Party autonomy in mediation: Does it matter?

A. Introduction

Alternative Dispute Resolution (ADR) has, for a long time, been viewed as the omnibus to the achievement of Sustainable Development Goal 16 on promotion of peace, justice and strengthening of institutions. Ultimately, these mechanisms are poised to increase access to justice by vulnerable populations; fast, flexible and cheap resolution of disputes and preservation of relations after the resolution. This is as compared to court processes which are more acrimonious, lengthy, technical and expensive in terms of time. In ADR, it is possible for parties to represent themselves or have people who are not entirely trained in legal procedures, represent them. There is also the obvious advantage of having adjudicators of disputes who are versed in the industry specific to the dispute rather than judicial officers in courts who decide matters on elements of the law and the evidence adduced before them.

The hall mark of all forms of Alternative Dispute Resolution (ADR) is party autonomy. Under this principle, parties derive the power to make choices, geared towards resolution of the dispute. Mediation is not an exception. This article will seek to analyse what this principle entails, the important role that it has in mediation and the disadvantages that it can bring to the resolution of disputes through mediation. It will be up to the reader to inference whether or not this principal is vital, and come up with suggestions on how better we can entrench mediation in our dispute resolution processes.

B. What is party autonomy?

Parties who opt for ADR as a primary or secondary point of call for the resolution of their disputes exercise free will on whether to engage or not. This will is exercised either at the time of contracting or after the occurrence of the dispute. At this stage, parties nominate the ADR mechanism of choice, the scope of disputes to be referred to the ADR process, the procedure for the appointment of the third party to assist in the resolution process, timelines and procedures of the process and the extent of how binding the outcomes will be to the parties. Some even go to the extent of nominating the language and venue of these proceedings.

In the case of mediation for example, parties will agree on the mediator, scope of disputes to be referred to mediation, venue, language, rules of the mediation (if any), and the extent to which the mediation settlement will be binding on them. The importance of defining the scope of the dispute is whereas most disputes can be resolved through mediation, some fall squarely within the mandate of the courts. Examples here would be issues pertaining fraud and sexual offences, amongst others. It would be entirely detrimental for parties to engage in a mediation, only for the mediation settlement to be deemed illegal as it either addressed matters outside the scope or as per the law and public policy in Kenya, such matter is a preserve of the courts.

C. Party autonomy in the context of primary mediations

'Primary mediations' are where parties engage in mediation proceedings as the first point of call towards resolving a dispute. This would either be in the context where it is part of the contractual terms agreed upon, or in very unlikely circumstances, agree to pursue mediation as their dispute resolution forum of choice after the dispute has been declared. This is as compared to 'secondary mediations' where parties, upon the declaration of a dispute, approach the court for resolution and while in those proceedings, opt for mediation. In the Kenyan context, the latter is most common.

Considering the circumstances within which primary mediations are carried out, there is always the assumption that both parties have goodwill to have the dispute resolved within the shortest time possible. It is this willingness that culminates into active participation in the appointment of the mediator, the proceedings and the enforcement of the settlement agreement. To summarise it, party autonomy is not a fuss in these type of proceedings in mediation.

D. The practice in Kenya

I. The legal framework

As enumerated above, court annexed mediation occurs where parties first, refer their dispute to courts for resolution and in the course of those proceedings, opt for mediation. In Kenya, the Court-Annexed Mediation (CAM) programme derives its legality from the Constitution of Kenya, 2010; the Civil Procedure Act (Cap. 21 of the Laws of Kenya)

(CPA), the Civil Procedure Rules, 2010 (CPR); the Civil Procedure (Court Annexed Mediation) Rules, 2022 (CAMR); and the Law Society of Kenya (LSK) Code of Standards of Professional Practice and Ethical Conduct (CSPPEC).

Article 159 of the Constitution empowers courts, tribunals and bodies exercising quasi-judicial power to promote alternative forms of dispute resolution. Pursuant to the provisions of Section 1A of the CPA requires that courts adopt expeditious resolution of civil disputes. Parties and their advocates are required to adhere to the directions of the court and utilize judicial time in an effective manner. Under Order 11, Rule 7 of the CPR, courts are required to hold pre-trial conferences in all matters to plan on the trial and determine the most expeditious way of disposing the trial. It is on this basis that courts can refer a matter to alternative dispute resolution.

