/law deals with disputes which have arisen and reported to institutions responsible for settlement of disputes, but it does not itself concern with the prevention of occurrence of land disputes.

2.7 Conclusion

This chapter has put things into perspective as it sheds light to reading and understanding the following chapters by rightly providing a snapshot of the meanings of the various concepts or terms used in land law relating to ADR and associated provisions in the main Law of the Land. The immediate next chapter now presents the legal framework for ADR in Tanzania.

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[71] Section19 of Written Laws (miscellaneous Amendment) Act No.2 of 2010
[72] Section 37 of Act No. 2 of 2002, Cap. 216, [R.E. 2002]
[73] Ibid Section 41
[74]Ibidi Section 38
[75]Ibidi Section 43
[76] Ibidi Section 47
[77]Ibidi Section 48
[78] The Appellate Jurisdiction Act No. 15 of 1979, Cap. 141 [R.E. 2002]

CHAPTER THREE

LEGAL FRAMEWORK FOR ALTERNATIVE DISPUTES RESOLUTION IN TANZANIA

3.1 Introduction

This chapter examines the legislative framework for ADR in Tanzania in order to establish their effectiveness in facilitating resolution of Land Disputes. It also examines the forms of ADR in use in Tanzania in order to find out how they are relevant to land dispute resolution.

3.2 Legal Framework

As already lamented above, the use of ADR in the settlement of disputes in Tanzania has been in existence right from time immemorial. Unlike litigation, ADR is not an imported mechanism into the African legal system, and so not regulated by any particular statute rather the process is more of voluntary, private and parties-driven. It is contractual in nature of which the relationship between the parties is governed by the express and implied terms of the contact. For example, in a Pakistan case of Dalima Dairy Industries Ltd. v. National Bank of Pakistan, it was held that the proper law of an arbitration agreement includes in particular the interpretation and validity of the agreement.

Today, there are many statutory and institutional frameworks through which ADR has been upheld as a legitimate means of dispute settlement in Tanzania. In fact, ADR was introduced in Tanzania in 1994 through Government Notice No.422 which amended the first schedule to the Civil Procedure Code Act (1966). It is now an inherent component of the country's legal system.

Formal, informal and Alternative justice systems exist, and people seek any of these to resolve their land conflicts. Each system has its own way of managing conflict. However, choice of the appropriate process depends on the particular circumstances. These justice systems have their own strengths and weaknesses in resolving land conflicts. Formal justices such as the courts of law are noted to be inefficient and unable to satisfy the needs of the populace in urban as well as the peri-areas particularly in developing countries[79].

Informal system such as the customary on the other hand also has its flows. Alternative to these two systems is the modern ADR system which remains as an alternative and not as a replacement to the formal courts or the customary system. As further lamented by analysts in the field, these justice systems could be enhanced and developed to support and complement each other in order to achieve an effective justice system.[80] These premises prompts the current author to present this chapter examining how the legal framework for resolution of land disputes embodies ADR.

3.3 Constitution of the United Republic of Tanzania

The constitution of the United Republic of Tanzania (URT), 1977 as amended is the supreme law of the country just like in any other country. It embodies ADR by virtue of Article 107 A (2) (d) that requires courts to be guided by certain principles, *inter alia*, a need to encourage mutual settlement. It spells out in *107 A-(2)* as follows: *In*

[79] Sackey, G. Investigating justice systems in land conflict resolution: A case study of Kinondoni Municipality, Tanzania. (Master Thesis). Netherlands: University of Twente. 2010, P. 5

[80] Lendita, Simon W"Investment and Land Disputes in Tanzania: A vehicle for Investment Legal Reform", Dissertation submitted in partial fulfillment of the requirement for award of Degree of Master of Laws in Commercial law of Mzumbe University, 2013pg 1

delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say (a)…. (b)….(c)…..(d) to promote and enhance dispute resolution among persons involved in the dispute. Thus, the Constitution of the URT obliges the courts to ensure that they promote and support alternative dispute resolution.

3.3.1 The Civil Procedure Code

The legal foundation for ADR in Tanzania is governed by the Civil Procedure Code, Cap 33 R.E.2002 particularly Order VIIIA, VIIIB and VIIIC, except for land and labour matters that have a separate set of laws governing them at lower levels. Rule 3 of Order VIIIA provides for use of procedure for Alternative Dispute Resolution. It is to the effect that after pleadings are complete attempts have to be made to resolve the case through negotiation, mediation, arbitration or such other procedures not involving a trial. However, in real world situation, it is only mediation which is actively practiced by courts under the auspices of the Civil Procedure Code as amended by Government Notice No. 422 of 1994[81].

Under Order VIIIA of the CPC Rule 3 (1), three methods of ADR are mentioned, namely, negotiation, mediation and arbitration. However, there is a room for use of other methods not specifically mentioned through the phrase such other procedures not involving a trial provided for under the same rule. The most commonly used ADR mechanisms in Tanzania are the following:

[81] Civil Procedure Code as amended by Government Notice No. 422 of 1994

3.3.1.1 Negotiation

Where a settlement cannot be reached by negotiation, other methods of dispute resolution, including litigation are resorted to. However, the practice has been that while the matter is pending in court parties pray for time to try an out of court settlement by negotiating among them and if successful file a deed of settlement in court.

The role of the court is to record what the parties agreed upon. On how negotiation is practiced, there is guidance from the Court of Appeal of Tanzania as justified in the case of Karatta Ernest D. O and Others vs Attorney General[82]. In this case, the court emphasized that it was an agreement between the parties alone and the role of the court as far as negotiation is concerned was discussed. The appellants were employees of the then East African Community (EAC) which demised in June 1977. The latter body, which had three countries, namely Kenya, Uganda and Tanzania, operated joint activities, including a common air carrier, a harbours corporation, railways, cargo handling services, posts and telecommunications and others. With its collapse in 1977, each individual country established her own entity to take over the functions, which were being operated under the community. The collapse of the community also brought to an end the employment between the community and its staff.' Most of the staff were employed in the newly established institutions.

The problem, which came to occur was that the employees of the defunct EAC were not paid their pensions and other benefits they earned as EAC employees promptly. It

[82] Civil Appeal No. 73 of 2014 Court of Appeal at Dar es Salaam (unreported)

took them years to be paid. Therefore, the EAC Mediation Agreement Act[83] was enacted in 1984, charged with duty of giving effect to what the three countries had agreed on about the division of assets and liabilities of the former EAC. Article 10.05 of the first schedule provided that each state shall:(a) Pay its nationals, employed by the Corporations or GFS and retired from active service by the division date the pensions and other benefits due to them on account of such employment. (b) Make provision for the pension rights and entitlements to other benefits accrued as of the division date in favour of its nationals in active service with such Corporations and the GFs at that date.

The government of Tanzania took initiatives to honor the agreement and started making payments to the ex-employees of the Community. The ex-employees were not satisfied with the payments. They felt they were being underpaid. It was then the appellants as plaintiffs filed Civil Case No. 95 of 2003 in the High Court of Tanzania at Dar es Salaam. On 21st September 2005 the case was marked settled as the parties had filed a deed of settlement showing the conditions upon which they had agreed to settle the matter. Somehow the parties found themselves discontented to what they had agreed upon on the deed of settlement then they went back to court. The Court of Appeal stated that:

"We have gone through the record of appeal and the submissions by the learned advocates and the learned Principal State Attorney representing the parties in this appeal. It is not disputed by the parties that the suit that was filed by the appellants (Civil Case NO.95 of 2003) was settled by the parties themselves. What they did was

[83] [CAP 232 R.E.2002]

to inform the Court on how they agreed to settle the matter. That was done by filing the Deed of Settlement in court. The Deed of Settlement was filed in Court on 21st September 2005, before Oriyo, J. as she then was.

The applicants made an attempt to file an application in the High Court after a period of one and half years after the Deed of Settlement where they asked the Court to give directions as to the true interpretation, meaning, and effect of the order that was given on 21/9/2005, to determine whether or not the respondent has fully complied with the judgment. The learned judge did observe correctly in our view that:

'The above judgment is not conventional type of judgment based on facts and evidence received by the court. It is not a reasoned judgment but merely a judgment recorded by the court. The basis of the judgment is the deed of Settlement. The basis of the Settlement is privy to the parties and unknown to this court. It was the applicants and the respondent and their representatives who negotiated and agreed on the terms/ drafts and signed the Settlement Deed.

When ready, they filed the Deed of Settlement in Court. It is only the applicants and the respondents who know the basis and the spirit of the terms and conditions contained in the Deed of Settlement. It is only parties who know how much each gained, took and give out in the process of the negotiation.'

The observation that was made by the learned judge when the appellants went back to the High Court to question the Deed of Settlement sufficiently explained the role of the court in as far as the Deed of Settlement is concerned. It was an agreement between the parties alone. How they arrived in the terms of settlement is a matter known to them alone. That is to say that it was not a case in which evidence was

given. What the Court was requested to do was to record what the parties had agreed upon. It is, therefore, wrong for the appellants to come to the Court to fault the learned judge for refusing to issue a certificate. If they needed one, they should have asked for it when they recorded the terms of settlement and before the respondent started making payment. The appeal was found to be lacking in merit and it was accordingly dismissed.

