Lecture given to Strathmore University: 2004

THE ROLE OF LEGAL ETHICS AND JURISPUDENCE IN NATION BUILDING

"MEDIATION – A SOLUTION FOR THE LEGAL SECTOR CRISIS"

INTRODUCTION

The business of Government and Good Governance at that, is no easy task anywhere in the world. Kenya is no exception and with the advent of Multi Party Democracy in 2002, Kenyans have waited with baited breath and in optimistic anticipation of the much wanted and often promised reforms and changes that true democracy should bring.

The oft recited saying of "Rule of the People by the People for the People" rings hollow. Post KANU we looked forward to being ruled by the New Guard and indeed accepted that democratically elected Members of Parliament would do the ruling. However any suggestion that the New Government would be doing this for our benefit erodes visibly in front of our very eyes day by day as the juggermant called Government sinks slowly into a morass of indecision and contradiction. If any energy is being displayed it is usually negative and spent on endless, meaningless, tribal posturing and politicking.

Politics is all well and good. In fact Kenyans are past masters and could teach the world a thing or two yet the force and bravado of the sycophancy demanded and given by and to our politicians makes mockery of the tenets of the Rule of Law and Separation of Powers of the Legislature, the Executive and the Judiciary. Parliament should make our Laws, the Judiciary interpret and enforce them and the Executive administer them.

So goes the theory yet the edges between these powers are so blurred as to be almost indefinable.

No one of these arms of Government is superior or more powerful than the other save that where there is excess, it is for the Judiciary to rein in and demand the Executive exercise

control. Without a strong Judiciary and the Rule of Law, the other two arms of Government remain unchecked often leading to the contemptuous treatment of the populace.

A Strong Judiciary

Despite the recent turnover and spring clean of our judiciary amongst much fanfare and public reassurance, the fact remains that the hopes and espousals of our legal and judicial persons in control are hopelessly over optimistic and quite incapable of execution.

Indeed doubt must surely have been cast over the very basis for the dismissal or resignation of so many judges with the recent reinstatement of the first of the judges to appeal his dismissal, Philip Waki.

Our judiciary like most judiciaries the world-over, is facing a mounting challenge in terms of its credibility, its functional effectiveness, its standing vis-à-vis the other powers of the state, its contribution as a bulwark for the protection of human rights, its rile in promoting a predictable institutional environment in the economic sphere and its obligation to provide a forum for the fair and effective resolution to disputes.

Governments worldwide are embarking on programs of judicial reform to redeem the judiciary's image. This is after recognition of the fact that a judiciary able to solve cases in a fairly and timely manner is an important pre-requisite for economic development.

It has been stated that any judiciary's functional inefficiency causes delay which in turn raises litigant related costs, higher costs in turn impede user access to the courts and thereby damage faith bestowed in a legal system.

It has also been suggested that a judiciary is not consistent with its conflict resolution obligation where it carries a large backlog of cases thereby stifling private sector growth and causing the erosion of individual and property rights.

It is widely believed that lack of timely resolution of conflicts raises costs, creates uncertainty and can obstruct the development of private sector business.

Empirical indicators of our judiciary's functional efficiency paint a very grim picture. The Kenyan section of International Commission of Jurists in a survey carried out between August and September 2003 reported that 68% of the Respondents thought that the quality of decisions by the Court of Appeal was between average and low. Only 17% of the Respondents stated that the quality of decisions made by the High Court was high while 78% rated High Court decisions between low and average. 89% thought that the quality of decisions made by the Subordinate Courts was between average and low. 81% of the Respondents stated that the decisions of the courts at all levels were inconsistent and 51% were of the view that the level of efficiency in the judiciary across different levels since 2000 was average.

As at August 2004, Statistical Returns for the Milimani Commercial Courts, the High Court Civil and Miscellaneous Division and the Chief Magistrate's Courts show at the worst a negative curve as regards disposal of cases and at the best a waiting time of between 4½ and 10 years. The figures below do not take into account those cases that settled or were dismissed before hearing or resulted in default Judgements.