Order 46, Rule 20 of the CPR is more profound on matters ADR. Courts may, on their own motion or upon request by either party, adopt and implement an ADR mechanism. This power includes power to make directions that facilitate that ADR mechanism. It is on this yardstick that Rule 5 and 6 of the CAMR provide for courts referral of any dispute to mediation and the screening process, respectively.

The CSPPEC comes in handy in addressing issues of ethics and integrity for practicing Advocates. In the process, it addresses the issues envisaged under Section 1A of the CPA, by requiring advocates as officers of the court to first, adhere to the directions of the court and second, promote efficient and flexible measures to make good utilization of judicial time. Part 8 of the Code stamps the application of the Code for Advocates in both adversarial and non-adversarial proceedings. ADR proceedings will lie in the latter. This is to the effect that Advocates are tasked with ensuring that their clients are aware of the possibility of resolution through ADR mechanisms, and where parties have a buy-in, pursue those mechanisms fully.

The analysis of all the provisions above, point out to circumstances that at all material times in proceedings in court, a judicial officer may by their own motion, refer a case they are adjudicating to CAM. A party to a court case may also, at any point before judgment is rendered, move the court to have the matter referred to CAM. The opposing party, if disagreeable, is left at the mercy of the court or the screening officer to determine the

suitability of the dispute being resolved through mediation. Though Rule 6 of CAMR provides for the guidelines for screening of disputes, the factors enumerated therein (such as the age of the case; the value and nature of the subject matter; and generally, whether the case is one which would benefit the parties more if referred to mediation) are subjective. A screener is likely to develop certain biases or assumptions which could be detrimental to the method adopted for resolution of the dispute.

II. Where do the courts stand?

This part will analyse some pronouncements of superior courts in Kenya on this cloudy issue, with the aim of establishing the principles applied and consistency, if any. The outcome will inform one on what factors are judicial officers always in the look out for, before either referring a matter to CAM, the reactions to botched mediations for non-participation or passiveness of parties in CAM proceedings.

In a ruling in the High Court in *Geoffrey Muthinja & 4 Others v Samuel Muguna Henry & 2 others* [2022] eKLR the court observed as follows:

> "Where, as here, the parties are bound by their constitution to handle their dispute in a particular way, they, while exercising party autonomy, chose to deny and oust the jurisdiction of the court to intervene between them. That choice must be respected by all including the court."

Perhaps in a more authoritative language, the Supreme Court in *Modern Holdings (EA) Ltd Vs Kenya Ports Authority* (2020) eKLR acknowledged ADR as a party's way of waiving to enforce a right and at the same time, assist a party to enforce their rights expeditiously. This is by far, a big truth as parties will nominate ADR mechanisms to have control over time, cost and procedures in the resolution of their dispute.

In the Court of Appeal in the Geoffrey Muthinja case (supra), the Court was of the opinion that where parties have the conduct of frustrating the method of dispute resolution, in this case mediation, the jurisdiction of the court cannot be invoked until such mechanism is exhausted.

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of

> last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.

This doctrine has continued to form part of the Kenyan jurisprudence.

The doctrine of exhaustion

This doctrine was comprehensively dealt with by a five-Judge Bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The Court stated as follows at Paragraph 52:

> The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a 5 party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.

In *Speaker of National Assembly v Karume* [1992] KLR 21 the Court of Appeal had the following to say on the doctrine of exhaustion:

> Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

E. Conclusion

The inference from the decisions above is that courts have only invoked their jurisdiction where parties have not exhausted the mechanisms nominated for the resolution of their disputes. Further, parties who attend the ADR forums to tick a box or frustrate the process are at a loss as courts will require full cooperation before invoking their jurisdiction. This

is not only a big win for ADR, and in particular mediation, towards coming up with a more cohesive society.

The Geoffrey Muthinja case (*supra*) is a classic one, underpinning the entire role of ADR in our society. Most interestingly, the parties are disputing over the running of a religious organization and in a great choice of words, the judge quotes 1st Corinthians 6:1:

> "If any of you has a dispute with another dare, he takes it before the ungodly for judgment instead of before the saints?" (NIV)

Party autonomy means that a party cannot, after the occurrence of a dispute, renege on their initial commitment. Where a party seeks to do so, courts will always decline and refer them back to that process. It also gives courts limited intervention and advances the freedom of parties in contracting.