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Challenges facing the Implementation of Court-Annexed Mediation in the Commercial Division of the High Court of Tanzania

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ABSTRACT

The ADR in Tanzania was first manifested in 1994 by G.N No 422 which amended the first schedule of the Civil Procedure Code and introduced court-annexed ADR to resolve civil disputes amicably. The application of ADR in resolving disputes is not only limited to normal civil disputes but also extended to resolve, Tax disputes, labour disputes, investment disputes and commercial disputes in the Commercial Division of the High Court of Tanzania. Therefore, this paper explores Alternative Dispute Resolution (ADR) and its application in resolving civil disputes, focusing on court-annexed mediation as a key mechanism for resolving disputes in the Commercial Court.

The article also highlights the evolution of court-annexed mediation and its impact on dispute resolution by tracing its historical background and the legal foundations underpinning its practice. The paper also explores fundamental principles governing court-annexed mediation to see if the conduct of court-annexed mediation in the Commercial Division of the High Court of Tanzania aligns with existing mediation principles. Moreover, the article provides practical challenges and recommendations for the effective use of court-annexed mediation in resolving commercial disputes, aiming for positive outcomes and enduring resolutions.

Keywords: *Alternative dispute resolution, Authority to settle, Court-annexed mediation, Mediation, Parties Autonomy, Commercial Court.*

I. INTRODUCTION

Alternative Dispute Resolution (ADR) is a method that resolves legal disputes without traditional litigation. It involves open communication, collaboration, and creative problem-solving among parties. Mediation, facilitated by a neutral third party, encourages constructive dialogue. Arbitration, a streamlined process with specialized expertise, provides binding or non-

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binding decisions. Negotiation involves direct discussions to settle disputes. ADR processes are adaptable to each dispute's unique circumstances.[2]ADR aims to promote a more accessible, efficient, and collaborative dispute resolution method, addressing the evolving needs of modern legal systems and promoting a fair and timely justice system.[3]

ADR methods like mediation and arbitration aim to improve access to justice and expedite dispute resolution by prioritizing flexibility, confidentiality, and cost-effectiveness. They alleviate the burden on overloaded court systems, provide a quicker, tailored process, and foster amicable solutions. Open communication and confidentiality encourage candid discussions, promoting creative problem-solving and maintaining relationships between disputing parties. This approach also encourages open communication and control over the outcome.[4]

Court-annexed mediation was introduced as an ADR mechanism in the Commercial Division of the High Court of Tanzania to resolve commercial disputes. The primary objective of this initiative was to provide parties with a flexible and informal mechanism to settle their disputes. However, the implementation of court-annexed mediation has encountered significant challenges in effectively assisting parties to resolve their disputes amicably. Therefore, this article discusses these challenges, providing an overview of the legal framework, including relevant statutes, rules, case law, and the process of appointing mediators. Based on the identified challenges, the article proposes recommendations to enhance the effectiveness of court-annexed mediation in the Commercial Division of the High Court of Tanzania.

II. HISTORICAL BACKGROUND OF COURT-ANNEXED MEDIATION IN TANZANIA

Before colonization, African states had their own mechanism for resolving disputes which arose between them. These mechanisms were used depending on the nature of the society, the parties involved and the source of a dispute. Some of these mechanisms were quite harsh, involving superstitious beliefs to identify offenders. For example in the case of **R v Palamba Fundikira**.[5] trial by ordeal was conducted to determine who caused the death of 11 children of the first appellant. Four women were accused and tested for innocence by drinking MWAVI, a traditional medicine that turns into poison when taken with evil intent. Two women died and two vomited.

[2] king. (2023). The Dilemma and Optimization of Pre-Litigation Mediation of Administrative Disputes as a Non-Litigation Dispute Resolution Mechanism. *Open Journal of Legal Science*, *11*(06), 6336–6344.
[3] Cortes, P. (2022). Embedding alternative dispute resolution in the civil justice system: a taxonomy for ADR referrals and a digital pathway to increase the uptake of ADR. *Legal Studies*, *43*(2), 312–330.
[4] Sourdin, T. (2014). Alternative Dispute Resolution (ADR) Principles: From Negotiation to Mediation. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2723652
[5] [1947] 4 EACA 96

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However, African societies commonly utilized mediation as a method for resolving disputes. This practice, which dates back to ancient times, involved neutral third parties such as parents, tribal elders, and chiefs facilitating agreements between neighbours, children, and communities to maintain harmony.[6] Mediation was mostly practised in many African societies to resolve civil disputes which were related to inheritance, marriage, land ownership and trade.

Colonialization led to the replacement of old customary law systems with colonial-controlled dispute-resolution mechanisms. Some traditional mechanisms survived as informal systems or lower courts in the judicial hierarchy. In traditional settings, dispute resolution is almost as old as the people's traditions and customs.[7] After decolonization, African dispute resolution (ADR) has become more efficient due to its impact on productive relationships. ADR offers faster, enforceable decisions through mediation, arbitration, and conciliation. However, there is increasing pressure on African investment for fair and organized ADR organizations due to concerns about corruption and inefficiency.[8]

That is to say, the introduction of Alternative Dispute Resolution (ADR) in Africa was driven by the increasing heavy caseloads and backlogs in African civil courts. The primary goal was to reduce these burdens, avoid unnecessary procedural technicalities, and reduce litigation expenses. In the context of Tanzania, the court-annexed ADR system in Tanzania was designed informally, allowing parties to participate easily and preserving their relationships post-admission. This approach aimed to reduce the burden on traditional courts and improve the efficiency of the legal process.[9]

Therefore, Court-annexed mediation in Tanzania originated from G.N No 422 of 199[10]4 amending the Civil Procedure Code, introducing new provisions of Order VIII A, VIII B, VIII C, and VIII D. This order impacted the procedures for resolving civil suits by requiring parties to submit disputes for court-annexed mediation after filing pleadings.[11] The Tanzanian constitution of 1977 also supports this through the provisions of Article 107A(2)(d), which imposed a duty on the court to promote and enhance dispute resolution among persons involved

[6] Lukumay, Z.(2016) *A Reflection on Court - Annexed Mediation In Tanzania*. LST Law Review, Vol. 1, Issue 1 January-June 2016, p.52-53

[7] Kohlhagin, D.(2012) "Alternative Dispute Resolution and Mediation: The Experience of French Speaking Countries" Presentation at EACC Conference: How to Make ADR Work, in Addis Ababa, Ethiopia, p.6.

