REPUBLIC OF KENYA

THE JUDICIARY

'ALTERNATIVE DISPUTE RESOLUTION AND RULE OF LAW' FOR EAST AFRICAN -PROSPERITY'REMARKS BY THE CHIEF JUSTICE AT THE EAST AFRICAN ARBITRATORS CONFERENCE

SEPTEMBER 25, 2014

Sisters, brothers, friends;
Ladies and Gentlemen:
Let me begin by extending a warm welcome home to all of you. Although our countries are separated by latter-day borders and boundaries, we know that we are one people with a common destiny and a singular future.

For those of us who had the fortune of going to school at the time when this region shared a currency, a court, a railways and harbours service and a single airline, among other common services, East Africa is not a nebulous construct of the imagination. Being East Africans implies that we are, in fact, Africans first.

Africans have been in a centuries-old struggle to reclaim their dignity as a people with their unique contribution to mankind, hence the efforts in recent decades to Africanise the Bar, to Africanise the Bench and to Africanise the jurisprudence emerging from the justice system in the region.
World over, the clarion call is heard to embrace alternative dispute resolution. The world is being driven to embrace alternative dispute resolution because adversarial litigation is becoming increasingly expensive even as disputes abound. Litigation in courts is steadily growing with the number of new forms of causes of action enlarging, and new avenues for litigation being opened up by constitutional, statutory and socio-economic growth and innovation.

For Africans, and East Africans especially, the return to alternative dispute resolution is a homecoming. Alternative dispute resolution mechanisms have always been part of Africa's system of justice. It is not a knee-jerk reaction a crisis in the inherited colonial justice system as we know it. In many traditional African settings, disputes would be settled by clan elders. Such disputes would range from family disagreements to inheritance. Our courts are nowadays handling numerous family disputes that range from divorce, maintenance of children to inheritance.

Yet, it is in East Africa that innovative thinking has reclaimed a place of honour for alternative justice systems. When Rwanda was faced with the prospect of putting thousands of people through a penal system after the 1994 Genocide, the use of Gacaca courts enabled communities to reach closure on a dark part of their history.

Alternative Dispute Resolution is provided for in the constitutions of most East African counties, and the courts are required to embrace it. Besides the ideological persuasion, new public accountability imperatives are forcing Kenya's Judiciary to grapple with a historical case backlog as well as a flood of new litigation in courts.

The passage of Constitution of Kenya, 2010, launched a new era of transformation for the Judiciary. Judicial officers and judiciary staff are now alive to the need for change in order to live up the overriding principle following Article 159 of the Constitution that judicial authority is derived from the people.
Article 159 (2) of the **Constitution of Kenya** provides that, in exercising judicial authority, the courts and tribunals shall be guidedby among others, the following principles-

> *(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause.*

Further, **Article 159(3)** provides that;

> *"traditional dispute resolution mechanisms shall not be used in a way that- (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law".*

Similarly,**Article 126(2)** of the **Constitution of the Republic of Uganda, 1995,**provides that, *in adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles-(d) reconciliation between parties shall be promoted.*
Article 107A of the **Constitution of the United Republic of Tanzania** provides that:

> *"…. in delivering decisions in matters of civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say – (d) to promote and enhance dispute resolution among persons involved in the disputes".*

Beyond these constitutional edicts, community practices bear out a strong social affinity for alternative justice systems.

In Kenya, arbitration has long been part of the process of settlement of disputes. The Arbitration Act, 1995, was overhauled and replaced by the Arbitration Amendment Act, 2009, and has now been consolidated into Chapter 49, Laws of Kenya, to provide solid guidelines to practitioners in arbitration with only limited appeal to the High Court as well as Court of Appeal in in relation to matters of law, and only those instances where parties agree.

Order 46 of the **Kenya Civil Procedure Rules, 2010** provides for arbitration, and other alternative dispute resolution, on the order of a court. **Rule 20 (2)** of Order 46 states that *the court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution*.

Commercial disputes benefit substantially from arbitration where the parties pick it as their choice forum. Arbitral proceedings in Kenya have, over time, begun to take much the same form as litigation, thus losing the advantage of expedition often associated with alternative dispute resolution.

Kenya has lagged behind its East African neighbours, who have introduced mediation as a compulsory step in the civil case process, in the case of Tanzania from 2001 and in Uganda from 2004.

Kenya will soon follow in Uganda's footsteps by introducing a pilot scheme initially into the Commercial and Family divisions of the High Court in Nairobi, probably early next year, before rollout to all High Court divisions and stations countrywide. The rollout will include the Environment and Land Court as well as the Industrial Court but later, the Magistrates Courts will be included in the loop once the Mediation Accreditation Committee is satisfied about the training and experience of a court approved panel of mediators. Already amendments to the Civil Procedure Act and Rules have been passed through Parliament so as to facilitate court-annexed mediation.

Litigation ties up millions of shillings and francs that should be circulating in our economies. Alternative Dispute Resolution is a useful tool for resolving commercial disputes as they are speedier and decisions emanating therefrom are enforceable through arbitration, mediation and even reconciliation. Investor confidence is bolstered by ADR, which has the potential to increase trade and investment in the region. External investors still prefer to settle disputes through arbitration, even if it is in foreign arbitral centres. It is important that ADR mechanisms and systems be developed to facilitate local dispute settlement by local and foreign investors.

