

ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS FOR LAND DISPUTES

Institution of Surveyors of Kenya

1. Background and context

1.1. Introduction

The pivotal role of land in the different aspects of our lives cannot be over emphasised. Issues relating to land administration, access to land, land use planning, restitution of historical injustices, the institutional framework and land information management system have always presented a challenge in land management. However, resolution of land administration and management issues is a critical requirement for sustainable recovery and growth of any economy.

Land disputes related to access, use and control of natural resources are common

in all parts of Kenya regardless of the tenure system. These land disputes have far reaching negative effects. Their resolution in the most effective and efficient way is a critical requirement for sustainable economic growth. It is also vital for minimizing conflicts and tensions between and among various communities and for contributing to national unity.

The Constitution under Article 159 (2) (c) requires the judiciary to encourage the use of Alternative Dispute Resolution (ADR) mechanisms in resolving issues including land matters. It further requires

the National Land Commission to encourage the application of traditional dispute resolution mechanisms in land conflicts. The National Land (NLP) mandates the Community Land Boards to use as much as possible ADRs mechanism such as negotiation, mediation and arbitration. ADR mechanisms are preferred due to their advantages which include, speedy resolution of disputes, flexibility, less technicalities, cost effectiveness, ability to involve experts, privacy, saving on courts time, among others.

1.2. Problem statement

Most land conflicts have seen their way to the court arena for resolution. This playground has overtime been characterized with foul play, corruption, inefficiency, delays, technicalities and solutions that mainly leave disputants as enemies at family and community level. Land disputes involve not only technical matters but mainly complex issues that relate to traditional and customary practices in the management and administration of land. The complexity calls for a change in the approach for resolving land disputes and ADRs are recommended as a first line approach.

1.3. Policy Objective

The policy will guide in advocacy and awareness creation on ADR and formulation of strategies for rolling out and implementation of ADR at County levels.

1.4. Situation analysis

Alternative Dispute Resolution (ADR) is an “umbrella” term that refers to various methods used to resolve disputes without resorting to litigation. It as a term that refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts. Use of ADR mechanisms for land dispute resolutions is not new. In management of community lands where relationships and harmonious existence between community members is critical, ADRs are the most effective methods to be employed. The ADR mechanisms include negotiation by two disputing parties with or without a third party, mediation by a third a party and arbitration where a third party awards a solution.

Most countries employ ADRs at certain

levels of dispute resolution that include traditional and semi formal approaches. In matters land, semi-formal bodies are established through legal provisions to help manage land. They include liaison committees, management committees, land control boards and land dispute tribunals. Though semi formal methods in use apply some form ADR they have failed to serve the land sector effectively and are accused of being bureaucratic, corrupt, tedious, time consuming and some lack capacity to perform.

On the other hand traditional institutions like elders’ courts, elders committees, neighbourhood groups and chief’s institutions use customary approaches to address and settle disputes within families and communities. They are

said to be more effective and are said to be adaptive to changing times and thus combine both traditional and modern approaches. ADRs especially those that incorporate traditional practices though widely and informally used face several challenges. Challenges include changing times and societal ways of life, use of technology, unequal bargaining powers, enforceability challenges which at times require court action, lack of a precedent system, lack of expertise among other challenges. However, despite the shortcomings of ADRs, they are widely in use in use; and if efficiently and effectively applied, they will relieve the burden of not only our courts but also of the disputants since they are meant to complement the court process.

2. Scope of the ADRs on land disputes

In Kenya ADRs are in use in all categories of land (public, private and community). They help resolve disputes related to: boundary, succession, multiple sales, un honoured sales, crop damage, access to water and grazing grounds, access to and land claims, trespass, human wildlife conflicts, family feuds extra. Issues that can be handled through ADR differ in scope in each land category.

Under community lands, every dispute can be subjected to a form of ADR whether through negotiation, mediation or through arbitration. On private land ownerships, disputes that arise on interests derived from adjudication of trust/community lands where issues of family land, matrimonial property, succession, use rights, general boundaries compulsory acquisition etc arise are best handled through ADRs. As for public lands, ADRs will be used to resolve dispute related to access and use of natural resources, rights created through settlement schemes where general boundaries are in use, matrimonial property rights and succession issues arise. Moreover, in urban areas, though ADRs are limited by virtue of use of accurate survey that requires exert determination on boundary issues and where properties are more for investments, ADRs are useful in the dispute arising in the informal settlements where land is given by settlement elders, chiefs and managed through neighbourhood groups and community leaders.

Considering that about 70 % of the country is not adjudicated with land communally owned and used; and that the adjudicated private lands still carry some elements of communal ownership and rights claims, ADRs have a very wide scope in Kenya. The use of general survey and community leaders during adjudication makes ADR a sustainable tool for resolving not only boundary disputes but land claims. It is only in urban areas and in limited land interests determined through fixed survey that the use of ADR may not be an appropriate mechanism. For their wide geographical coverage ADRs operations should be promoted and supported throughout the country.