[8] Dickerson,J(2021).*" Overview of Commercial Alternative Dispute Resolution in Africa"* Available on http://www.businessconflictmanagement.com/blog/2012/06/adr-in-africa/ Accessed on 27/10/2023

[9] Mashamba ,C.(2014) *Alternative Dispute Resolution in Tanzania: Law and Practice*. MkukinaNyota Publishers Ltd p.103

[10] Government Notice No 422/1994

[11] Order VIII Rule 16 of the Civil Procedure Code [Cap 33 R:E. 2019]

in the disputes without undue delay.[12]

In 2012, court-annexed mediation was introduced in the Commercial Division of the High Court through G.N No. 250 of 2012 to be used in the amicable settlement of commercial disputes and to ensure the speedy administration of justices without undue delay. These Rules grant the court the power to mandate mediation procedures but also the High Court (Commercial Division Procedure) Rules[13] provide a structured framework for resolving commercial disputes. They specify the jurisdiction of the High Court's Commercial Division and define what qualifies as a commercial dispute. This includes issues arising from commercial relationships like contracts, business torts, and trade disputes. These rules ensure consistent court decisions and help businesses better understand their legal rights and obligation

III. AN OVER VIEW COURT-ANNEXED MEDIATION

Court-annexed ADR is a mandatory process in which parties must appear before a mediator to resolve their dispute before going to court. It can be court-sponsored or conducted independently by private mediators. In Tanzania, it is a process where parties attend mediation before a judge or magistrate to settle their dispute amicably before going to litigation. Failure to comply with court-annexed mediation can result in serious consequences, as it is ordered by the court. This process is initiated after parties present their case to the court and the court refers them to ADR mechanisms for resolution. It is also known as court-mandated mediation. [14]This form of mediation is also known as compulsory mediation because the law requires the existence of mediation before litigation.[15] The goal of court-annexed mediation is to foster a supportive environment and encourage the parties to participate willingly, aiming for a voluntary, timely, fair, and cost-effective dispute resolution.

When parties achieve an amicable settlement through court-annexed mediation, the case concludes at that point. This method has proven beneficial for dispute resolution as it helps alleviate the issue of court case backlogs.[16] In addition to that, it fulfils the parties' substantive, procedural and emotional interests and wishes since they play a big role during the mediation process. court-annexed mediation remains an important procedure for dispute settlement. The court's involvement in this process does not eradicate the court's core principles to do justice

[12] The Tanzanian constitution of 1977
[13] G.N No. 250 of 2012
[14] Hamis, T.(2022) *Court-Annexed Mediation In Tanzania: Successes, Challenges And Prospects*. International Journal of Innovative Research and Advanced Studies (IJIRAS) Volume 9 Issue 11, November 2022. P.6
[15] Mzee, M& Ahmad, O. (2020). Towards Effective Court-Annexed Mediation on Commercial Disputes in Zanzibar. International Journal of Law, Government and Communication. 19(2), 192-198
[16] Choy, C.Y, Tie, F. H. & Siang, C.O (2016) "Court-Annexed Mediation Practice in Malaysia: What the Future Holds" University of Bologna Law Review, Vol. 1, pp. 271-308.

without fear and favour since judges continue to do justice accordingly without being prejudiced.[17]

In Tanzania's legal system, court-annexed mediation typically takes place shortly after the final pre-trial conference, once pleadings have been submitted to the court and the parties make no further applications. For instance; Order VIII Rule 16 of the CPC provides that As soon as the written statement of defence or if there are more defendants than one, the last written statement of defence, and the reply (if any) thereto, or the last reply if there are more plaintiffs than one, or other pleadings have been presented, the case shall be ready for mediation.[18] If a party unjustifiably misses a scheduled mediation session, the mediator will forward the file to the trial Judge or Magistrate, who may then issue appropriate orders.

The presiding judge or magistrate may dismiss the lawsuit if the plaintiff fails to comply, or strike out the defense if the defendant is non-compliant. Additionally, the judge may order the party to pay costs or issue any other just order he deem fit. This provision mandates that all civil cases in Tanzanian courts undergo court-annexed mediation, except for human rights cases, election petitions, constitutional cases as well as applications for judicial review. That is to say, once the suit is subject to mediation the parties must comply with a court order where the failure to do so the suit be subject to serious consequences. In the case of **Fahari Bottlers Ltd & Another vs. Registrar of Company & Another*[19]*** it was held inter alia that,

"the requirement for a suit to be referred to mediation first before full trial begins is a mandatory one under the Civil Procedure Code…".