Statistical Returns

In the High Court of Kenya, Civil Division (July 2004)

No of Cases Pending on 1/08/2004	No of Cases filed during the month	No of cases heard during the month	No. of Cases Dismissed	Dismissed under Order XVI	Transferred during the month	Remarks
8,008	207	113	36	Nil	17	4 ½ Year delay

In the High Court of Kenya at Milimani Commercial Courts (August, 2004)

No of Cases Pending on 1/08/2004	No of Cases filed during the month	No of cases decided during the month	No. of Cases Pending on 31/08/2004	Remarks
6,376	139	51	6464	10 year delay

In the Chief Magisrate's Court, Milimani Commercial Courts (August, 2004)

No of Cases Pending on 1/08/2004	No of Cases filed during the month	No of cases decided during the month	No. of Cases Pending on 31/08/2004	Remarks
65,848	1344	645	66547	9 years delay

With such statistics can there by any surprise at the enormous delays that have become synonymous with Kenyan justice? Judges may occasionally be corrupt, lazy, uncommitted to expeditious disposal of cases or just of their depth but mostly they are just overwhelmed with Daily Cause Lists that cannot reasonably be dealt with. Much the same goes for the registry staff, underpaid and overworked and open to any suggestion of additional inducements to do the jobs the Government pays them so badly to perform.

To this scenario, add the lawyers who two time on court assignments, have no intention of getting early hearing dates, revel in many technical objections to cause delay. All the while they expect their patient clients to pay through the nose for all these antics year after year in an average scenario of anything up to twelve years where you are looking at a High Court Case on Appeal to conclude.

Compounding the problem is a huge over supply of Advocates with far too little work. So what do they do? Make work for themselves by pushing disputants into litigation which they should never have entertained in the first place.

In effect, lawyers and the court system suffer from some of the worst press attributed to any profession. Our adversarial system encourages two diametrically opposed and polarized positions. Costs in terms of money and time are invariably totally out of proportion to the subject matter or judgement in dispute. Clients are estranged and

frustrated and indeed unnerved by the arcane practices of our courts and legal procedure. Business and social relationships may be irreparably soured after a bruising court case. Judgements are often meaningless and unenforceable by the time they are delivered, the judgement debtors have long since died, left the country or become bankrupt or untraceable.

Subsidiarity in Judicial Services

The Government is responsible for the delivery of legal and judicial services.

Every member of society is responsible for the common good. A fundamental requirement of the common good is speedy and affordable justice. For a long time already, the state through the Judiciary has undertaken the sole responsibility of delivering legal and judicial services, leaving out individuals and intermediate bodies. The results are far from satisfactory, as the backlog of court cases awaiting hearing show. At times, it looks as if States all round the globe have undertaken an impossible task.

In Kenya much discussion has been held on the Law Reform needed to speed up processes, by establishing small-claims courts without time-consuming procedures, by employing more judges, building more courts, appointing acting judges etc. Little action so far has been taken.

Can the citizenry contribute in this process? Should they not also be parties hand in hand with the Government to help provide an efficient and cost-effective delivery of judicial service?

The principle of subsidiarity suggests that smaller social bodies should be respected and encouraged to contribute to the common good. Only if theses smaller bodies failed, then higher bodies should intervene – as much as possible without absorbing the smaller ones but subsidizing them. Hence the name “subsidiarity”. This concept fosters creativity and shared responsibility. This principle is very congenital with the African tradition of the councils of elders in the clan system. The private sector must play its role in the resolution of our disputes more simply and cost effectively.

This paper seeks to show a response from the private sector addressing what seem inherent problems in our court systems. This response is ADR.

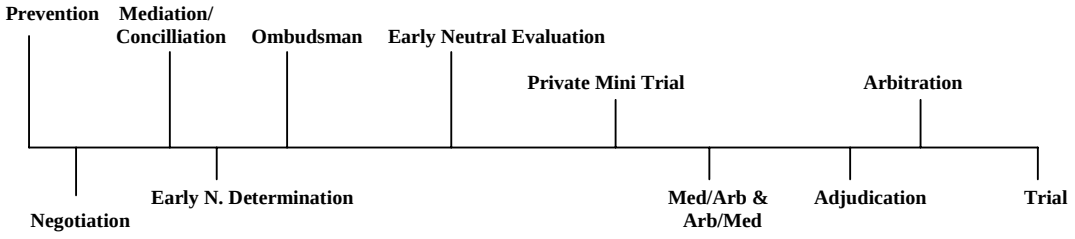
ADR

ADR stands for Alternative Dispute Resolution or sometimes Amiable Dispute Resolution. The legal skeptics are more fond of the epithet 'Another Disastrous Result or an Alarming Drop in Revenue'. It encourages the disputants to take the responsibility for the resolution of the disputes out of the hands of the Judges and Lawyers and back into their own. The different processes require the parties to change their adversarial mind set inherited from the English colonial legal system to an ethos of principled negotiation and away from the positional negotiation stands so prevalent in the courts.