3.3.1.2 Mediation

In Tanzania, *mediation* is the most common form of ADR used in courts, having been made part of the civil procedure and practiced as court- annexed mediation with Judges and Magistrates as Mediators. Mediation is also used in land disputes settlement and also in employment matter. Under the Employment and Labour Relations Act[84] where all labour disputes have to start by mediation by the Commission for Mediation and Arbitration established under section 12 of the Labour Institutions Act[85], and if mediation fails then the Arbitrator has to make a binding decision. In that respect the Labour Court has consistently enforced the rule that all labour disputes must first be referred to the CMA for mandatory mediation.

The High Court of Tanzania, Labour Division, the Labour Court dismissed the case of Hector Sequeiraa vs. Serengeti Breweries Ltd[86], describing it as 'incompetent' a labour complaint which was filed directly in the court without first pursuing mandatory CMA mediation.

[84] Act No. 6 of 2004
[85] Act, No. 7 of 2004
[86] Labour Complaint No. 20 of 2009,

Furthermore, mediation is used in the Commercial Court under the High Court (Commercial Division) Rules of 2012-part V of which talks about court annexed mediation. They provide as to what the mediator is required to do. Under these rules, the mediator has, in an independent and impartial manner, to do everything to facilitate parties to resolve their dispute. May conduct joint or separate meetings with the parties, may seek expert opinion if parties agree to pay costs thereof if any. Such a mediator has to be guided by principles of objectivity, fairness and natural justice; and confidentiality is guaranteed by rule 39. These rules are exhaustive on how mediation has to be carried out and they provide the consequence of non-appearance for mediation.

3.3.1.3 Arbitration

The Arbitration Act, Cap.15 R.E. 2002 is the principal legislation regulating arbitration in Tanzania. It regulates both domestic arbitral proceedings and enforcement of foreign arbitral awards. Reference to arbitration pursuant to section 4 of the Arbitration Act is read together with the First Schedule, unless there is any agreement to the contrary, a submission to the arbitration is deemed to be irrevocable except by leave of the court. According to Section 5 of the Act, parties to the arbitration agreement are allowed to agree on the name of an arbitrator(s) to be appointed by a third person or appointment body designated therein. The award is enforceable as decree of the court by filing the same in the High Court by virtue of section 12 of the Arbitration Act, Cap.15 R.E. 2002 and the Arbitration Rules, GN.427 of 1957[87].

[87] Section 5 of the Arbitration Act, Cap.15 R.E.2002

Arbitration is also governed by the Civil Procedure Code under the rules made under section 80 to the code, which are incorporated in the second schedule that provides for both arbitrations by the order of the Court and that without intervention of the court. As Mkumbukwa[9] notes, there are six forms of arbitration in Tanzania. It is only the sixth form of arbitration, which is governed by the Arbitration Act. This form includes international and local arbitrations. This would also cover arbitration carried out under the National Construction Council Rules in respect of construction disputes discussed in the preceding chapter.

The other five forms of arbitration are dealt with as provided for under the second schedule to the civil procedure code by virtue of Order VIIIC Rule 2. The first form is the one provided for under Order VIIIA Rule 3 of the CPC where parties to the case during the stage of pre-trial conference may request the court to allow them to pursue arbitration as a form of ADR instead of going to mediation or any other form. This Rule envisages an arbitration, which was not contemplated by the parties when they signed the agreement. They may get an idea of going to arbitration after they are before the court. This is quite a departure because ordinarily there ought to be arbitration clause or arbitration agreement.

The second one is similar to the first one and the only difference is that the second one is talking about reference to arbitration at any stage before judgment is pronounced while in the first one reference is before trial. The second form is provided for under Rule 1(1) of the Civil Procedure Arbitration Rules. Like the first one this form pre-supposes existence of a suit in court and absence of an enforceable arbitration clause binding the parties. This form has a broader scope since arbitration can be resorted to

even after any other form of ADR has failed. Even after parties have closed their case before judgment they can request to go to arbitration.

The third form of arbitration is to be found under Rule 17 of the CPC arbitration rules under which a party may apply to the court for leave to file a written agreement allowing reference of the dispute or differences to arbitration so as to seek court's assistance in compelling the other party to attend arbitration. This form pre-supposes that there is a written arbitration agreement and there is no pending suit in court between parties in respect of that dispute and one of the parties is refusing to submit to arbitration as per their agreement.

The fourth form is provided for under Rule 18 of the CPC arbitration rules which covers the situation where the plaintiff ignores the arbitration clause and files a case in court. It allows the defendant to apply to the court to stay proceedings initiated by the plaintiff in disregard of the agreement to refer the dispute to arbitration. The fifth form is arbitration without intervention of the court which is provided for under Rule 20 of the CPC arbitration rules. This is where the parties themselves have referred the matter to arbitration without involving a court and an award has been made thereon.

Any person interested in the award has to make an application in writing to any court having jurisdiction on the subject matter of the award that the award be filed in court and the court proceeds to pronounce judgment according to the award. Upon pronouncement of judgment the decree follows, and no appeal lies from such decree except in so far as the decree is in excess of or not in accordance with the award.

3.3.1.4 Conciliation

Conciliation is not directly mentioned under order VIIIA Rule 3 of the CPC, but is envisaged under the phrase such other procedures not involving a trial. Article 1 of the Regulations on the Procedure of International Conciliation adopted by the Institute of International Law in 1961, provides that conciliation is:

"a method for the settlement of international disputes according to which a commission is set up by the parties to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being acceptable by them or of affording the parties with a view to its settlement, such and as

In Tanzania, conciliation is commonly used in matrimonial disputes. Under the Law of Marriage Act[88], matrimonial disputes cannot be instituted in court before going to Marriage Conciliation Board established under section 102 whereby Boards are established by the responsible Minister in every Ward. The aim is to enable matrimonial disputes to be resolved amicably. Section 104 of the same law/Act talks about the proceedings of the Board however, there is no exhaustive rules of procedures governing conciliation by the Board.

To give some examples, some of the cases reconciled include that of Hon. Edward N. Lowassa Vs *Heko* Newspaper, conciliation case no. 1 of 1997 in which Hon. Edward Lowassa (MP for Monduli) lodged his complaint to the Ethics Committee of the Media Council of Tanzania against *Heko* newspaper, respondent. At issue was a lead

[88] Cap. 29 R.E. 2002

news story published by the respondent in its August 27, 1997 issue with the headline: *Tume ya Kero ya Rushwa: Baadhi ya viongozi, vigogo ambao watafikishwa mahakamani wafahamika:* The committee found the publication libelous, wrong, inaccurate and biased. The respondent did not take any measure to correct or apologize despite the complainant's letter requesting the respondent to do that.

The Ethics Committee ordered *Heko* newspaper to pay TZS 1,000,000 to Lowassa as compensation. *Heko* was also ordered to publish an apology on the front page with similar prominence as that given to the original story. *Heko* newspaper paid the amount in four equal installments of TZS 250,000 and the money was given to children's charitable homes in accordance with Hon. Lowassa's wishes. *Heko* further published an apology as ordered.

Another case is that of Seifuddin Khanbhar Vs *Nipashe* Newspaper[89], conciliation case no. 3 of 2002 in which the complainant lodged a complaint against a story published by *Nipashe n*ewspaper of December 6, 2002 alleging that the complainant's company, which dealt with cultural heritage, had defaulted in paying business taxes for about ten years. The Ethics Committee ruled that the newspaper had wronged the complainant by publishing a story without evidence to support the allegations. It ordered the newspaper to apologize to the complainant and asked the parties to settle the matter amicably and to report the outcome of the reconciliation. The Committee also stated that its powers were limited to reconciling parties and not to order compensation which involved millions of shillings, explaining that such powers were

[89] Conciliation case no. 3 of 2002

a preserve of the courts of law. The parties settled the dispute amicably. The newspaper published an apology and paid an undisclosed amount of money as compensation to the complainant.

The other case, is that of Charles Mhagama Vs *Nipashe Jumapili* Newspaper[90], conciliation case no. 2 of 2007 in which a councilor in the Songea Municipal Council, Charles Mhagama, lodged a complaint against *Nipashe Jumapili* for allegedly defaming him in its edition of July 8, 2007, in which it was reported that Mhagama was publicly whipped by the father of a school girl whom Mhagama was allegedly having a love affair with. The complainant wanted the respondent to apologize and pay compensation for publication of a false story that he had been beaten in public by the father of a girl he had been caught with at a guest house. The respondent argued that no name was used, thus harm, if any, was minimized. The committee decided that:

(i) Demand for an apology and restoration of his dignity was reasonable.