In the High Court's Commercial Division, the use of court-annexed mediation is governed by Rule 33 of The High Court (Commercial Division) Procedure Rules. According to this rule, if a lawsuit is not resolved or dismissed under rules 28, 29, or 32, the Court mandates the parties to engage in mediation. Within seven days of the Court's order, a mediator will be appointed, and a date for the initial mediation session will be scheduled. This process aims to facilitate constructive dialogue between parties to potentially achieve a mutually acceptable resolution outside of formal litigation proceedings.[20]

The party or their advocate, or both if represented, will receive a notification and must attend the mediation session. If a party fails to attend without good cause, the mediator shall remit the

[17] Li, Y. (2016) "From "Access to Justice" to "Barrier to Justice"? An Empirical Examination of Chinese Court-Annexed Mediation", Asian Journal of Law and Society, Vol. 3, pp. 377-397.
[18] Order VIII Rule 16 of the Civil Procedure Code [Cap 33 R:E 2019]
[19] (2000) TLR 102.
[20] 33 of The High Court (Commercial Division) Procedure Rules 2012 as it was amended by G.N No 107 of 2019

file to the trial judge who may dismiss the suit or strike out the defence for non-complying parties. Additionally, the trial Judge may order the non-complying party to pay costs or make any other just order. If a party is dissatisfied with an order made by the court, they can apply with the Court within seven days for the restoration of the suit or defence.[21]

IV. LEGAL FRAMEWORK GOVERNING COURT-ANNEXED MEDIATION IN THE COMMERCIAL DIVISION OF THE HIGH COURT OF TANZANIA

Court-annexed mediation in the commercial division of the High Court of Tanzania is governed by a framework of legislation and subsidiary regulations. These legal instruments outline the procedures for initiating mediation, the criteria for mediator selection, and the procedural guidelines for conducting mediation. They also outline the consequences of non-compliance with mediation orders. The legislation specifically addresses the submission of disputes for mediation and the mechanisms for appointing mediators. They also outline the timelines and procedures involved in mediation sessions. Other legislative measures focus on the ethical standards and professional etiquette of mediators, emphasizing impartiality, confidentiality, and avoiding conflicts of interest. These provisions form a comprehensive framework for court-annexed mediation as an alternative dispute resolution mechanism within the High Court of Tanzania.

(A) The Constitution of the United Republic of Tanzania of 1977.

The Constitution stands as the foundational legal document of the state, enshrining the rights and responsibilities of every individual within its jurisdiction. It establishes the principle of constitutional supremacy, as outlined in Article 64(5), whereby all laws derive their authority from the Constitution itself. In cases where any other legislation contradicts the provisions of the Constitution, the Constitution takes precedence. This principle ensures that any law found to be inconsistent with the Constitution is rendered invalid to the extent of its inconsistency, underscoring the paramount importance of constitutional principles in governing the legal framework of the state.[22]

Concerning the resolution of disputes amicably constitution provides a legal foundation for the application of ADR, a mechanism under article 107A of the constitution that provides for the principles of administration of justice in Tanzania where principle number four through article 107A(2)(d) requires the court to deliver justice to promote and enhance dispute resolution

[21] Rule 36(a)&(b) of the High Court (Commercial Division) Procedure Rules. 2012 as it was amended by G.N No 107 of 2019

[22] Article 64(5) of the Constitution of the United Republic of Tanzania Cap 2 of 1977

among persons involved in the disputes.[23] This principle demands the court use another informal mechanism of mediation to ensure an amicable resolution of disputes. Therefore, the aim of introducing Alternative Dispute Resolution (ADR) in Tanzania was to complement the second principle in administrative justice under Article 107A(2)(b) which requires the court to deliver justice promptly or without delays.[24]

(B) Civil Procedure Code [Cap 33 R:E 2019]

Court-annexed mediation in Tanzania was introduced by Government Notice No. 422 of 1994, [25]which amended the First Schedule of the Civil Procedure Code (1966) by introducing new provisions under Orders VIIIA, VIIIB, VIIIC, and VIIID. These amendments significantly impacted the procedures for resolving civil suits in ordinary courts by instituting a mandatory procedural requirement for parties to submit their disputes to court-annexed Alternative Dispute Resolution (ADR) after filing pleadings.[26] This mandatory requirement for all civil cases in Tanzanians to go through ADR before proceeding with normal litigation makes it a serious consequence for non-compliance. If the plaintiff fails to comply, the court may dismiss the suit, while if the defendant fails, the court may strike out the WSD or issue any other order deemed fit.[27]

The Civil Procedures Code under Order VIII, Rule 25(1) provides a structured process for selecting a mediator in civil suits, requiring parties to appoint a mediator within fourteen days of the dispute's referred to mediation.[28] If parties fail to agree within the stipulated time, the court can intervene and appoint a mediator manually or electronically and inform the parties thereafter.[29] Also, Order VIII Rule 25(6) outlines the individuals qualified for nomination as mediators, including judges, registrars, magistrates and Retired judges or magistrates who can also be appointed as mediators. The Chief Justice may nominate a qualified mediator and his name shall be put in a register of mediators where a court and parties may appoint the mediator from the register of mediators appointed by the Chief Justice.[30]

Since mediation is voluntary mechanism where decision to settle rest to the parties themselves Order VIII Rule 28 of the Civil Procedure Code discusses about this issue where party attending a mediation session must have the authority to settle any issues that arise. If a party requires

[23] Article 107A(2)(d) of the Constitution of the United Republic of Tanzania Cap 2 of 1977
[24] Article 107A(2)(b) of the Constitution of the United Republic of Tanzania Cap 2 of 1977
[25] Government Notice No. 422 of 1994
[26] Order VIII Rule 16 of the Civil Procedure Code [Cap 33 R:E 2019]
[27] Order VIII Rule 29 of the Civil Procedure Code [Cap 33 R:E 2019]
[28] Order VIII Rule 25(1) of the Civil Procedure Code [Cap 33 R:E 2019]
[29] Order VIII Rule 25(2) of the Civil Procedure Code [Cap 33 R:E 2019]
[30] Order VIII Rule 25(6) of the Civil Procedure Code [Cap 33 R:E 2019]

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approval from another person to finalize a settlement, they must ensure that they have established a dependable means of communication with that person prior to the session. This communication should be readily available throughout the mediation, regardless of whether the session occurs during or outside regular business hours.[31] On the issue of confidentiality Rule 31 entails that All communications, notes, and records from a mediation session are confidential. Parties cannot use statements or information from the mediation as evidence in court or other settlement processes, except in cases where a party seeks to void the settlement agreement on the grounds of fraud. [32]However, the Civil Procedure Code is applicable in the Commercial Court only if the High Court (Commercial Division) rules are silent per rule 2(2) of the rules.