It is indeed ironic that we have all but lost sight of the good attributes of our customary law and traditional courts of elders, the rural system of quick fix practical remedies at little cost, which was as much concerned with preserving village relationships as it was about determining the winner of any dispute. Now we must try and rediscover the virtues of principled dispute resolution in the more formal and complex setting of our highly paced society of commerce, complex relationships and property ownership.

ADR covers any Dispute Resolution Proceeding that is not litigation and many, including the writer would add the process of Arbitration.

The field of ADR offers a spectrum of choices.



As you examine the processes of the spectrum in ascending order from left to right you will find:

1) There is an increasing involvement of a third party in the process.

2) The processes become increasingly formal and legalistic.

3) The potential damages to the relationship between the disputants increases.

4) The process become more expensive.

5) The process takes longer to reach resolution from the commencement of the dispute.

6) There is an increasing focus on the disputants rights as opposed to their interests.

The salient characteristics of the major ADR processes are described.

1. **Negotiation**

Negotiation is a process whereby each party makes agreements with the other party or modifies its demands to achieve a mutually acceptable compromise. It is usually the first step in an attempt to settle a dispute and is sometimes overlooked or by-passed. Negotiation should be principled and not positional and it will by itself, if used effectively often yield positive results. In negotiations, the parties carry out the discussions without any third party involvement and thereof prevents the need for any other process.

2. **Mediation/Conciliation**

Mediation is negotiations facilitated through the intervention of a neutral third party: the Mediator. The Mediator merely assists in enhancing the negotiations between the parties. He does not decide, adjudicate or judge between the parties. He is just a facilitator who helps the parties reach a consensus by listening, suggesting and brokering a compromise. The parties have to be willing to come to some form of settlement. We will look in detail at the process of mediation later.

Conciliation is sometimes used as a synonym to Mediation. However, there is a school of thought that conciliation is slightly closer to the adjudication end of the spectrum and that the role of a conciliator is more active and proactive intervention. Whereas mediation is merely facilitative, conciliation is more evaluative.

3. **Early Neutral Evaluation**

If the parties can be made to see their strengths and weaknesses at an early stage, this may catalyze an early settlement of the dispute. The parties appoint a neutral third party (usually with a legal background) who is supposed to objectively study the respective contentions of the parties and predict the possible outcome if the dispute went to arbitration or litigation. The Parties may then decide their options as to whether to proceed or settle.

4. **Expert Determination**

This is similar to Early Neutral Evaluation but in an overwhelmingly technical dispute, an expert is engaged by the parties to assess the relative strength and weakness of their technical arguments and give his determination of the same. Parties can voluntarily agree to accept this decision as binding. Useful for rent review cases and accounting decisions.

5. **Mini Trials or Executive Tribunals**

This is similar to many of the other ADR approaches but with a provision that Senior Executives from each side submit their contentions before a neutral third party who acts as a judge/tribunal. The Executives so present must have decision-making powers and power to settle. The idea is to ensure that there is direct involvement of the most senior management in the resolution of the dispute and that they pre-play what could initially happen in court. By so doing, they are made aware of the consequences of not settling and preview the likely outcome of a full blooded hearing.

6. **Dispute Review Board (DRB)**

This is an in-situ dispute resolving committee usually established and empowered by Building or Engineering contracts. It is given the jurisdiction by the parties to hear and advise on the resolution of the disputes as they unfold on site. The major difference with other forms of ADR is that the DRB, usually comprising of three independent/impartial experts, is appointed at the commencement of the project. It undertakes regular visits to site and is actively involved throughout the construction period. Decisions and recommendations are made by a DRB on disputes on a continuous basis. A DRB is presently in operation in the Ol Karia Geo-thermal Power Station Project and such boards should be encouraged in large multi-party turnkey contracts. In this way, disputes are defused before they spiral into longer and more complex issues. The process minimizes the possibilities of various issues compounding to large claims.