We are acutely aware of the thriving system of the Open Door Courthouse as established in Lagos, Abuja and Kano in Nigeria. This model is of great interest to us here in Kenya and we would welcome any assistance from our Nigerian friends to demonstrate how it works and whether it could be adapted to Kenya, particularly with regard to small claims. With the devolution of Kenya into 47 counties and the

reorganisation of the provincial administration, Kenyans might experience a gap in the dispute resolution service previously provided by those Defunct offices.

The Judiciary is embracing traditional methods of dispute resolution. Pilot schemes are underway at Isiolo and Kisii with magistrates' courts in those two stations supervising Elder Adjudication both on the civil side and in relation to criminal cases involving assaults, defilement and molestation as well as petty and stock theft.

There may still be lingering questions about the use of alternative dispute resolution mechanisms in resolving criminal matters, but in some countries, the courts have been called upon to encourage reconciliation between parties. However, given that criminal offences are against the State, it is important to consider to extent to which ADR can be employed. Of course, this poses the great debate about restorative justice versus retributive justice.

This question is of some importance because the courts in Kenya recently had to deal with such a situation. In the case of **Republic vs. Mohamed Abdow Mohamed [2013] e KLR,** the family of the deceased wrote to the Director of Public Prosecutions (DPP) requesting that the charge of murder against an accused person be withdrawn on account of a settlement reached between the families of the accused and the deceased. The DPP, in making the application to have the matter marked as settled, cited **Article 159(1)** of the **Constitution** which allows the Courts and Tribunals to be guided by ADR. The court in rendering its decision stated that, in the unique circumstances of the application, it was satisfied that the ends of justice would be met by allowing rather than disallowing the application. The accused was discharged.

There may be need for further discussions on the extent to which ADR can be employed in criminal cases. In the constitutions of Uganda (Art 126(2) and Tanzania (Art 107A), there is a requirement in matters of a *criminal* nature to apply and promote the principle of reconciliation among the persons involved in the dispute. There is a case for a similar approach in Kenyan criminal law, on which I hope debate may soon commence.

Regionally, the establishment of the East African Community aims to widenand deepen co-operation among partner States in the political, economic and social fields for the prosperity of the region. The East African Court of Justice (EACJ) has made important efforts to mainstream ADR under it. However, apart from national laws advocating ADR, there is need for ADR mechanisms at a regional level.

ADR can also play a critical role in resolving political conflicts. We know that resources and politics are closely tied. Research now openly acknowledges that future political upheavals and disputes will more and more frequently emanate from resource scarcity. The potential for resolution of such disputes through ADR

(conciliation, negotiation and mediation), whereby relationships between disputants are maintained, calls our attention to the urgency of the need to embrace such these alternative justice mechanisms. Kenya is currently grappling with the land question. Oil discovery in various parts of East Africa, and the infrastructural development of the region through our expanding ports – whether the Lamu Port and Lamu-Southern Sudan-Ethiopia (LAPSSET) Corridor project – or similar monumental initiatives within the region will generate disputes that will need to be resolved both quickly and within an environment that does not create winner-take all results as is often the case with litigation.

On another limb, ADR mechanisms can also be used to resolve political conflicts emanating from political party nominations.
Mediation saved Kenya from the brink of civil war a few years ago, so there is no reason why ADR should not similarly be employed in resolving low-level political conflicts before they balloon in national and even regional crises.

I have already noted that Art 159 of our Constitution mandates the *guidance of* and *promotion by* the *courts* of all forms of alternative dispute resolution in the exercise of judicial authority. The concept of judicial authority being exercised under guidance of and to promote ADR, has led me to consider afresh the urgency of this mandate. The fact that far too many disputes, which are more suited to non-litigative processesfind their way into and clogging the courts, persuades me even more.
I have therefore taken the following steps: First, I have deployed the Principal Judge of the High Court to give policy and administrative leadership and special focus to the establishment of ADR facilitative processes in the Judiciary. Secondly, in order to facilitate ADR acceptability nationally, I see the importance of taking two additional but mutually inclusive measures.

The first measure: It has become necessary to establish a system within our courts by which under the imperative of Article 159 – and in order to assist in the management of the case backlog – litigation will only be commenced after a substantive attempt has been made by the disputing parties to resolve the dispute through a *compulsory* mediation process. To this end, a pilot process is to be commenced for compulsory court mandated (or court-annexed) mediation using Court Approved Rules and Court Accredited/Appointed Mediators. Under this compulsory mediation scheme, where the outcome of the mediation results in an agreement, the court shall record the same as a consent order.

The second measure: A court-facilitated ADR Liaison Centre should be established. The object of the **ADR Liaison Centre** shall be to enable disputants and the providers of all types of dispute resolution services to meet in a court facilitated environment. There, accredited dispute resolvers will be listed in their respective specialisations and expertise, and the disputants will be able to select and engage a resolver of their choice for their dispute, irrespective of whether or not such dispute is

presently being litigated in court. The ADR Liaison Centre will be a common market-place for accredited dispute resolvers and disputants, under the general oversight of the court, to meet and move the dispute forward in more amicable environment.
With these remarks, I thank you all for your attention, and wish your fruitful engagement.

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THE SUPREME COURT OF KENYA