(C) The High Court of Tanzania (Commercial Division) Rules of Procedure of 2012

The High Court Commercial Division Rules outline procedures for dispute resolution through court-annexed mediation. Rule 9 provides guidelines on the appointment of mediators, where the Chief Justice may appoint individuals with mediation skills based on recommendations from the Commercial Court Users' Committee. These mediators are registered in a list maintained by the Registrar of the Court. Hence the presiding Judge or Registrar can nominate a mediator from the register. Moreover, the court under Rule 33 has the mandate to compel parties to go for mediation and appoint a mediator on behalf of the parties. The appointed mediator must schedule the first session within seven days. The process begins with the court's assessment of the case and mandates mediation as an alternative dispute resolution mechanism.[33]

Rule 34(1) of the mediation rules mandates that parties must attend sessions, either with their legal representatives or without. Parties must be notified about the session using the format specified in Form No.3 in the Schedule, ensuring they are properly informed about the session details and confidentiality. Attendance is mandatory to ensure both parties can participate fully in discussions. Also Court-annexed mediation in the Commercial Court adheres the principle of voluntariness in settlement, where Rule 35 provides that the authority to settle resting with the parties themselves. This is because the mediator's role is to facilitate an amicable resolution without making a binding decision. Therefore, during court-annexed mediation, parties can agree or not to settle through exchanging proposals to their satisfaction. This voluntary mechanism allows parties to reach an amicable resolution without making a binding decision.[34]

[31] Order VIII Rule 28 of the Civil Procedure Code [Cap 33 R:E 2019]
[32] Order VIII Rule 31
[33] Rule 33 of The High Court (Commercial Division) Procedure Rules, 2012
[34] Rule 35 of The High Court (Commercial Division) Procedure Rules, 2012 as it was amended by G.N No 107/2019

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The Rules emphasize the mediator's crucial role in dispute resolution, requiring mediators to act independently and impartially. They must hold meetings as necessary and propose settlement solutions, guided by principles of objectivity, fairness, and natural justice. In doing so, mediators should consider the rights and obligations of the parties, trade practices, and the circumstances surrounding the dispute. Mediators may also take into account the parties' wishes, including requests to hear oral statements, and can propose settlement solutions at any stage of the proceedings.[35] Moreover, regarding to the time which is required for the dispute to be resolved, Rule 40 mandates that disputes must be resolved within 14 days from the date of the first mediation session.[36] In case there is a failure to comply with a court order, Rule 36 empowers the court to take serious action if a party fails to attend, such as dismissing the suit if the non-complying party is the plaintiff or striking out the defence if the non-complying party is the defendant. The court may also order the non-complying party to pay costs or issue other justifiable orders[37].

Mediation concludes when the parties execute a settlement agreement, the mediator cancels a session due to non-compliance, the mediator declares that further mediation is not worthwhile, or the 14-day period from the first session expires. If no settlement agreement is reached, the suit returns to the trial judge, who then continues with the proceedings. This process ensures that parties have a fair opportunity to resolve their disputes while allowing the judicial process to resume efficiently if mediation does not lead to an agreement.[38]

In summary, The Rules outline the process of court-annexed mediation, including the court's role in appointing a mediator, confidentiality, authority to settle, and consequences for parties failing to submit disputes. However, they lack clear procedures for the commercial division of the High Court, requiring judges to use their skills to resolve disputes. The rules also contain mandatory provisions, making parties autonomous and lacking essence. This makes court-annexed mediation perceived as an adversarial mechanism, rather than an amicable dispute resolution mechanism.

[35] Rule 38 of The High Court (Commercial Division) Procedure Rules, 2012 as it was amended by G.N No 107/2019

[36] Rule 40 of The High Court (Commercial Division) Procedure Rules, 2012 as it was amended by G.N No 107/2019

[37] Rule 36 of The High Court (Commercial Division) Procedure Rules, 2012 as it was amended by G.N No 107/2019

[38] Rule 41 of The High Court (Commercial Division) Procedure Rules, 2012 as it was amended by G.N No 107/2019

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(D) Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021

Regulations were introduced in Tanzania to establish a formalized system for accrediting professionals in dispute resolution. The regulations outline accreditation processes, criteria, and qualifications for individuals aspiring to become recognized practitioners in these roles.[39] To qualify, practitioners must meet specific educational and professional requirements. For example, accredited practitioners to have a five-year history of community dispute resolution, be an advocate with five years of experience, be a member of an allied association with five years of professional practice, hold a bachelor's degree in specialized fields, or not have a criminal record, and adhere to ADR ethics.[40]

Moreover, Regulation 3(1) establishes an Accredited Panel with significant authority to oversee the accreditation process, address issues, and enforce discipline among dispute resolution practitioners. The Panel ensures individuals seeking recognition meet rigorous standards, address disputes within the accreditation framework and take disciplinary measures to uphold the integrity of the accreditation system. It also investigates and addresses breaches of professional conduct, ensuring practitioners maintain the highest ethical standards in their roles.[41]

(E) Code of Conduct and Practice for Reconciliators, Negotiators, Mediators and Arbitrators of 2021

The Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations of 2021 was introduced by GN. No 148 of 2021 to ensure that all accredited ADR practitioners adhere to the ethical principles and etiquette of their profession while engaged in the resolution of disputes.[42] This code was created to maintain the legitimacy of ADR as the proper mechanism for resolving disputes by shaping its members of the field to act with a high level of integrity, honesty and standard behaviour while handling disputes of their clients. This could increase the level of public confidence about the mechanism but also ensures that parties who are involved in the resolution of disputes arrive at an acceptable decision.[43]