7. **Med-Arb/Arb-Med**

The name comes from the amalgamation of the words Mediation and Arbitration. The idea is to commence the resolution of the dispute as a Mediation. If the Mediation fails then being a voluntary non-binding process, it may be deemed to be wasted time and costs. The suggestion is that since the Mediator is already aware of the issues he is best placed to arbitrate the matter. Once he becomes an arbitrator, his Award is then binding and enforceable. Even if the Mediation is successful, the parties agreement can then be converted into a consent Award of the Mediator-Arbitrator.

The corollary applies whereby in the middle of a Binding Arbitration, the parties may prefer a win-win solution and agree to settle on their own terms by way of a Mediation Settlement.

8. **Adjudication**

Adjudication applies mainly in building disputes, where a neutral third party gives a summary interim decision which is binding on the parties for the duration of the contract. The contract would normally stipulate the adjudication as a mandatory first step before proceeding with any further action. It is binding unless the parties proceed to formal arbitration within a given time frame. Adjudication is considered to be a rough, quick fix solution and is intended to diffuse arguments and maintain civility between the parties. It provides early warning and solution before hardening of the attitudes of the parties.

9. Arbitration

Arbitration is the process whereby formal disputes are put to a private tribunal of the parties' choice for a final, binding and enforceable decision. It has a major advantage over other ADR methods of enforceability of the decision by the Courts and can be flexible, speedy, confidential and a cost effective process if the process is not hijacked by the same lawyers who are well versed in extending litigation times and costs.

However, Mediation is emerging internationally as the prime alternative to Arbitration and Litigation. In part, this growth of interest is attributable to dissatisfaction with the cost, delays and length of litigation in most jurisdictions in the world. The growth of interest also results, however, from the perceived advantages of Mediation particularly its appeal as a procedure that offers parties full control over both the process and the outcome.

MEDIATION

Mediation is a non-binding procedure in which a neutral intermediary, the Mediator, assists the parties in reaching a settlement to their dispute.

It is non-binding in that after the first meeting neither party is obliged to continue the process unless they accept to do so.

There is no decision that is imposed upon the parties. For a settlement to be concluded, both parties voluntarily agree to accept it.

The Mediator is not a decision maker. Rather, he/she assists the parties in reaching their own decision either by 'facilitative' mediation where the Mediator facilitates the communication between the parties and helps each side to understand the others perspective, position and interests or by "evaluative" mediation where with the consent of the parties, the Mediator can be asked to express his opinions and views which the parties are free to accept or reject.

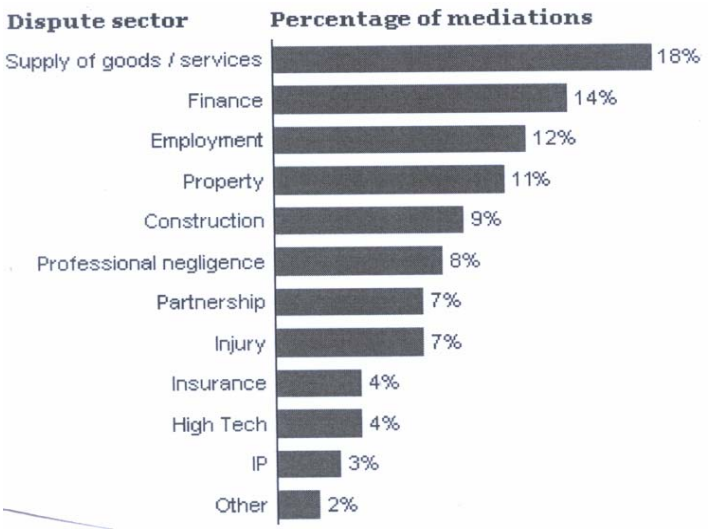
The process remains confidential at all stages. This is necessary to encourage frankness and openness in the process assuring any admissions or proposals or offers for settlement will not have any consequences outside the mediation process and cannot be used in any subsequent litigation or arbitration in the event no settlement is reached.