(ii) The Committee observed that the editor's argument that because no name was used in the story would minimize harm did hold water. It was even more dangerous because in innuendo, any other person could seek redress from the Committee arguing that the story was actually about him.

(iii) The truth was the cardinal principle in journalism and all efforts should be taken to ensure the authenticity of the facts before a story is published.

(iv) The Code of Ethics also enjoins journalists and editors to give a right of reply to all parties in a story, especially in contentious issues such as the ones raised in

[90] Charles Mhagama Vs Nipashe Jumapili Newspaper, Conciliation case no. 2 of 2007

the story. The Ethics Committee found that *Nipashe Jumapili* did contravene the Code of Ethics for media practitioners by not adhering the requirements to seek the truth and denying the right of reply to the complainant. The Committee thus ordered:

(a) *Nipashe Jumapili* to publish on its front page an apology in its next issue; and.

(b) The newspaper to agree with the complainant on costs to be paid as solatium to defray his costs.

The Editor of *Nipashe Jumapili* agreed to adhere to the decisions of the Ethics Committee to apologize and defray the costs of the complainant. After a caucus, the two parties agreed on the payment of TZS 1,000,000.

3.4 National Laws

3.4.1 Civil Procedure Code

Under Order VIIIA of the CPC Rule 3 (1) three methods of ADR are mentioned, that is negotiation, mediation and arbitration. However, there is room for use of other methods not specifically mentioned. The most commonly used ADR mechanisms in Tanzania are as follows:

3.4.2 The Land Act

The Land Act No. 4 of 1999 essentially provides for the basic law in relation to land, other than the village land. It provides for the management of land and settlement of dispute and related matters. This features clearly in the long title of the law. It deals with general land and general land is defined under section 2 of the Land Act to mean

all public land, which is not reserved land or village land and includes unoccupied or unused village land. However, the law somehow confusingly, includes village large land which is unoccupied or unused.

The Land Act[91] contains provisions that facilitate resolution of disputes through ADR under the provisions of section 18 on inquiries. For instance, as of recent in July 2016 the Minister for Lands Hon. William Lukuvi appointed an inquiry under section 18 of the Land Act[92], and section 7 (2) of the Village Land Act[93]. This was after the mediator had failed to mediate the parties upon one party refusing to continue with mediation.

3.5 Conclusion

This chapter establishes that the most commonly used ADR mechanisms in Tanzania are mediation/conciliation, arbitration and negotiation. The legal and institutional frameworks for ADR in Tanzania are firmly in place. It is thus, not far-fetched to predict a successful future for ADR in which it will enjoy the support of the major stakeholders and play a vital role in justice delivery in Tanzania.

[91] CAP 113 R.E 2002
[92] Section 18 of the Land Act, Cap 113 R.E.2002
[93] Section 7 (2) of the Village Land Act, Cap.114 R.E. 2002. Also note that the Minister also appointed by appointing Justice Jacobo Mwambegele from Commercial Division of the High Court to adjudicate on boundaries dispute involving Mabwegele and Kambaya Villages and neighbouring Villages of Mfuru, Mbigiri, Dumila, Mambwega and Matongolo in Kilosa District, Morogoro Region

CHAPTER FOUR

CASE LAW DEVELOPMENT ON ADR IN TANZANIA

4.1 Introduction

ADR programmes are instruments for the application of equity rather than the rule of law. Each case is decided by a third party or negotiated between the disputants themselves, based on principles and terms which seem equitable in the particular case rather than on uniformly applied legal standards. ADR systems cannot be expected to establish legal precedent or implement changes in legal and social norms. They tend to achieve efficient settlements at the expense of consistent and uniform justice. The present chapter addresses case law development on ADR principles or mechanisms in Tanzania.

4.2 Land Disputes Resolution Systems

Prominent learned persons argue that *Land disputes* can be resolved through formal and informal methods. It can be through legal disputes settlement machineries or ADR. In Tanzania, there is land settlement machinery based on which specialized courts have been established to settle disputes at the national, district, ward and village levels. These courts are legally recognised and have established procedures. Practically there are other informal justice systems, but they are not recognised by the setup of the machinery. The Land Disputes Courts Act of 2002 Act No. 2 establishes the various courts for the settlement of land disputes.

The Act provides for the composition, functions and the procedures through which disputes could be settled. As expressly worded, every dispute or complaint should be

instituted in any of the courts having jurisdiction to determine land disputes in a given area. The various courts are described in detail as follows:

4.2.1 Village Land Council

VLC Part III of the Land Disputes Courts Act, 2002 (Act No.2) provides for the functions and powers of the VLC. According to the latter Act, the VLC shall consist of seven members of whom three must be women. Each member is nominated by the village council and approved by the village assembly. And subject to section 61 of the Village Land Act, 1999, the functions of the council are to receive complaints from parties in respect of land, convene meetings for hearing disputes from parties and mediate between and assist parties to arrive at a mutually acceptable settlement on any matter concerning land within its jurisdiction. Where the parties are not satisfied with the decision of the council, the dispute in question can be referred to the Ward Tribunal (WT).

The total administrative functions of the VLC as well as the WT, is the responsibility of a registrar appointed under section 23 of the Local Government (District Authorities) Act, 1982. The registrar shall be the Chief Executive of all the VLC and WT, responsible for estimates and expenditures, and advises local authorities on any matter regarding the functions of the VLCs and WTs in their respective areas of jurisdiction.

4.2.2 Ward Tribunal (WT)

The Ward Tribunal Act, 1985 establishes a ward tribunal as a court with jurisdiction and powers in relation to the area of the district council in which it is established. Part

IV of the Land Disputes Courts Act of 2002 (Act No. 2) provides for the jurisdiction, powers and procedure of the WT which may consist of not less than four and not more than eight members of whom three must be women and they are elected by the Ward Committee as provided under section 4 of the Ward Tribunals Act of 1985.

The Act specifies further than in all matters of mediation, the tribunal should consist of three members at least one of whom is a woman. The chairperson to the tribunal should select all three members including a *convenor* who will preside at the meeting of the tribunal. Nonetheless, the jurisdiction of the WT in its proceedings of civil nature relating to land is limited to the disputed land or property valued at three million shillings (equivalent to USD 2,145 as at October 2009). The WT is to record the order of mediation immediately after the settlement of a dispute. The primary function of each tribunal is to secure peace and harmony in the area for which it is established by mediating between and assisting parties to arrive at mutually acceptance solution on any matter concerning land within its jurisdiction. In addition, the WT has the jurisdiction to enquire into and determine disputes arising under the Land Act, 1999 and the Village Land Act, 1999.

In performing its functions, the WT is supposed to consider any customary principles of mediation, natural justice in so far, any customary principles of mediation do not apply and any principles and practices of mediation in which members have received any training. The procedure to be followed in the tribunal is that a person shall make a complaint to the secretary of the tribunal either orally or written. Where the complaint is received orally the secretary shall immediately put it in writing and produce a copy for the complainant. The Secretary shall then cause it to be submitted to the Chairman

of the WT who shall immediately select three members of the Tribunal to mediate. Advocates are not allowed to appear and act for any party in the WT. And notwithstanding the provisions of section 23 of the Ward Tribunals Act, the WT in proceedings of civil nature relating to land has powers to the following:

(i) Order the recovery of possessing of land;

(ii) Order the specific performance of any contract

(iii) Make order in the nature of an injunction both mandatory and prohibitive;

(iv) Award any amount claimed;

(v) Order the payment of any cost and expenses incurred by a successful party or his witness; and

(vi) Make any other, which the justice of the case may require.

Where a party to the dispute fails to comply with the order of the Tribunal, the WT shall refer the matter to the District Land and Housing Tribunal for enforcement. A person who is aggrieved by an order or decision of the WT may appeal to the DLHT within forty-five (45) days after the date or the decision or order against which the decision is brought. The DLHT may for good and sufficient cause extend the time for filing an appeal either before or after the expiration of the 45days. Where an appeal is made to the DLHT within the stated period or any extension of the time granted, the DLHT shall hear and determine it. The Minister for Lands may make rules prescribing the procedure for appeals from the WT to the DLHT.

4.2.3 District Land and Housing Tribunal (DLHT)

Part V of the Land Disputes Courts Act of 2002 describes the establishment, composition, proceedings, jurisdiction and powers of the DLHT. Subject to section

167 and section 62 of the Land Act of 1999 and the Village Land Act of 1999 respectively, the minister is to establish in each district, region, or zones as the case may be a court known as District Land and Housing Tribunal to exercise jurisdiction within the area established. The DLHT should comprise of one chairman[94] and not less than 2 assessors[95] and not more than 7 assessors of whom, three (3) of whom shall be women for each established DLHT. The two assessors are required to give their opinion.