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[39] Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021

[40] Regulation 5(1) Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021

[41] Regulation 11(1) of the Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations of 2021 provides that "*A complaint filed under these Regulations shall be determined by the Accreditation Panel to be convened by the Registrar within fourteen days from the date of receipt of the complaint"*

[42] The Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations of 2021

[43] ibd

The Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations of 2021 aims to ensure the integrity of dispute resolution processes, including reconciliation, negotiation, mediation, adjudication, and arbitration. It applies to practitioners in various dispute resolution activities, including reconciling conflicting parties, negotiating settlements, mediating disputes, and arbitrating cases. The regulation establishes a uniform standard of conduct across alternative dispute resolution, emphasizing ethical behavior and professionalism. It reinforces the Code's comprehensive application to practitioners in various stages and methods of dispute resolution within Tanzania's legal framework.[44]

Paragraph 2 of the 1st schedule of the Code provides for principles guiding the handling of disputes, ensuring that parties in dispute have the autonomy to make voluntary and non-coerced decisions regarding the resolution of issues. Practitioners respect and actively encourage these decisions, providing clear information about their respective roles and emphasizing that the authority for decision-making lies with the parties themselves. Practitioners may express views or opinions on the matters at issue and suggest evaluative approaches to facilitate amicable settlements while refraining from providing legal or professional advice unless required by the parties.[45]

The Code of Ethics for Reconciliators, Negotiators, Mediators, and Arbitrators outlines ethical conduct standards for handling disputes. It mandates transparency and integrity, requiring individuals to provide written disclosure of any circumstances that could compromise their independence or impartiality. This proactive measure aims to ensure all parties are well-informed about potential biases or conflicts of interest that could impact the fairness of the resolution process.[46] The Code also emphasizes the duty of the mediator to inform all parties involved, including experts and advisors, about the confidential nature of the mediation process. Paragraph 4(2) defines the scope of confidentiality, stating that all parties must maintain confidentiality regarding any information, documents, or communications arising during the mediation process.[47]

However, there is a complexity that raises concerns about the lack of a unified machinery overseeing and enforcing ethical standards across all ADR practitioners in the Tanzanian legal

[44] Regulation 4(1) of the Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations of 2021
[45] Paragraph 2 of the 1st schedule of the Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations of 2021
[46] Paragraph 3(1) of the 1st schedule of the Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations of 2021
[47] Paragraph 4(1)&(2) of the 1st schedule of the Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations of 2021

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landscape. For example, for Judges who act as mediators in the court-annexed mediation, their ethical conduct will be enforced by the judge's ethical committee under section 37(1) of the Judiciary Administration Act which is the only institution dealing with the ethics of the judges. [48] In contrast to the enforcement of other ADR practitioners that are accredited under the GN. No 147 of 20121 their ethics will be automatically enforced by the mechanisms established under the GN. No 148 of 2021. [49]The coexistence of these disparate mechanisms underscores the necessity for a more comprehensive and integrated approach to the enforcement of mediators' ethics in Tanzania specifically in the case of Judges who serve as mediators in the court-annexed mediation.

V. MEDIATOR AND HIS ROLE IN COURT-ANNEXED MEDIATION

The mediator is a third party who assists in resolving a dispute between two or more other parties. The role of the mediator is to facilitate communication between the parties, assist them in focusing on the real issues of the dispute, and generate options that meet the interests or needs of all relevant parties to resolve the conflict.[50] The mediator makes primarily procedural suggestions regarding how parties can agree. Occasionally, a mediator may suggest some substantive options to encourage the parties to expand the range of possible resolutions under consideration. A mediator often works with the parties individually in caucuses to explore acceptable resolution options or develop proposals that might move the parties closer to resolution without making a binding decision.[51] In the case of **Salama O. Kitenge vs Sophia Mshoro**[52] it was held inter alia that;

"In my considered opinion, a mediator has no mandate to enter judgment in favour of the plaintiff for nonappearance of the defendant or to dismiss the suit for nonappearance of the plaintiff. The role of a mediator is nothing else but to assist the parties in a dispute to arrive at an amicable settlement. A mediator's role is not to decide the case either way as if he or she were a trial Magistrate. If one of the parties to the suit does not appear on a date fixed for mediation or if both of them do not appear, the appropriate thing to do for a mediator is to adjourn the mediation until another date, and accordingly notify him or them

Mediators play a crucial role in the mediation process, varying in their level of directiveness

[48] Act No. 4 of 2011
[49] Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations of 2021
[50] Honeyman, C., & Yawanarajah. Beyond intractability: A free knowledge base on more constructive approaches to destructive conflict. Retrieved from http://www.beyondintractability.org/essay/mediation last accessed on 25th May, 2024
[51] ibd
[52] Civil Appeal No 100 of 2003

and involvement. Some mediators are hands-off, allowing parties to drive negotiations forward while providing guidance only when necessary. Others, on the other hand, are proactive, actively shaping and negotiating resolution terms. Regardless of their directiveness, mediators function as catalysts, helping parties navigate disputes and move towards a resolution. They can switch between a facilitative role, where they support and guide parties, and an evaluative role, where they offer insights and assessments about the merits and potential outcomes of the dispute. The choice of approach depends on the specific nature of the dispute and the needs of the parties involved. The mediator's goal is to enable meaningful dialogue and assist parties in reaching a mutually satisfactory resolution.[53]

Facilitative role; a facilitative mediator is a key player in the mediation process, managing the interaction between disputing parties to create an environment conducive to open communication. They encourage open expression of perspectives, needs, and interests, fostering mutual understanding and respect. The mediator uses techniques like managing interruptions, clarifying misunderstandings, and summarizing key points to keep the conversation constructive. They motivate parties to work towards an amicable settlement by highlighting the benefits of mediation over litigation. [54]