3. Policy Statements

3.1. Preferred ADR mechanisms for land disputes

Though the National Land Policy recommends negotiation, mediation and arbitration methods, literature study and field research revealed that ADRs applied on land disputes resolutions mainly favour mediation and arbitration mechanism against negotiation. Negotiations operate well at family and individual level where common custom and beliefs may contain the emotive nature of land matters which may render negotiations unfeasible. In this circumstance, mediation, a form of ADR which incorporates conciliation is more favourable. On the other hand, a quasi judicial form of ADR is a suitable mechanism of handling disputes which have not been resolved at mediation level before taking them to a formal court and hence recommended. Depending on the circumstance, mediation and arbitration may be compulsory and awards in mediation may be binding. However, the application of traditional practices in mediation makes its awards enforceable. It is therefore recommended that mediation and arbitration be made compulsory as the first instance forums of land dispute settlement mechanisms.

Policy proposal: while allowing negotiation to flourish on its own under its own favourable conditions, the Government shall endeavour to promote mediation and arbitration as the preferred mechanisms for resolving land disputes both at national and county level.

3.2. Location of ADR

By customary approaches, ADRs are in use at family, clan and at community levels. From a modern set up that uses administrative boundaries for governance ADRs are in use from a village set up to provincial level with a hierarchal process of resolving disputes. However, the basic ideology and principle in ADR use especially from a customary approach is the establishment of truth behind each issue at hand, conclusive finalisation of matters and reconciliation of the disputants. Mediation is proposed at village level and if this process with all its advantages cannot finalise and reconcile parties then arbitration occurs at sub-county level. After these two stages it is proposed that appeals are done at High court for the due process of to take place.

Policy recommendation: The government shall put in place mechanism to establish and recognise ADR institutions at village level for mediation purposes and arbitration tribunals at sub-county levels. Unnecessary levels of appeals shall be discouraged so as not to lose the objective of having ADRs in place.

3.3. Implementation of ADRs at County level

ADRs are currently in use for land administration and management However, the mechanisms used are not consistent, and there are no standards or enforcement mechanism. To improve, standardise and operationalise ADR as tool for land administration, the government shall:

- a) Take an audit of all ADR mechanisms applicable in the country. This shall be a joint activity between the government, professional bodies and civil society to save time and cost share.
- b) Without discouraging negotiation, the government, shall come up with an ADR model that allows few levels of dispute resolution to lessen unnecessary appeals that add no value. The model shall have a village level and sub-county level where mediation and arbitration apply.
- c) Initiate a purposeful public awareness campaign on ADR.
- d) Develop a legal framework for implementation of ADR that shall:
 - i. Standardisation of process
 - ii. Give jurisdiction
 - iii. Direct on enforcement of ADRs awards,

- iv. Give affirmative action for ADRs to be a first line of approach for certain land disputes
 - v. Direct on appealing procedures
 - vi. Direct on period of office and size of membership at village level
- e) Initiate mechanism for having Village committees established in all villages and arbitration tribunals at sub-county level.

3.4. Capacity building

Presently, land disputes are being undertaken by committees and elders with no training on ADR and a public that has little understanding on land matters. To effectively implement and sustain use of ADRs, the government shall:

- a) Undertake joint stakeholders' public education and awareness campaign on the use of ADRs. This campaign should be programmed as a continuous activity by all actors.
- b) Develop training and reference manuals for use by ADR actors and those undertaking public awareness creation and education on land matters.

3.5. Institutional arrangements

For the operations and administration of ADRs, several institutions shall operate.

The National Land Commission (NLC) that by law is mandated to encourage use of ADRs for dispute resolution shall at County level in conjunction with the County Land Boards undertake the overall administrative responsibility over ADRs at village and sub-county level. The NLC shall:

- a) ensure that capacity building is continuous, financial support is availed, record keeping and support systems are in place, there is adherence to land policy values and principles given in the Constitution.
- b) participatory approach in the management of ADRs and in ADRs operations.

However, for effective supervision and in line with the nature of ADRs operations at village level, the local chiefs shall oversee the day to day operations of ADRs.

3.6 Financial involvement

The proposal to have ADRs at the grassroots' level under village establishment will lead to having so many bodies that will incur enormous administrative and operational costs. However, ADRs have been operating at this level with and for some without the financial support of the government. For recognised and harmonised use of ADRs the government shall:

- a) Undertake a study on how traditional ADRs have been managing and a cost benefit analysis. The studies should inform on the size of the villages, the number of person at each village elders committee, the administrative costs and the financial support required to operate ADRs.
- b) Propose affordable establishment of ADR at grass root level (village committees) taking into considerations the cost involved and the nation's financial resources to undertake land administration.
- c) The study should take into consideration that traditional and most village committees exist on the premise of voluntary services. Whether or not they are purely voluntary, the spirit of community service and patriotism that they uphold should not be killed when formalising ADR use in Kenya.



Institution of Surveyors of Kenya,
 10th Floor, Reinsurance Plaza, Aga Khan Walk,
 P.O. Box 40707-00100, Nairobi.
 Tel: +254-20-313490, Fax: +254-20-2214770
 Mobile: +254 724 929737/+254 737 929737
 Email: info@isk.or.ke
 Website: www.isk.or.ke