However, the chairman may not be bound by their opinions and he may give reasons in the judgement for differing from their opinions before reaching a decision as judgment. The proceedings of the Tribunal are to be held in public. A party to the proceeding may appear in person, by an advocate, a relative, or an authorised officer of a body corporate. Notwithstanding the absence of one or both assessors who were present at the commencement of proceedings, the Chairman and one of the assessors (if any) may continue and conclude the proceedings. The court can be held in any place within its local limits of jurisdiction and a party to the proceeding may appear in person or by advocate or any relative or member of the household or authorized officer of body corporate. The jurisdiction of the DLHT in its proceedings is limited to proceedings for recovery of possession of immovable property in which the value of the property does not exceed Fifty (50) million (equivalent to 35,715USD as at October 2009) shillings and where the subject matter is capable of being estimated at

[94] According to Sec (25) of the Land Disputes Court Act,2002, the "Chairman" must be a legally qualified person and hold office for a term of3years and may be eligible for re-appointment

[95] An "assessor", according the Land Disputes Court Act,2002 , must be ordinary resident of the district, not a member of the National Assembly, District council, village council, VLC, a mentally fit person, never been convicted of any criminal offence involving violence dishonesty or moral turpitude, and one who is a citizen of the United Republic of Tanzania

a money value in which the value of the subject matter does not exceed forty (40) (equivalent to 28,572USD as at October 2009) million shillings. The DLHT is given powers to execute its own orders and decrees. The Tribunal in hearing an appeal against any decision of the WT should sit with not less than two assessors and consider the records relevant to the decision, receive additional evidence if any and make some inquires as it may be deemed necessary. A party to any proceeding appealed against, may appear personally or by an advocate, a relative or authorised officer of corporate body. The DLHT after hearing the appeal may:

(i) Confirm the decision; or

(ii) Reverse, or vary in any matter of the decision; or

(iii) Quash any proceedings; or

(iv) Order the matter to be dealt with again by the WT as it may deem appropriate by giving an order or direction as to how any defect in the earlier decision may be rectified.

The DLHT after making the decision on the appeal shall immediately record the decision and the reason thereof. The Chairman may direct that the language of the Tribunal be in English or Kiswahili except that the record and judgement of the Tribunal shall be in English.

4.2.4 The High Court (Land Division)

Section 37 of the Land Disputes Courts Act of 2002 empowers the *High Court* to determine all land disputes of national interest of which the Minister may by notice published in the Gazette, the recovery of possession of immovable property valued not less than fifty million shillings or where the subject matter is estimated at money

value exceeds forty million shillings. The High Court's mandate also extends to all disputes relating to land under any written law in respect of which jurisdiction is not limited to any particular court or Tribunal and also appeals from the DLHT. A person, who is aggrieved by the decision or order of the DLHT may within sixty (60) days after the date of decision or order appeal to the High Court. Extension of the time for filing an appeal, before or after the period of sixty days has expired, may be granted by the Court for good and sufficient cause. Appeals to the High court shall be heard by a Judge and two (2) assessors in a sitting (section 39 of Act No. 2).

The parties to the dispute may appear in person or by an advocate or other representatives in accordance with the Civil Procedure Code. The High court may call for and inspect the record of proceedings of the DLHT through the Registrar of the High Court and examine the records or registers for the purposes as to the correctness, legality and propriety of any decision or order of the DLHT. Where the Registrar of the court in any case after making the inspection and examination and is of the opinion that the decision or order is of illegal or improper or procedure irregular may forward the record back to the High Court to consider whether or not to exercise its powers of revision (section 44 of Act No.2). A decision or order of the WT or DLHT shall not be reversed or altered on appeal on account of any error, omission or irregularity of the proceedings before or during the hearing of the decision or order or on account of improper admission or rejection of any evidence unless such actions has occasioned a failure of justice. The aggrieved person by the decision of the High Court may with the leave of the High Court, and where the appeal originates from the WT require to seek a certificate from the High court, to appeal to the Court of Appeal.

4.2.5 The Court of Appeal

The *Court of Appeal* shall have jurisdiction to hear and determine appeals from the High Court (Land Division). This is subject to the provisions of the Land Act 1999 and Village Land Act, 1999. Section 48 of the Land Disputes Courts Act of 2002 gives the provision that the Appellate Jurisdiction Act, 1979 shall apply to proceedings in the Court of Appeal.

4.2.6 Other Justice Systems

Other systems play important roles in dispute resolution. The Non-Governmental Organisations (NGOs) are seen to mediate disputes between persons in conflict and provide legal advice and training through specific programmed on issues relating to land within communities in both urban and rural areas. One key NGO is the Legal Resource Centre (LRC) which provides advice to the vulnerable and marginalized groups of people including the poor, homeless and landless people and communities. There are other NGOs that also offer legal services and assist in the same manner. These, amongst a few, are the Lawyers for Human Rights and the Centre for Rural Studies, Tanzania media women Association (TAMWA), Tanzania women lawyers Association (TAWLA) and HAKIARDHI (Land Rights Research and Resource Institute). They also encourage people by advertising through print and electronic media to make people aware of their rights. University based law clinics and institutes for instance, the Centre for Applied Legal studies at the University of the Witwatersrand also assist or represent communities in land issues and advice in the development of the land policy. The National Land Committee also (NLC) assists poor rural blacks across eight provinces to access land rights and development

resources. It serves as a network with eight affiliated land rights organizations' and other often works in close association with LRC, Other persons such as state officials, Mtaa leaders and land experts in one way or the other resolve land conflict.

4.3 Case Law Development on ADR in Tanzania

In Tanzania before introduction of ADR, the only methods, which were applicable were the traditional methods and court proceedings. However, the two methods were not enough as far as solving the dispute amicably is concerned. The history of ADR has been a little bit different from other ways in Tanzania. In traditional methods, resolution of conflicts prescribes an outcome based on mutual problem sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. Resolution is non-power based and non-coercive, it follows then that conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.

However, in some circumstances the methods involve coercive measures to reach the conclusion, as discussed in-depth in R v Palamba Fundikira[96]. In the latter case, a trial by ordeal was conducted to discover who has by witch craft caused the death of 11 children of the first appellant. 7 women were accused as causatives of the death of the children and to prove their innocence they were subjected to a traditional test to drinking a traditional medicine called MWAVI. By itself, mwavi is not a poison, but when taken with evil mind it turns to poison. Upon taking two women died and other two vomited.

[96] 5 (1947) 4 EACA 96

ADR is a total non-coercive method and only intends to preserve the good relationship that the parties had before the dispute. Dispute resolution settlement through this mechanism/system does not require the cause of the dispute that arose but possibility of resolving it without further coercive and undesirable measure. A settlement process, seeks to mollify the opposition without discovering or rectifying the underlying causes of the dispute[97]. Traditional local leaders including male and female elders played a pivotal role in conflict management. Due to the wide powers, knowledge, wisdom and the respect they were accorded in the society they could resolve family conflicts and conflicts related to natural resources.

There are some conflicts that come to courts that could well have been handled by the local elders in a community or the Local administration. In the case of Torgindi v Mutsweni[98], Torgindi accuse Mutseni as a causative of his marriage breakdown. As a result, a dispute arose, and the drumming arose. Each part was ordered to compose and sang a song as loud as he could so that the whole village could hear. Mutsweni was not a good song composer, but he hired a person to compose for him. The drumming started and went on for more than weeks every day. The village elders then opine that if the drumming continues it would end up in fighting, therefore, the parties were called to prepare and sing their songs before the elders. The elders here acted as Judges and at the end they would decide who wins a case basing on the song composed by each of the conflicting parties.

[97] Claire Baylis and Robyn Carroll, "Power Issues in Mediation, ADR Bulletin,Vol 7,no. 8 {2005} art 1 p 135
[98] 5 (1947) 4 EACA 96

4.3.1 Place of Preliminary Objections in ADR Cases Involving land Disputes

Under Rule 18 of Labor Institutions (Mediation and Arbitration) Rules (Government No. 64 of 2007), the CMA may set down a combined mediation and arbitration proceeding on the same date, which may be conducted by the same person. The parties may also opt to elect the same mediator to be their arbitrator under Rule 30 GN No. 67 of 2007[99].

Most arbitrators are legal practitioners and hence are aware of mediation. However, they are reluctant to refer matters to mediation due to parties not having confidence in the end result of the process. There are other forms of mediation-related ADR methods such as adjudication, which is primarily used in construction disputes, and conciliation which is used in family-related disputes. Section 101 of the Law of Marriage No. 5 of 1971, as a general rule, obliges disputants in a marriage dispute to first refer the matter to the Marriage Conciliation Board to reconcile the parties; upon failure it should certify the failure to the court. Under section 106 (2) of this law, every petition for divorce to be filed in court must be accompanied by a certificate issued by the Board within six months.

The final settlement agreement is a legally binding agreement and is enforceable under the normal rules of contract law. Although there is no requirement in common law that the settlement agreement be written, this is advisable to aid enforcement. It is usual, if court proceedings have been commenced prior to the mediation, to include as

[99] see Buzwagi Project v Antony Lameck Revision No. 297 of 2008 (unreported); TBL v Charles Malabona Revision No. 24 of 2007 (unreported); Bulyanhulu Gold Mines Ltd v James Bichuka Labour Revision No. 313 of 2008 (unreported).

a term of the settlement an obligation to withdraw or discontinue the action. The dismissal of the court proceedings may be achieved by consent order or consent judgment, which may record the terms of the settlement. If such terms are recorded, they become enforceable as a judgment of the court.