They encourage creative thinking and consider various options for resolution, empowering them to take ownership of the resolution process. The mediator remains neutral, facilitating dialogue that helps parties understand each other's positions and interests, aiding in the identification of practical and satisfactory solutions. This approach not only enhances the likelihood of reaching a settlement but also preserves relationships, especially in commercial disputes. The mediator's role is vital in guiding parties towards a mutually beneficial resolution while maintaining the integrity and fairness of the mediation process.[55]

Evaluative role; in this role, a mediator guides parties through a detailed analysis of their claims and defenses. The mediator's primary function is to objectively assess the strengths and weaknesses of each party's positions, including the factual and legal merits of each claim. They provide an informed perspective based on their legal expertise, helping parties understand how a judge or jury might view the evidence and arguments presented. The mediator's personal opinions or biases do not influence the process, but they focus on offering an impartial analysis that encourages parties to consider the practical implications of continuing litigation versus

[53] ibd

[54] Mackie, K. J., & Mackie, K. (2013). *A Handbook of Dispute Resolution*. Routledge. http://books.google.ie/books?id=-HiZRtQr_60C&printsec=frontcover&dq=ADR&hl=&cd=5&source=gbs_api

[55] Nandan, D. (2020). Role of mediator, & what are its advantages and disadvantages of mediation? Available at SSRN: http://dx.doi.org/10.2139/ssrn.3625710 last accessed on 25th May, 2024

settling. The mediator also facilitates discussions that highlight the risks and benefits of various legal strategies, presenting a balanced view of potential outcomes. This approach often includes reality testing, challenging unrealistic expectations and helping parties envision the consequences of different scenarios.[56]

VI. PRINCIPLE GOVERNING COURT-ANNEXED MEDIATION

To ensure effective court-annexed mediation, parties must align their conduct and practices with specific principles. These principles preserve the legitimacy of mediation as a dispute resolution mechanism, foster trust among stakeholders, and contribute to the success of the process. These principles include:

Confidentiality

Confidentiality in law is the obligation for parties in disputes to maintain privacy in communication unless agreed otherwise or required by law. It is crucial for successful mediation as parties need assurance to freely share sensitive information without fear of negative consequences. Mediation differs from litigation in its focus on privacy and confidentiality, with privacy-protecting individuals apart from mediators and confidentiality pertaining to the mediator and parties. Statements, information, or documents shared during mediation are inadmissible in civil proceedings without consent from all parties. Concessions or admissions made during mediation are also not allowed.[57] For example, Rule 39 of the High Court(Commercial Division) Procedural Rules provides that

"*All communications at a mediation session, as well as the mediation notes and records of the mediator, shall be deemed confidential. A party to a mediation may not rely on the record of statements made or any information obtained during the mediation as evidence in court proceedings or any other subsequent settlement initiative, except in relation to proceedings brought by either party to vitiate the settlement agreement on the grounds of fraud".*[58]

One of the primary reasons parties choose mediation is to avoid the publicity often associated with litigation, making confidentiality a crucial aspect of the process. Additionally, mediation is favored by parties because they trust its ability to resolve disputes outside the court system. Confidentiality is key in mediation, as it ensures that parties can express themselves openly,

[56] Mashamba ,C.(2014) *Alternative Dispute Resolution in Tanzania: Law and Practice*. MkukinaNyota Publishers Ltd,p.67

[57] Brown, K. (1991)Confidentiality in mediation: Status and implications. *Journal of Dispute Resolution*, *1991*(2), 1

[58] Rule 39 of the High Court (Commercial Division) Procedural Rules, 2012 as it was amended by G.N No 107/2019

facilitating a deeper understanding of the issues at hand. In the case of in the case of R**uth Twissa vs Israel Salath Mwakila and 6 Others**[59] Mgonya J stated that;

"…Second, is Confidentiality to the Parties. Unlike the potential publicity of court proceedings, everything said at the mediation is entirely confidential to the parties (unless specifically agreed otherwise)"

Exceptions to confidentiality in mediation arise in cases involving fraud, undue influence, or misrepresentation, where parties may engage in deceptive tactics, such as providing false information or coercion, compromising the integrity and validity of the negotiation. If such unethical behavior is brought to court, the defrauded party can use information obtained during mediation to prove the misconduct, preventing confidentiality from shielding wrongful actions and enabling a fair resolution. [60]Additionally Paragraph 4(1)(b) of the Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations allows the court to order the disclosure of mediation communications, transcripts, and notes if necessary for a fair resolution, ensuring that essential information is not withheld, thereby balancing confidentiality with the pursuit of justice.[61]

Privilege

The principle of privilege was introduced in mediation to prevent parties from tendering any documents or evidence adduced during the process. This means that all information and documents in adjudication are public and available to anyone, regardless of their involvement in the dispute. The "Without prejudice privilege" rule was introduced to limit the use of mediation and negotiation information as evidence in court, ensuring confidentiality and preventing parties from exploiting such admissions, this position was discussed in the case of **Unilever Plc v Procter & Gamble Co**[62] where Robert Walker L. J stated that;

"…they make clear that the Without Prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties to speak freely about all the issues

[59] Land Case No. 65 Of 2015
[60] ibd
[61] Paragraph 4(1)(b) of the Code of Conduct and Practice for Reconciliators, Negotiators, Mediators, and Arbitrators Regulations
[62] [2000] FSR 344

in the litigation both factual and legal when seeking compromise and for the purpose of establishing a basis for compromise admitting certain facts. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence with lawyers at their shoulders as minders."