On the whole and with the realization of a growing need for an ethos of principled negotiation, most disputes are appropriate for Mediation. However there are instances when it is not. Where one party is intransigent in its position and manifests bad faith. Where matters of law or public principle need to be publicly pronounced by a court. Where interim measures of protection are needed and court sanction is requested.

On the other hand, Mediation has shown itself to be an attractive alternative where the parties priorities are to minimize cost, ensure control over the process, effect a speedy settlement, maintain confidentiality and above all preserve underlying business relationships. It is low risk. There is nothing to loose except a days attendance and costs. Far less than ten years worth of litigation. Mediation has a high success rate considering its non-binding nature.

It can be used at any stage of a dispute. After negotiations have stalled or failed. At any time during litigation or arbitration where the latter processes can be interrupted to allow the parties to explore the possibility of a settlement or indeed as England has presently instigated, as a condition in the Court of Appeal before asking the court for a hearing date.

Mediation has been used across the board as more particularly detailed by CEDR[1] Statistics of 2004.



Mediation espouses no hard and fast rules of procedure. It is flexible to the parties needs or request but generally, the format follows:-

1) An Agreement to mediate either already contained in a contract governing the relationship between the parties or where the parties voluntarily agree to an ad hoc process or as this paper seeks to encourage later on where the court system either sponsors or insists on the process as a precursor to the use of our Courts.

2) Once a dispute has accrued, one party will request for Mediation either to a Mediation Service Provider or directly to the other party.

3) Appointment of the Mediator will be done by voluntary agreement or the parties or when the process is to be managed by a Service Provider, then by that Institution from a panel of qualified Mediators.

[1] Centre for Dispute Resolution is a general civil/commercial mediation organization in England established in 1990 providing a wide range of mediation services; email: mediate@cedr.co.uk; and website:http://www.cedr.co.uk

4) A Preliminary Meeting usually sets the stage by informing all parties of the process on the day, arranging times and venues, collating short statements of case and relevant documentation and arranging the fees of the Mediator.

5) First and subsequent meetings then follow a well framed process of:
   (a) Agreeing the ground rules.
   (b) Gathering information of the dispute.
   (c) Identifying the Issues.
   (d) Exploring interests of the parties.
   (e) Developing and evaluating options.
   (f) Settlement.

Global Perspective

Mediation is a well known phenomenon to the customary law and tribal hierarchies of African Society. Indeed, until the politicizing of the positions of District Officers and Provincial Commissioners, rural society settled all small disputes by the intervention of the Village Elders. Ironic indeed that we have come full circle whereby the developed world, weary of the monster created by vexatious litigants known more to the world of Soap Operas and American Television, come now to preach alternative methods of resolving disputes.

Many jurisdictions are familiar with Mediation and have attempted to incorporate the process into their court systems:

- USA, Canada;
- Asia: China, Hong Kong, India, Singapore;
- Australasia: Australia, New Zealand;
- Europe: Germany, Greece, Ireland, Italy, Netherlands, Portugal, Scandinavia, Spain, U.K.;

- Africa: Egypt, Namibia, Nigeria, South Africa, Tanzania, Tunisia, Uganda, Zambia, Zimbabwe.

Statistics are fairly informative.

An average mediation session takes 1.5 days. 80% of cases referred to mediation settle on that occasion. Of the remaining 20% a further 15% settle within a three week period after the adjournment of the initial session.

In the State of Ontario Canada, in the early 1990's a dedicated Case Management System in the courts using mandatory mediation referrals:

(a) at the close of pleadings after 90 days;

(b) again at notice of trial scheduling after 150 days;

(c) again at trial management conference after 240 days;

produced startling results. Only 5% of the cases filed in the courts ever actually went the course to full hearing and a six year delay between filing and hearing was reduced to 15 months. This experience has been repeated in several other commonwealth jurisdictions. Focus the parties on the prospect of settlement and the disadvantages of a hearing early and consistently and one forestalls the all too often eleventh hour settlement on the day of the hearing.