The existing reality is that the settlement agreement is unenforceable unless it has been reached through court-connected mediation or out-of-court mediation ordered by the court and a judgment is made on the basis of the settlement agreement. The parties may also explicitly agree for the settlement agreement to be ratified by the competent court, which gives the agreement the force and effect of a final judgment in court for it to be enforceable. It is possible to revise or withdraw the final settlement agreement only before it becomes binding.

In *court-annexed mediation proceedings* where the mediation results in an amicable settlement of all issues in controversy, the mediator will complete a form known as a consent settlement order form. This form will identify the parties and contain the name of the court, the number of the case and the full terms of the agreement. The same will then be recorded and have the same force as a judgment of the court, and parties may make application for its execution of the decree.

4.3.2 Jurisdictional issues in ADR Cases in Land Matters

The Land Dispute Courts Act of 2002[100] establishes a District Land and Housing Tribunal with jurisdiction over land matters within the district, region or zone in

[100] Act No. 2 of 2002 Chapter 216 of the RE 2002

which it is established. Other institutions with jurisdiction to entertain land cases that are governed and established by The Land Dispute Courts Act, herein after referred to as the Act, are The VLC, The WT, The High Court[101] and the Court of Appeal.[102] The Act was enacted as the response to implement one of the underlying principles of the Land Act[103] and Village Land Act[104]; which is to ensure the establishment of an independent, expeditious, and just system for adjudication of land disputes. The land courts system established by the Act operates to ensure that land disputes are adjudicated in a just and expeditious way by an independent institution. Since the Act came into operation on 1st day of October 2003, 42 District Land and Housing Tribunals (DLHTs) were established but only 39 are functioning. Given the fact that there are about 151 Towns and District Councils, this means that about 109 urban authorities do not have DLHTs (LRC, 2013). This year marks ten years after the Act was made operational, but not every district in Tanzania mainland has DLHT.

This chapter uses DLHT as a case study to argue that the principle conceived in the enactment of the Act is far from becoming a reality. It bases on data of the past four years to demonstrate that DLHT is overburdened by increment of an average of 2,000 pending cases every year. It further indicates legal and practical challenges that hinder access to and independence of DLHT. The chapter calls for drastic strategic measures to strengthen DLHT in terms of human resources and facilities. The author reiterates some of the reforms of the court system as proposed by the Law Reform Commission

[101] Is established under article 108(1) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time

[102] The Court of Appeal works and discharges its judicial duties in accordance with the provisions of the Court of Appeal Rules of 1979. These provide the procedure to be followed and are made by the Chief Justice under section 12 of the Appellate Jurisdiction Act, 1979.

[103] Act No 4 of 1999 Chapter 113 of the RE 2002

[104] Act No 5 of 1999 Chapter 114 of the RE 2002

of Tanzania. At the onset, it is important to register that the findings of this paper are based on library and desktop research only.

4.3.3 Jurisdiction and Challenges

DLHT enjoys original, appellate and revisional jurisdiction over land matters. Original jurisdiction of the DLHT is confined to pecuniary value of the subject in dispute. If the subject is immovable the limit is fifty million Tanzanian Shillings and if the subject is movable or can be computed to monetary compensation the limit is forty million Tanzanian Shillings[105]. Since the pecuniary jurisdiction of the WT is limited to three Million Tanzanian Shillings, it can be argued that the pecuniary jurisdiction of the DLHT is above Three Million, but limited to either forty or fifty million Tanzanian shillings for movable and immovable property respectively. DLHT equally enjoys appellate[106] as well as revisional[107]jurisdiction over matters emanating from WTs. Since their establishment DLHTs have had original jurisdiction to adjudicate all matters arising out of land. However, in the case of Olam Tanzania Limited Property International v. Baraka Mkondola[108], the High Court of Tanzania ruled that DLHT has no original jurisdiction to adjudicate matters concerning land registered under the Land Registration Act, Cap 334. The Court of Appeal in its ruling[109] made on October 2010 corrected the High Court decision and set the precedence to the court

[105] S 33 (2) LDCA
[106] S 34 LDCA
[107] S 36 (1) LDCA
[108] High Court of Tanzania (Land Division) at Mtwara, Land Appeal No 14 of 2007 (Unreported) Judgment delivered on 25th September 2009
[109] See Olam Tanzania Limited and 3 Others v Selemani S. Selemani and 4 Others, Court of Appeal of Tanzania at Mtwara, Consolidated Civil Revisions No. 2,3,4,5, &6 of 2010, ruling made on 11th October 2010 (Unreported).

Subordinate thereto by stressing that "…. DLHTs have jurisdiction to hear and determine all land disputes arising under the Land Act, regardless of whether the said land is registered or not[110]"

4.4 Limitation Period for ADR in Land Matters

Mediation proceedings do not suspend the statutory limitation period for a court claim. The parties can opt to ask the court to stay the proceedings, which will have the effect of preserving the time limits within the proceedings. Mediation procedures are fixed under the CPC, the Labour Institutions Act, the Employment and Labour Relations Act and the Labour Institutions (Mediation and Arbitration) Rules of 2007. However, for mediation of labour disputes under the CMA, the aggrieved party is required to file a prescribed form, which includes a summary of the dispute so as to initiate the mediation proceedings. Other procedural requirements include summons to the respondent and notice as to the hearing date to both parties.

In general, for voluntary mediation there are no procedural requirements and the parties are free to agree on a mediation procedure. While mediation as a process is structured, it remains sufficiently flexible to allow the mediator to assess the developing situation and to have meetings with participants in a manner considered most conducive to constructive dialogue. In spite of absence of mandated structure for mediation, the common practice is for a mediation to incorporate caucus sessions between each party and the mediator, as well as joint sessions with both parties. It is also important to note that under the commercial court rules the time frame for

[110] Rwegasia, A. Land as Human Right: A History of Land Law and Practice in Tanzania. Mkuki na Nyota. Dar es Salaam. Pp 332-333

mediation should not exceed the period of 14 days, subject to an extension of time that the court deems just to grant. Pursuant to the ELRA, mediators at the CMA are required to issue a certificate within 30 days or any longer period as may be agreed by the parties. There are no special considerations for international mediation proceedings; hence international standards may apply without restrictions.

4.5 Court Annexed Mediation

The law in Tanzania does provide for *court-annexed mediation* under the CPC as a result of Government Notice No. 422, which amended the First Schedule to the CPC and influenced by the Mroso Committee's recommendation in 1994. This means the procedure is integrated into the court system and it is mandatory in civil disputes. The CPC brought in amendments that have made it a mandatory requirement for civil cases to be first referred to mediation before full trial is conducted. The amendments introduced new Orders VIIIA, VIIIB and VIIIC to the First Schedule of the CPC.

There is mandatory requirement, under the provisions of Rule 1 of Order VIIIC of the CPC, that all filed civil cases must go through the mediation stage between the completion of pleadings or interlocutory applications and the trial. The mediation is conducted by another judge or magistrate appointed by the court. If the parties fail to settle at mediation, the case is returned to the allocated judge or magistrate for trial.

4.6 Conclusion

Currently, there is no official regulating body for mediation in land dispute, nor are there any statutory qualifications needed to act as a mediator. Thus, anyone can

become a mediator. In practice, most mediators have some form of accreditation following the assessed professional training by a domestic or international dispute resolution institution before taking up a case. Although mediators may also possess other professional backgrounds or expertise, private and voluntary mediations in Tanzania are in general conducted by retired judges or senior lawyers. Foreign mediators are required under Tanzanian immigration laws to have a business visa to enable them to conduct mediations in the country. The understanding and cooperation enjoyed by both parties from the beginning of the process are transferred into reconciliatory gestures, after final judgement. This is, however, not the case in judicial court proceedings which create a "winner-vanquish" situation. Antagonism starts right from the beginning of the process and even beyond the judgement, when both winners and vanquished are declared, through the court verdict. The reconciliation approach provided by ADR, goes further to promote peace and unity, prerequisite for development in the community and nation as a whole.

CHAPTER FIVE

FINDINGS ON ADR PRACTICE IN TANZANIA AND RELATED LEGAL CHALLENGES

5.1 Introduction

This chapter deals with analysis of findings on ADR practice in Tanzania and related legal challenges which face parties and authorities in translating the ADR principles into practice in Tanzania.