Parties' Autonomy

Mediation is a party-centered ADR mechanism where parties have exclusive freedom over a dispute. Parties have the freedom to control the process, such as appointing a mediator, determining applicable laws, and venue. The mediation process promotes direct involvement from the parties, encouraging them to provide the factual background, identify issues, and interests, generate agreement options, and ultimately make the final decision for settlement. The goal of mediation is to find a mutually acceptable solution that satisfies the parties' needs, desires, and interests. Parties' autonomy is a fundamental principle that should be observed for mediation to be successful unless parties choose not to as it was stated in in **Geoffrey Muthinja & 4 Others v Samuel Muguna Henry & 2 others**[63] 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."

voluntariness

Mediation is a voluntary process in which no party is compelled to participate. Unlike litigation, where parties are summoned to respond to claims or present evidence in a public courtroom, mediation invites parties to engage in a cooperative approach to resolving their issues. It is a common form of ADR, where the final decision rests with the parties themselves, rather than being imposed by a third party. In all ADR proceedings, it is the individuals involved who choose to resolve their disputes through this method.[64]

Authority to settle

In mediation, the authority to settle remains with the parties, as the mediator does not impose a binding decision. The mediator employs particular procedures, techniques, and skills to help the disputing parties reach a resolution without the need for adjudication. Mediation is often sought when parties recognize that they cannot resolve their conflict on their own and need the

[63] [2022] eKLR
[64] Kovach, K(2005) *Meditation, in The Handbook of Dispute Resolution*, Jossey-Bass, P 305.

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assistance of a neutral third party to reach an agreement.[65] For example Paragraph 2(a) of the fist schedule of G.N No 148/2021 provides that parties to a dispute are free to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute and it is a duty of the mediator to ensure that parties are reaching to an acceptable deal.[66]

Parties have the right to decide whether to settle a dispute and determine the terms of the settlement, even if the court has referred the case to mediation or if mediation is required by contract or statute. Their self-determination is crucial in the mediation process, allowing them to create an acceptable settlement. They have complete control over the outcome and can withdraw at any time. In cases of mediation during litigation, settlements must be written, signed, and filed with the court. Pre-litigation settlements are considered binding contracts. Foristance Rule 35(1) of the High Court(Commercial Division) Procedural Rules, provides that the party to a mediation session shall have the authority to settle any matter during the mediation session[67]

Impartiality and neutrality

Impartiality and neutrality are core principles of mediation, though our laws do not clearly define these two terms however the word impartiality can be defined to mean freedom from favouritism, bias or prejudice while neutrality means that mediators must remain neutral as to the context and the outcome.[68] Mediator neutrality and impartiality are of utmost importance to ensure a fair process and outcome. However, when managing conflict during mediation, mediators may sometimes find it challenging to maintain neutrality if they aim to achieve a fair process and outcome for all parties involved.[69]

This principle is reflected in Article 107A(2)(a) of the Constitution of Tanzania, which emphasizes impartiality in delivering decisions in civil and criminal matters, irrespective of an individual's social or economic status, in accordance with Tanzanian law. This aligns with the ethical standards and professional conduct expected in mediation, where mediators must approach disputes with neutrality, ensuring all parties are treated fairly and without bias. This ethical obligation mirrors the constitutional directive, reinforcing the notion that everyone, regardless of their social or economic position, deserves equal and unbiased treatment in

[65] Fiadjoe A. (2004). *ADR: A developing World Perspective.* Cavendish Publish Ltd. London. P.59
[66] Paragraph 2(a) of the G.N No 148/2021
[67] Rule 35(1) of the High Court (Commercial Division) Procedural Rules, 2012
[68]Gaffney, I.(2022)Impartiality and neutrality in mediation. *Journal of Mediation and Applied Conflict Analysis* p.59
[69] Maiese, M (2005). "Neutrality." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Available on https://www.beyondintractability.org/essay/neutrality accessed 06/06/2024

mediation proceedings.[70]

VII. CHALLENGES FACING THE IMPLEMENTATION OF COURT-ANNEXED MEDIATION IN THE COMMERCIAL DIVISION OF THE HIGH COURT

The Commercial Division of the High Court of Tanzania introduced court-annexed mediation to expedite the resolution of commercial disputes and reduce case backlogs. However, this article found that there are challenges facing court-annexed mediation leading to poor implementation of this mechanism as a result they contributed to a massive failure of mediation within the court. The article identifies weaknesses in the legal and procedural framework governing court-annexed mediation as well as practical challenges as follows.

(A) Judges and Registrars serving as mediators

This is one of the factors that hinders the effectiveness of court-annexed mediation in the commercial court because when Judges or registrars serve as mediators, the outcome often results in mediation failure due to one key issue: their lack of mediation skills. These skills are distinct from the traditional dispute resolution methods that Judges are trained in, and are essential for the success of the mediation process. The author noted that judges are typically trained to resolve disputes through the conventional "winner takes all, loser loses all" approach. However, this mindset is at odds with the concept of amicable settlements, where the idea is that both parties should compromise, with a "winner wins a little, loser loses a little" outcome.[71]

Also, the article specifically pointed out that the same individuals who adjudicate cases as judges in another dispute in the same court may also be appointed by their fellow Judges to act as mediators in another dispute. This dual role presents challenges in achieving amicable resolutions, as many judges and court registrars tend to maintain a litigation-focused mindset and may be overly stern. The dual responsibilities of mediator and judge can lead to ineffective dispute resolution because many judges struggle to shed their adversarial attitudes during mediation. Additionally, judges are seen as authoritative figures who command respect, which can make parties feel uncomfortable during mediation sessions and lead to poor participation in the process.[72]

(B) Presence of Mandatory provisions of the law

Mediation is a voluntary process where disputants use informal procedures instead of litigation

