



## **ALTERNATIVE DISPUTE RESOLUTION**

Many a times someone's rights have been infringed and no justice is sought. The question that is asked thereafter is "why? Why didn't you seek justice by falling on the justice system?" the answer often given is; "the judicial system is too costly or too time consuming". What other legal remedies can one seek when they feel that the judicial system is not an option? Is there an alternative to the judicial system? Yes, there most definitely is. And this alternative solution is what is termed as Alternative Dispute Resolution (ADR).

### **WHAT IS ALTERNATIVE DISPUTE RESOLUTION (ADR)?**

ADR is the procedure or combination of procedures **voluntarily used** by both parties to resolve a dispute or address the issues in controversy. The main types of ADR are Mediation, Arbitration and Conciliation. These three types are used in most commercial disputes and more often than not, commercial contracts in this day and age provide for an ADR clause in case of a dispute between the parties.

This article will deal mainly with Mediation as a form of ADR, particularly with Court Annexed Mediation (CAM).

### **WHAT IS MEDIATION?**

Mediation is a nonbinding dispute resolution that involves an independent third party who helps the disputing parties to resolve their disputes. The disputants (parties to the dispute) decide the terms of the arrangement unlike in a court setting where the procedure is followed from an Act of Parliament or Rules that guide the courts in resolving disputes.

Is Mediation and Court Annexed Mediation the same thing?

### **WHAT IS COURT ANNEXED MEDIATION?**

Due to the case backlogs at the courts, CAM has been introduced to offer alternative avenues for disputants to receive fair hearings. Mediation as a whole has been encouraged under Article 159

of the Constitution of Kenya, 2010 which states that alternative dispute resolution mechanisms need to be promoted as long as they do not contravene the Bill of Rights.

Further, the overriding objective of the Civil Procedure Act, Chapter 21, Laws of Kenya is to ensure that civil disputes are resolved in a just, expeditious and costly manner. For more information on the developments leading to CAM click [here](#).

Unlike Mediation which is voluntary, CAM is a form of mediation that is conducted under the directive of the High Court of Kenya for any matters that are filed at the High Court of Kenya Family and Commercial Division.

CAM was launched as a pilot project on 4<sup>th</sup> April 2016 in the High Court's Commercial and Family divisions in Nairobi County and is currently undergoing sensitization in the Mombasa County.

### **HOW ARE MATTERS REFERRED TO CAM?**

A Judicial Officer looks at the issues forming the basis of the case so as to determine whether or not the case is suitable for mediation. This determination is followed after matters undergo a case screening process.

However, if the issues form a substantive question of law that should be determined by a judge, the matter will not be referred to CAM. Cases involving allegations of issues such as child abuse, matters of a criminal nature and any issue generally raising a question of law will not be referred to CAM.

### **WHAT IS CASE SCREENING AND WHAT IS THE PROCESS?**

**Case screening** is the procedure whereby a Judicial Officer will analyze a case filed in the High Courts' Commercial or Family Divisions in Milimani and determine (based on certain criteria) whether a matter should be referred to CAM or not. Since CAM is still in the pilot phase, the screening criteria is currently under review by the Judiciary and shall be available to the public once the same has been published.

The High Court has set down internationally accepted screening criteria to determine which matters will be referred to CAM. The court is also in the process of training screening officers who shall review the details of each case filed in court with the aim of identifying which matters are best suited for Mediation and which ones will go through the usual litigation process.

### **WHICH CASES HAVE TO GO THROUGH SCREENING?**

All matters filed at the High Court Family and Commercial Divisions after 4<sup>th</sup> April 2016 have to undergo screening at inception to determine whether or not they will be referred to CAM. This screening process is mandatory.

However, matters filed in these divisions before the inception of the pilot project may undergo screening to determine whether or not they will be referred to CAM.

### **WHAT HAPPENS AFTER SCREENING?**

Once screening has been done and a matter has been referred to Mediation, the MDR will give the parties in the matter notice of the referral within Seven (7) days.

The MDR will then nominate 3 mediators from the Judiciary's register of accredited mediators and notify the parties of the nominated mediators. This register can be found at the Mediation Accreditation Committee or online [here](#).

The parties have to inform the MDR of their preferred mediator within 7 days of receiving the notification.

Parties are however free to choose any other preferred mediator from the register of the accredited mediators if they don't agree with the MDR's list of appointed mediators. This has to be done within 7 days of receipt of the notification of nomination from the MDR.

Once parties settle on a preferred mediator, the MDR will appoint the preferred mediator to handle the case. The appointed mediator will thereafter schedule a date for the initial mediation and will notify the parties of the date, time and venue.

### **WHAT HAPPENS AFTER THE CONCLUSION OF THE MEDIATION PROCESS?**

Should parties reach an agreement, they will sign a mediation agreement that is to be filed with the MDR within Ten (10) days of signing the agreement.

### **WHAT ARE THE CAM TIMELINES?**

The whole mediation process is expected to be concluded within Sixty (60) days, with a provision of a Ten (10) day extension period.

The timelines are determined by a number of things:-

1. The screening process;
2. The time taken to appoint a mediator;
3. The time taken during the mediation process.

### **PROS OF CAM:**

Mediation has the following advantages as opposed to litigation:-

- It is faster
- It is more cost-effective
- It is private and confidential- all information exchanged during CAM is not admissible in court.
- It allows for flexible resolutions and settlements of disputes.

### **CONS OF CAM:**

- The procedure has been made mandatory by the CAM pilot rules for all matters filed after 4<sup>th</sup> April 2016. Should parties be unwilling to undergo mediation, they have to file an application for determination by the Judge.
- CAM may not always result in a mediation settlement agreement which means that the parties will have to go back to court to seek further directions.

- This in a sense erodes the right of parties who wish to undergo litigation to present their case in court.

### **CONCLUSION:**

From the timelines provided by the Judiciary, all indications are that this process will take a substantially less amount of time than the normal ion process. This shall end up saving parties' time, money and emotions that can be invested in other ventures.

CAM therefore seems to be beneficial to all parties involved.

Parties might also be able to maintain a cordial relationship after the mediation process, as mediation is not adversarial in nature but is based upon mutual agreements between the parties involved.

The Judiciary has a brochure that guides the public through its Court Annexed Mediation process and the same can be found [here](#).

Should you have any queries or need any clarifications with respect to the above, please do not hesitate to contact us.

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