5.2 Practice of ADR and Procedural Technicalities

The study has established that rules of procedure are hand-maiden of justice and thus must not be used to the substantive justice.[111] To a lay person who is in most cases unrepresented would feel that justice is done if our tribunals are free from legal technical issues in favour of a substantive justice. It is common that a judgment at a ward tribunal is reduced down in Swahili language, but its application for execution is lodged at the DLHT which often than not is far away from the WT. As if it is not enough, an application for execution and appeals are filled in English. Similarly, the law governing these tribunals is reduced down in English as if all the villagers are trained to understand and speak English. This barrier may not encourage the litigant or the villagers to access these machineries. Likewise, the proceedings at the DLHT

[111] See Article 107 A (2) (e) of Cap. 2 R.E 2002; The National Housing Corporation Vs Etienes, Civil Application No. 10 of 2005, CAT at DSM (Unreported); DT. Dobie (T) Ltd Vs Phantom Modern Transport (1985) Ltd, Civil Application No. 141 of 2001, CAT (Unreported); Julius Ndyanabo Vs AG, Civil Appeal No. 64 of 2001, CAT at DSM; Cropper Vs Smith (1884) 26 CL.D.700 at p. 700; General Marketing Co. Ltd Vs A.A.Shariff(1980) T.L.R. 61 p.65; Manji Ltd Vs Arusha General Stores(1991) TLR 165, Rawal Versus Mombasa Hardware (1968) E.A 39

are recorded in English [112]. It may not be difficult at the WT to access the Court, but in case the subject matter exceeds the jurisdiction of the Court, it is where hardship commences.

It has been established that the DLHT can only be accessed by filling in the forms in English as they are shown under the Land Disputes Courts (The District Land and Housing Tribunal Regulations, 2003, GN. No. 174 of 27/06/2003). Applications in terms of chambers summons and affidavit are lodged in English and in case of any gap the Civil Procedure Code and the Evidence Act applies[113]. This is where technical issues lie, and it is doubtful if the same are at the fingertips of the unrepresented persons. Going by the same logic that legal technical procedures are not allowed, there is no law that has been enacted to guide the litigants from the WT and DLHT appealing to the High Court and thereafter appealing to the Court of Appeal. They are subjected to the entire Court proceedings under the Appellate Jurisdiction Act and the Court of Appeal Rules, 2009. Through this mechanism, land disputes may not come to a halt.

In Mvomero within Mkindo Ward where a suit was being lodged at the DLHT of Morogoro at Morogoro and decided to its finality but yet the land disputedidnot come to a halt. This was the case between Kambala Village Council Vs Jaribu Mwishee and 19 Others, 208 where later on the Villages of Mkindo, Dihombo, Ki Gugu and Hembeti joined the proceedings. The applicant's claim was that Kambala village

[112] See 2nd Schedule Forms No. 1,3, of the Land Disputes Courts (The District Land and Housing Tribunal Regulations,2003, GN.No. 174 of 27/06/2003

[113] See Section 51 of the Land Disputes Courts Act, No. 2 of 2002

be declared the sole registered owner of the village suit land and for the order that the Respondents be evicted from the suit land and perpetual prohibition against the Respondents not to invade the suit land. Despite the rue fact from the records that the suit dragged in Court for almost ten years, possibly with good cause, the existing records show that the area in dispute that is bogo suburb, commonly known as Mgongola basin was situated at Kambala village. The decision of the DLHT was issued on 02/06/2015, among other things, nullifying the certificate of village land of Kambala, No. 006 MVDC and ordering for verifying boundaries of the villages and establishment of buffer zone of seventy meters wide to separate the farm land from the pastoral areas through permanent beacons demarcating the area. From the time the decree was so issued, there was efforts employed by the Applicants to appeal and staying the execution of the decree at the High Court of Tanzania at Dar Es Salaam but an application for stay was not sustained thus was struck out on 03/11/2015. But an appeal is still pending at the High Court of Dar Es Salaam. Despite having such a dispute dragged in Court for such long, yet disputes over the area have not come to a halt. Villagers are still reported to have been in serious fights which at the first instance do not show any greenlight of finally resolving the matter.

Another major challenge is the seeming skepticism by lawyers to the effect that ADR is a threat to their legal profession[114]. This stems from the notion amongst most lawyers that frequent referral of cases to ADR services might affect their revenue streams, the belief that cannot definitely allow the survival and flourishing of the ADR activities in Ghana, in particular, and the West African region as a whole. Also

[114]Chipeta B D Civil Procedure in Tanzania, A students Manual 2002

related, is inadequate awareness creation on the existence of ADR for patronage by clients. Many Ghanaians do not even know the existence of ADR, its process and benefits. This starves vast majority who could have patronized its services than resorting to the judicial court system. Effective Public Relations (PR) is missing in terms of educating the public on the need to resort to ADR services. An equally important challenge is the training deficits of practitioners. This stems from inadequate funding and logistic constraints needed to train such practitioners and the effect being that few practitioners are attending to numerous cases. International best practice opines that a third party or mediator must undergo a compulsory training to be equipped with the right skills to prudently and professionally handle cases to the admiration of all parties.

Infrastructure and logistical provisioning for effective functioning and sustenance of ADR in Tanzania is woefully inadequate. Lack of Legislative Instrument (LI) to support the Act also militates the effectiveness of ADR. A mediator noted that although the Act has made some provisions for the establishment of ADR centres, nothing has been not done so far, and Government does not see the need for it because there is no LI to enforce it.

The ADR system in Tanzania also seems to be in competition with other resolution agencies like rent control and Domestic Violence and Victims Protection Unit (DOVVSU), Social Welfare (SW), despite the fact that they are agencies with respective functions.

Non-binding evaluation or assessment

It is also stipulated that parties together with their legal representatives make an appearance before a neutral party and present their cases, arguments or evidence to support their positions. Dutifully, the neutral party makes a non-binding evaluation or assessment of their positions and offer an opinion concerning the possible outcome of the case should litigation be opted for. The parties are then left with a choice of which mechanism to opt for to reach a joint solution. One professional once remarked that: "the parties consult a practitioner or expert for advice on how their case might result in should they move to court". The recommendations by the neutral or conciliator remains unbinding. The inherent disadvantage associated with this mechanism however is that, the party at advantage or likely to win unduly delays the process for a long time. This medium is usually opted for in situation where there is deep distrust among disputants. Under the Tanzania's court connected ADR, litigants are referred to ADR by the Magistrate or judge only after they have filed their case at the court and made an appearance before him or her, and with their consent. With the view to making ADR attractive to disputants, no fee is charged beyond the filing fee. Accordingly, cases that have not been filed at the courts cannot be dealt with under the court connected ADR. In such instances, the parties in dispute can go to a private practitioner to have their case heard and settled. To promote the patronage of ADR, magistrates or judges consistently remind disputing parties on the availability of an amicable resolution mechanism during their first court appearance. Once the parties have opted for the ADR, the court ADR coordinator explains the system to them in more detail, emphasizing the voluntary nature of the whole process. However, once an agreement has been reached, the Magistrate will ratify it as judgment of the court and

that there is no appeal. To reduce tensions, various styles are used by the mediator. A common practice is the mediator urging the disputants to address each other by their names, to show respect and not to interrupt each other. This helps the mediator guide the discussion in the direction which is most likely to result in a mutual settlement.

According to one of the ADR practitioners interviewed in the present study case in Bagamoyo District, once a case is settled under the ADR procedure, the parties return to court for the Magistrate to enter the agreement as a 'consent judgement'. This gives it the status of a legal judgement which can be enforced by the court. If a party fails to honour the agreement the party can be compelled to do so. In instances where the mediator is unable to resolve the dispute, the case is sent back to the courts for the normal litigation to begin.

With regards to control, another success area chalked by ADR process, is its ability to provide disputing parties the opportunity to "control" and "own" the process as parties dictate the type of mechanism to pursue, the choice of the neural party, amongst others, are within the ambit of the parties. These processes are however, absent in the judicial court system where the judge representing the court, superintends over the entire process and only gives parties the opportunity to decide when opting for mediation, for the settlement of the case. Moreover, another endearing attribute of ADR, is the use of neutral panelists or third parties, who facilitate in the resolution process. These professionals are used for disputes related to their area of expertise and thus, provide professional impetus in the process which at the end of the day will be beneficial to both parties. However, the expertise of the judge in the court is only

limited to his/her legal field and specialisation, and will not appropriately appreciate cases brought outside his/her specialization.

Cooperation is highly demonstrated under ADR, especially between parties. ADR services take place in a more informal, less confrontational environment. This is more conducive to maintain a positive business relationship between the two parties. With mediation, specifically, the result is collaboration between the two parties. Therefore, ADR is a process that looks into the best interest of both parties in order to conclude a compromised mutual decision.

As indicated earlier, flexibility is entrenched and becoming a good characteristic of the ADR processes. This success stems from the fact that legal and non-legal disputes can be addressed during this process proving it to be more flexible. Some may think this is a suitable package in the sense that it takes into account fundamental concerns of the parties and offers remedies consistent with the interest of parties, which are not available when at court.

The last success story of ADR is its reconciliation approach, as its preoccupation is animating a compromise solution, satisfactory to both parties. ADR proceedings allow parties ample opportunity to own and control the process; thereby allowing them accept judgement thereof, for mutual beneficial ends.