More recently in the Commercial Courts of England, a pilot project of 2000 shows a 83% settlement rate of the cases in which ADR was attempted, 52% settled through ADR, 5% proceeded to trial following unsuccessful ADR, 20% settled some time after the conclusion of the process and the outcome was unknown or case sill alive in 23% of the cases.

In the Court of Appeal over the same period half the cases voluntarily submitted to Mediation settled and of those that didn't, only 60% went to trial.

Looking at predominantly commonwealth jurisdictions the various jurisdictions seem to follow three models where definitions and procedures interchange:

1) Court sponsored – A Mediation secretariat and reference point guides Mediation requests through the procedure, helping to identify and appoint Mediators, offering information, clauses for contracts e.g. Uganda and Nigeria.

2) Court Annexed - Essentially voluntary such jurisdictions that encourage this route have tried to balance the argument that Mediation is inherently impaired where it is not fully consensual with the commitment of both parties, whilst realizing that to succeed litigants and their lawyers must be robustly encouraged to mediate.

   England has grown from the more benign extreme to a position expressed in the latest spate of Court of Appeal decisions where not only are parties put to task to explain why they should not submit to Mediation but where parties have unreasonably refused to mediate, the court can impose court sanctions[2].

3) Court Mandated by statute a procedural rules - these compulsory systems employ case management conferences and pre-trial review meetings, a more interventionist approval by Judges and Registrars (Canada, Australia) who are fully conversant with the benefits of ADR and have the back up of the Court or private sector mediation service providers of a high level of training and accreditation.

ADR in the context of Civil Case Management

[2] Halsey v. Milton Keynes NHS Trust and Steel v.Joy and Halliday (2004) EWCA (Civ) 576 following Dunnett Railtrack (2002) 1 W.L. R. 2434 and fine tuning Hurst v. Leeming (2001) EWHC 1051 Ch.

Civil Case Management as a regime refers to an embodiment of rules which would achieve the following objectives: earlier dispute resolution, reduction of legal costs, elimination of delays and backlogs, efficient allocation of judicial, quasi-judicial and administrative resources, protection of parties by ensuring that individual litigants receive information about time limits provided in the Civil Procedure Rules and easier access to the most appropriate method of resolving a particular dispute.

It is acknowledged that:

(a) a modern civil justice system must operate under a model of case flow management, a time and event managing system which facilitates early resolution of cases reduces delay and backlogs and lowers the cost of litigation;

(b) in order to facilitate early resolution of cases and reduction of delay and backlogs, a civil justice system must focus on dispute resolution as a whole and make available to the public on an institutional basis both court adjudication process and various ADR techniques;

(c) mediation as an integral component of Civil Case Management and procedural reform may be used to curtail the disputants' freedom to engage in procedural maneuvers by empowering the judge to set firm deadlines and otherwise manage the litigation process thereby reducing delay and cost in civil litigation.

It has been observed that it is an essential element for case management that parties should be encouraged and assisted to settle cases or at least to agree on particulars issue and that the use of ADR should be encouraged.

It has also been noted that by various means and at an early stage, courts should explore the scope of ADR or settlement and see whether there is any way by which the court could assist the parties to resolve their disputes without the need for trial or a full trial.

In canvassing for the use of ADR and particularly mediation as a tool for case management H.J. Brown and A.L. Marriott in their book "ADR: Principles and Practice,

2nd Edition, 1999 Sweet & Maxwell," posit that the primary case rests on the broad principle that resolution of dispute by consensus and by compromise contributes to the well being of the society as a whole.

They argue that it was a maxim of Roman Law that *interest republicae ut sit finis litium*: the interest of the state should be an end to litigation, which maxim has been followed in the English Civil Justice System.

In the premises, they are of the view that conceptually, courts as a matter of public policy should encourage and enforce settlement.

They however lament that whilst judges are prepared by nod and a wink to encourage settlement, they have shied away from actively participating in the process of settlement.

They recommend that for civil case management to work, judges must be more interventionist than hitherto in controlling procedure curbing delay, capping costs and encouraging settlements.

Where to Kenya?

We are poised at the cross-roads, we have the advantage of all the benefits and mistakes experienced by other jurisdictions. We have the support, by word at least, of a Judiciary as yet undecided as to how to administer the new relative called ADR. Let us not make the mistake of Tanzania by thinking it is the Judges who should become the Mediators.