5.3 Conclusion

It is unquestionable that the main ADR methods used in Tanzania comprise arbitration, reconciliation, and mediation. In commercial disputes, arbitration is a

common choice, particularly in contracts facilitating inward foreign direct investment or other commercial activity in Tanzania. Virtually, all agreements between foreign investors and state authorities or local companies contain an arbitration clause. In addition, arbitration clauses are regularly inserted in domestic commercial agreements, as a growing number of parties to commercial agreements are beginning to recognise the advantages of arbitration over litigation in domestic courts.

However, domestic arbitration under the Arbitration Act (Cap 15 R.E. 2002) is often conducted inefficiently and there is a possibility of delaying tactics by resistant parties. Reconciliation and meditation are binding once the mediator has recorded the settlement. The most key questions outstanding to-date are – "*Does ADR form part of court procedures or does it only apply if the parties agree*? *Can courts compel the use of ADR? It can be said that the local courts encourage parties to use ADR and in some cases parties can be compelled to use ADR*? Where reconciliation, mediation or other similar ADR procedure is ordered by the court, such procedure, with the exception of arbitration, must be conducted in accordance with any directions issued by the Chief Justice (*Order VIIIC (1), CPC*).

Under the High Court (Commercial Division) Procedure Rules, where the Commercial Court directs the parties to submit to mediation, the court must appoint a mediator who, in turn, must set the date for the first mediation session within seven days of appointment. The registrar shall be the Chief Executive of all the VLC and WT, responsible for estimates and expenditures, and advises local authorities on any matter regarding the functions of the VLCs and WTs in their respective areas of jurisdiction.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Findings

From the foregoing field survey conducted involving the respondents identified under the methodology section above in light of research questions and objectives, all the respondents at all levels commonly shared the opinion that there is a general ignorance on the forms and procedures of the ADR system among the public members and even among the offices/staff responsible to implement the system in Bagamoyo District. The majority of the respondents indicated a general lack of knowledge about where to go or where to start the process of dispute settlement, the respective parties finding themselves in court while seeking justice. It was revealed that apart from mediation, arbitration and negotiation forms of ADR, the other forms and the advantages of this system (ADR) are either partially known or not known at all. Surprisingly but alarmingly, testimonies from the respondents at court level and higher levels such as among the prominent lawyers who have been working on land dispute cases/matters indicate a general lack of knowledge on ADR even among the provincial administration officials, especially chiefs.

The reviewed literature established that globally ADR has been extremely successful in settling of disputes such as labour disputes, with variations between and within countries, subject to certain conditions including knowledge, cultures, traditions, norms and values as well as the inherent state governing policies and laws or regulations. While in many countries, the ADR system remain widely unknown and less practiced, in other countries, the success in its implementation has made the land

institutions to form commissions to actualize the application of ADR in land dispute resolution in that particular country, a good example being the Republic of South Africa (RSA).

It is further documented that locally, there little research has so far been done to assess/evaluate how the ADR system has been functional and how its uptake should be improved. One of the possible reasons for its limited applicability and low research is the shortage of funding from the government of Tanzania. Its effective practice is possible if there is in place at all levels knowledgeable, skilled and motivated personnel to translate its principles into correctly both in theory and practice, but as experience may confirm, the training of staff on ADR issues is expensive and that is why it is seldom done.

As came out from the reports given by the respondents in the study district, and most ADR service providers are private practitioners, from a range of professional backgrounds, but who may or may not be accredited by or linked to some of the large ADR organisations or professional groups. There is also no consistent and accessible quality assurance from the ADR practitioners.

In terms of enforcement mechanisms, the research findings also revealed that in Tanzania as a whole, there are laid down land dispute settlement machineries which at all falls have legal backup. While the rationale for the establishment of such machineries is to the effect that anyone who claims an interest over land has to knock the doors of the judicial holy temples for the redress, the opportunity has not been used as anticipated and wished. The respondents of all types acknowledged that the

laws applicable in Tanzania with respect to land matters, particularly those vesting land dispute settlement machineries with force and validity have been examined and reviewed but not to the extent that they can be easily interpreted and translated into practice by everyone who is given chance to use them. This is a legal construction and implementation gap, calling for more concerted measures or actions to improve the situation.

From the legal point of view (albeit with no conclusive intimation), in real world situation, land dispute settlement machineries through ADR in the study district and Tanzania at large seem to be either inaccessible or accessible to a highly limited degree. This is why the likelihood of persistence of chronic disputes and emerging ones to remain un-resolved through ADR between/among the individual members of the society is high.

When it comes to the issue of strengths, the reviewed documents have been found revealing that the ADR mechanisms/system has been introduced in 1994 through the Government Notice No.422, which amended the first schedule to the Civil Procedure Code Act (1966). One would have expected that this period is long enough to warrant its popularity or familiarity in the public, as it already an inherent component of the country's legal system. Unfortunately, this is not the case. One of the reasons for the partial practice of this system in Tanzania is that still the country is not a signatory to any treaties relating to the issue of ADR through mediation. The country's domestic mediation legal framework is not based on a treaty such as the UNCITRAL Model Law on International Commercial Conciliation (2002). Moreover, Tanzania is not a member of the European Union (EU), this is why the Directive 2008/52/EC on certain

aspects of mediation in civil and commercial matters is not applicable. However, it is important to take note that Tanzania has been a party to treaties that provide for mediation or conciliation such as the Convention on the Settlement of Investment Dispute between States and Nationals of Other States of 1965 since 17 June 1992 and to the Multilateral Investment Guarantee Agency of 1985 since 19 June 1992.

6.2 Conclusion

Upon reform of land laws in 1999 following the National Land Policy of 1995 the new system for adjudication on land disputes aimed at adopting a procedure which is not tied to legal technicalities and that which is not strictly bound by rules of practice or procedure but which aims at delivering substantial justice was introduced to encompass some forms of ADR. However, the limitations related to low popularity of the ADR system, shortage of funding to support research on, and training on ADR application matters, reluctance or negligence of those informed about ADR to use the opportunity as allowed by the Law, and subjectivism in decisions made by the courts when passing rulings, make the effectiveness of and motivation for the ADR system remain low.

Generally, this study has depicted that despite the specialized court system for land disputes settlement in Tanzania, there is no distinct legal regime for use of ADR at all levels of land dispute settlement machinery and therefore there is an urgent need for taking more concerted measures for justice maintenance purposes on land matters. The only method of ADR in use at the High Court level is mediation through court annexed mediation like in any other civil cases though there are no procedural rules guiding the same, making practitioners at regional, district and lower levels face

difficulties in applying the system. Negotiation is rarely used where parties to the dispute opt to resolve the matter out of court and then file a deed of settlement in court, and this raises concern about the settlements for made for the disputes reported at tribunal or court level.

6.3 Recommendation

Given the reported study findings and the literature review on the lessons learnt from other studies in Tanzania and beyond, the following recommendations are worthy to consider:

Need for adoption of community ADR model

This model represents a combination of a high degree of regulation and/or government support with a decentralized approach. With this model, justice is more likely to be realized due to increased accessibility to the general public through community-based ADR organizations and other humanitarian organizations (e.g. those targeting protection of the rights of refugee and women), community oriented government-sponsored legal centers, legal aid and the police. Working in these institutions are the ADR practitioner volunteers, individuals formally employed by the community ADR organizations as well as freelance mediators and arbitrators who are engaged on contract basis. The advantage of this model is that typically the disputants do not pay for the service, and where ADR services are not volunteered, the costs are carried by the government. This will significantly improve ADR uptake in land disputes settlement.

Raising ADR awareness to the public

Awareness of the existence of the different ADR forms to the various stakeholders and their various advantages and the disadvantages is paramount. There should be a land owners and adviser awareness campaign to enhance understanding of the various ADR schemes. For this to be achieved, the following are the ways in which public awareness of ADR could be enhanced:

A high profile public promotional campaign: The campaign would need to be a continuous one since most users of ADR services tend to believe that they are one-off users who may never again have a significant land dispute. The promotional campaign should specifically target those people who seem to be regular users of the justice system including National and County government agencies and the public. Some of the ways through which the promotion can be facilitated include the following: (i) development information materials about ADR, explaining various sorts of ADR and nature of the services provided through each; (ii) developing a handbook setting out the advantages and disadvantages likely to be encountered in taking particular sorts of disputes to ADR; and (iii) developing other information, educational and communication (IEC) materials such as pamphlets, leaflets/brochures, videos, and booklets setting out people's basic legal entitlements in relevant areas.

Furthermore, (vi) in order to create confidence in these alternative mechanisms, there is a need for this information to be spread through organized seminars, articles in relevant publications and Arbitrators journals and magazines and other dispute resolution publications.