Firstly, it is well known that Judges make poor mediators, so used to decision making and adjudication they have great difficulty patiently watching a non interventionist process unfold. Secondly, they are already grossly over burdened. Judges are there to do just that – Judge. Leave the mediation to others even if only 5% of the cases that fail to mediate come before them, it will take several years to reduce the backlog.

Then are we to deny parties their inalienable right to be heard in court if that is what they wish or should we encourage rather than compel parties to embrace a court sponsored scheme encouraged by the clarion call of Try it Once!

A court sponsored scheme is a good starting point since it would focus on cases that have a high probability of success and would also provide immediate benefits. Such a scheme would help win over judges and political actors who have a vested interest in the continued efficiently of our judiciary.

We need a pilot scheme set up at the first opportunity preferably in the High Court, Milimani Commercial Court and one out of town major station say Nakuru or Meru along the following guidelines:

1. Donor funded 12 month pilot project.

2. ADR Advisory Office, within the court precincts/administration office headed by a Deputy Registrar and Mediation Service Provider Administrator.

3. Court sponsored panel of Private Sector mediators trained and accredited to international standards to sit by roster a week at a time paid by project funding. If no funding is available, the pilot scheme Mediators sitting for say one week every second month would act pro bono and accept some small honorarium.

4. Deputy Registrar to manage the cases at close of Pleadings[3]:
   (a) To hear parties objections to a three hour mandatory mediation session.
   (b) To record and agree or discuss such objections.
   (c) To refer the case to a mutually chosen Mediator on the court's panel failing which to appoint such a Mediator.
   (d) To fix the time table for such meditation.
   (e) To set a date for reappearance before him/her to record either a settlement or reasons for failure and impose courts sanctions if appropriate.

[3] This would suggest the need for the return of the Summons for Direction procedure: formerly Order LI of the Civil Procedure Rules deleted by Legal Notice No. 36 of 2000.

(f) To record any settlement as an Order of Court.

(g) To set down for hearing by Registrars Certificate, those cases that must go for hearing.

(h) If the three hour session is insufficient and the parties agree to continue, to order such mediation to continue at the parties own costs outside the court mandated process.

Rationale for the Pilot Scheme

Courts generally have limited experience when it comes to reform process. Pilot schemes may therefore help the judiciary develop tools needed to manage projects and implement reforms and usually serve as a foundation for larger efforts.

Experience from other jurisdictions show that pilot schemes allow the judiciary or the relevant authorities estimate costs of reforms, the time need to implement them and to define the main obstacles for further reform.

It is agreed that consensus is an essential element of judicial reform. The building of this pre-conditional element is the first step of any reform program. Pilot schemes lend themselves to the preliminary stages of the reform process for the reason that they help communicate a vision of the change process, and help the judiciary see beyond its vested interest. Pilots help stakeholders avoid setting unattainable goals and reduce the risk of failure and the loss of valuable resources. Often times, these schemes generate ownership of reforms and generate a political and social commitment for change that makes reforms difficult to reverse.

Conclusion:

The legal sector is no different from so many Government controlled sectors.
It would certainly help if the Government could divest itself of arrogance and of its horror of privatization. Yet all it really needs to do is appreciate ADR, not as a threat to its privileged monopoly or dispute settler, but rather as an aid to the fulfillment of its mission statement to be “For the Benefit of the People”. Then maybe the country can rise up out

of its judicial slumber and finally make redundant the too often quoted adage that "Justice delayed is justice denied".

Can the Justice Department not appreciate the benefits of private sector intervention? Will it join hands with concerned helpers to tackle, once and for all, a reduction of case lists presently backed up over the horizon. It will cost nothing to try, and the potential benefits are immeasurable.

Moreover Kenya has set a world stage for some big mediations recently, notably the Sudan and Somali peace talks. The Government can learn something from the importance of the mediation process from these goings on. The Sudan and Somali experience should spur the government to support the application of mediation to the resolution of disputes at all levels be it macro or micro.

Then maybe all can agree with an American Jurist, Justice Felix Frankfurter:

> "The court's authority, consisting of neither the purse nor the sword, rests ultimately on substantial public confidence in its moral sanction."

Advocate
Nairobi - 12/10/2004
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