In addition, (vi) Arbitrators/mediators/facilitators/adjudicators and experts offering ADR services on their own, can create awareness especially in the rural areas by talking to and encouraging their clients and the general public on the use and the suitability or appropriateness in resolving their land disputes through off-court mechanisms;

Establishing a Central Information Access point: There is a need for considering creation of a central access point for information about, assessment and referral to appropriate ADR services. This includes having a well-promoted information and referral hotline. To achieve this, a statutory requirement for lawyers to provide information about ADR to their clients and for courts to provide information about ADR to all prospective applicants is necessary. The establishment of a national ADR information network to enable service providers to share useful practical information about dispute resolution techniques having regard to the needs of particular groups in our society is also crucial.

Having a Special Department for Dispute Resolution

The National Land Commission should establish an ADR Service Department charged for executing application of ADR mechanisms in settling land disputes at different levels. This department should be manned by a trained and qualified arbitrator, negotiator and adjudicator and so on in line with the requirements of the Chartered Institute of Arbitrators, Kenya Branch. The Department should have the capacity to monitor and evaluate the progress made in each dispute under resolution in order to ensure expeditious resolution. The Department should be linked with ADR centers established (if already) or to be established at the County level (if not yet).

This will enable more people to have access to ADR services at low costs. However, as mentioned above, the public needs to have been highly informed and sensitized on the advantages of each form of the ADR for them to seize the opportunity as they wish.

Capacity building and Quality assurance

Consistent and accessible quality assurance from ADR practitioners will also been needed to be ensured in order to enhance ADR uptake. This requires taking into account (a) the urgency of having specialized information for disadvantaged or marginalized communities including indigenous peoples and people from other cultures; (b) training of front line practitioners at village, ward and district level on matters relating to correct interpretation and use of ADR mechanisms in their areas of jurisdiction; this will enhance the quality of the services being delivered and therefore the demand from the public for ADR services, increase ADR application initiatives and the integrity of ADR service providers meanwhile reducing unnecessary litigation issues at tribunal and court levels.

In other words, many arbitrators and mediators should continually undergo training in the ADRs to equip them with the necessary skills needed in conflict resolution using ADR. On that note, there is also a need for academic institutions such as Universities and the Chartered Institution of Arbitrators (OUT Branch) and the Mediation Training Institute (MTI) Tanzania to introduce and encourage part time courses for individuals on ADR. Training in communication skills to the provincial administrators is crucial as it is one of the ingredients for effective dispute resolution. This could be done through seminars and postgraduate diploma. Informal training is also important.

Mediation as a key process and strategy in ADR has been explored in-depth in this study and the opinion givers among the key respondents suggested for the need for extensive and more inclusive training on mediation and arbitration and other ADR forms for effective community ADR especially with regard to land issues. Standards for ADR should be developed based on the framework described in this research, comprising guidelines for developing and implementing standards, a requirement for a code of practice which takes account of essential areas and, where applicable, the enforcement of such a code through appropriate means. Developing ADR standards should be an ongoing process and recognize the diversity of ADR.

ADR programmes also need to be developed to encourage practitioners to work with members of minority and marginalized groups in order to develop their experience with the ADR application processes which seem to be common and acceptable to those groups and the community around them.

Legislation

There is need forlegislations in place, which will specifically ensure and encourage ADR usage to resolve land disputes beforehand to supplement the only existing ADR law, that is, the Arbitration Act. This is proposed because it is high time to have in place appropriate filtration of land disputes that unnecessarily end up in courts, thus decongesting the same. This has potential to allow the use of the ADR mechanisms in order to achieve expedition in resolving land disputes.

ADR Success Stories

Spreading the success story of ADR from those who have already applied it is important, and ways to achieve this can be considered in common or in different

dimensions depending on the social-cultural context in which they are purported to be maintained. This will encourage those who have never experience the use of ADR to give it a try and in the long run will be popular hence its application can be enhanced. This should go hand in hand with better information spreading ways and increased publicity of ADR schemes as well as improvements in the schemes practice, to meet the standards of fairness, efficiency, and inclusiveness.

Increased Budget Investment on ADR promotion and Enforcement: Due to unpopularity of ADR and the limited capacity of front line staff and other officers to put it into practice, financial investment is needed from the government and allied development partners to support advocacy, sensitization and training of stakeholders at different levels. Otherwise, the predetermined objectives will not be achieved due to limited knowledge; motivation and commitment both in the community and legal persons purported to see the relevance of ADR and using it effectively.

Effective Accreditation of ADR Practitioners: Those responsible for accrediting ADR practitioners should: (a) clearly define the level of competence and responsibility recognized through the accreditation; (b) use valid and reliable assessment procedures; (c) provide monitoring, review or audit processes; (d) provide fairness to those seeking accreditation; (e) ensure that accreditation processes are transparent and publicly available; and (f) provide consistency and comparability with similar accreditation regimes.

Ensuring reliability and enforceability of ADR mechanisms legalized

Important and urgent also is the need for ensuring that local mechanisms are reliable and trustworthy by guaranteeing that there is no favoritism and corruption as regards

to land allocation; strictly adhering to the laid down regulations governing land administration procedures such as land allocation and taking appropriate harsh action to corrupt individuals will come in handy in ensuring transparency as far as land matters are concerned. Co-ordination within and between the various land institutions should be encouraged or enhanced where weak. Easier enforceability of ADR agreements by the disputants should be encouraged. This can be done by making outcomes legally binding for example by putting into writing the outcomes of mediations; and Better funding provision from the National government especially for the volunteers who offer ADR to the rural communities.

6.4 Areas of Further Research

This can be taken as a special recommendation even though it appears on a separate section. What is intended to be meant here is that ADR is wide field, requiring further studies in such areas as follows in Tanzania:

(i) Studies seeking to understand and compare between ADR and Litigation as a means of settling land disputes;

(ii) Studies looking at the Role of Politics and Historical Injustices in Land Disputes/Conflicts and how lessons learnt from this could inform policy and law or regulations review and enforcement agenda improvement

(iii) Research on the perceived and actual added values or benefits if any or demerits of the ADR system in different socio-economic and district council governance systems.

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WEBSITE

http://cdn.grin.com/images/brand/1/grin_fb.png

http://cdn.grin.com/images/brand/1/grin_twitter.png

APPENDICES

Appendix 1: Questionnaire for Ordinary People

1. Where do you live?.....
2. What is your occupation?.....
3. Where is the place of your work……
4. Do you know what ADR is? .....
    a. Yes……..
    b. No……..
    c. If yes, have you ever practiced or participated in resolving land dispute in

    Tanzania?.....
5. What are challenges of ADR in resolving land dispute in Tanzania?.....
6. To what the extent ADR in resolving land dispute in Tanzania…….
7. Do you know the enforcement mechanism deals with ADR in resolving land dispute
8. What in Tanzania?……should you do if you think the enforcement mechanism are not performing their duty effectively?……
9. What are the factors that contribute to the strength of the legal framework for ADR in resolving land dispute in Tanzania?
10. Do you think the weakness of the legal framework for ADR in Tanzania in resolving land dispute in Tanzania can be reduced?.....
    a. Yes……

b. No……

c. If yes, explain how it can be solved?……

d. If no, why?

Explain……

……

e. Give your comments on the plans to reduce the weakness of the legal framework for ADR in Tanzania in resolving land dispute in Tanzania…….

11. How do you think the institutional framework for administration of justice in land matters should help you in resolving land dispute in Tanzania?

Appendix 2: Questionnaire for Leader in Government Institution

BACKGROUND

1. Name of office…….

2. Ministry/Organization……..

3. Position……..

4. Profession……..

RESOLVING LAND DISPUTE

5. Do you know what ADR is ……...?

(a), yes……. (b), no…….

6. If yes, have you ever faced with problem of negative impact during resolving land dispute in Tanzania……..?

7. If you have been facing with problem of negative impact during resolving land dispute in Tanzania, to what extent……..?

8. At what area do you normally experience the problem……?

9. Does this problem affect you……..?

a. yes……b, no……

10. If yes, how does it affect you? Explain……

11. What do you think are the causes of weakness of the legal framework for ADR in resolving land dispute in Tanzania……?

12. Do you think this problem of ADR in resolving land dispute in Tanzania can be solved……?

a, yes……b, no…….

13. If no, why? Explain…….……

14. If yes, explain how it can be solved……

15. Is there any plan and strategies by the government to reduce /solve the weakness of the legal framework for ADR in resolving land dispute in Tanzania

a. yes……..b, no…….

16. If no why?.....

17. If yes, what are the government's plans to reduce/solve the problem facing ADR in resolving land dispute in Tanzania ……

18. Give your comment on plans to reduce problem facing ADR in resolving land dispute in

Tanzania.....

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Appendix 3: Questionnaire for Members of Institutions

1. Have you ever heard used laws governing ADR in resolving land dispute in Tanzania?
2. Is the court responsible for resolving land dispute in Tanzania through ADR?
3. Do you think our country needs more strict laws in resolving land dispute in Tanzania?
4. Are institutions doing its best to control resolving land dispute in Tanzania?
5. Is the law governing ADR in resolving land dispute in Tanzania cause institution failure?