[70] Article 107A(2)(a) of the Constitution of the United Republic of Tanzania
[71] Lukumay, Z. N. (2016). A reflection on court-annexed mediation in Tanzania. LST Law Review, p.55.
[72] Hamis, T.(2022) *Court-Annexed Mediation In Tanzania: Successes, Challenges And Prospects*. International Journal of Innovative Research and Advanced Studies (IJIRAS) Volume 9 Issue 11, November 2022. P.12

to resolve their disputes. However, the Commercial Division of the High Court's provisions regulating court-annexed mediation contains a mandatory provision which forces parties to go for mediation out of their will which results in mediation lacking efficiency. This article finds that the current legal framework specifically Rule 33 of the High Court (Commercial Division) Procedure Rules is not suitable for accommodating parties' voluntariness in court-annexed mediation, as it is a court which mandates to direct parties to submit their dispute for mediation. The tendency of compelling parties to mediate out of their consensus has led to massive failures in court-annexed mediation because it has contributed to poor participation of the parties in mediation and sometimes during mediation parties to the dispute may refuse to mediate completely which causes mediation to be marked as failed. Mandatory provisions affect parties' participation in the mediation mechanism since many disputants attend mediation sessions as a matter of compliance but in fact, they are not willing to settle through mediation.[73]

The study has gone further to check for best practices of court-annexed mediation in other jurisdictions such as Kenya where the author referred to Part II of The Civil Procedure (Court-Annexed Mediation) Rules specifically Rule 5(1)&(2) where parties may by mutual consent, request the court to refer the case to mediation where upon receipt of the request the court may refer a case to mediation at any stage before final judgment.[74] This evidences that the law governing Court annexed mediation in Kenya does not compel parties to mediate, hence it ensures that those who submit themselves for mediation have intentions to settle and they do not go for mediation as a matter of compliance to prevent massive failure of mediation. In other words, court mediation in Kenya is optional compared to what is done in Tanzania.

Therefore, the author found that mandatory requirements for the parties to submit their dispute for court-annexed mediation in the High Commercial Division have led to poor implementation and party participation, as parties are forced to resolve disputes out of their will, resulting in significant failures in court court-annexed mediation in the Commercial Division of the High Court.

(C) Absence of Pre-Litigation Mediation.

The article highlights that in Tanzania, court mediation is conducted after pleadings have been filed and interlocutory applications have already been determined as reflected in Rule 33 of the High Court (Commercial Division) Rules of Procedure and Rule 16 Order VIII of the CPC. These Rules do not accommodate parties to resolve their issues before filing their pleading

[73] Rule 33 of the High Court (Commercial Division) Procedure Rules, 2012 as it was amended by G.N No 107/2019
[74] Rule 5(1) of the Kenyan Civil Procedure (Court-Annexed Mediation) Rules, 2022

before the court of law. [75]Hence The absence of pre-litigation mediation is among the leading factors in the unsuccessful implementation of court-annexed mediation in the Commercial Division of the High Court of Tanzania because when parties go for mediation after completion of pleadings creates a win-lose outcome, which is not the primary objective of mediation.

The article pointed out that once pleadings are submitted to the court, each party gains access to the other's documents, allowing them to assess the strengths and weaknesses of their respective claims and defences. This exchange of pleading, however, might negatively impact their willingness to engage in mediation. This always happens when a party to the dispute identifies a flaw in the opposing side's pleadings, they may choose not to participate in mediation or do so half-heartedly and wait for litigation. For instance, if a defendant notices that the plaint is bad in law as it fails to disclose a cause of action, they might refuse to negotiate during mediation and instead party may wait for the litigation to proceed, intending to raise a preliminary objection during the hearing, which could result in the dismissal of the suit.

The author referred to the legal framework governing court-annexed mediation in South Africa where Rule 5 of Court-Annexed Mediation Rules of the Magistrates' Courts allows parties to the dispute to make a referral to mediation before the commencement of litigation. Under this Rule, parties are required to make a written request to the dispute resolution officer of the court to go for mediation. If all parties agree, the officer must appoint a mediator, set the date, time, and venue for mediation, and conclude a written mediation agreement.[76] Again rule 6 of the same rules applies to referral to mediation after the commencement of litigation.[77]

Therefore, the tendency of the court to conduct mediation after the filing of the suit makes parties to the dispute feel court-annexed mediation as part of the suit hence it directly affects the efficacy of the mechanism.

(D) Inadequate time for resolving a dispute

This is reflected under Rule 40 of the Commercial Court Rules[78] which provides inter alia that, the mediation period shall not exceed fourteen (14) days. However, the article highlighted that the time provided by the Rules for resolving disputes is often too short, especially for complex commercial cases that require more time to resolve. The limited timeframe mandated by law is a significant factor contributing to the failure of mediation in many cases. For example, in a

[75] Rule 33 of the High Court (Commercial Division) Procedure Rules, 2012 as it was amended by G.N No 107/2019
[76] Rule 5 of the South African Court-Annexed Mediation Rules of the Magistrates' Courts of 2014
[77] Rule 6 of the South African Court-Annexed Mediation Rules of the Magistrates' Courts of 2014
[78] Rule 40 of The High Court(Commercial Division) Procedure Rules, 2012 Gn. No. 250 of 2012 as it was amended by G.N No 107/2019

dispute between two companies, when one party makes an offer during mediation, it is both legally and logically expected that the other party should be given ample time to review the offer, consult with their management, and arrive at a well-considered, consensual decision. Unfortunately, the laws governing court-annexed mediation fail to provide for this necessary time, placing more emphasis on speed than on justice. Thus, the current focus on quick resolutions compromises the quality and fairness of the mediation process.

(E) Poor Cooperation from Advocates

The article revealed that advocates contribute to the ineffectiveness of court-annexed mediation because they often do not guide their clients toward amicable dispute resolution. Instead, they are more inclined to proceed to a full trial, motivated by the potential to earn substantial litigation fees. These fees are typically calculated based on filing and handling the suit, managing miscellaneous applications, appearances, drafting, and providing legal advice. Many advocates believe that assisting their clients in settling during mediation could result in a financial loss, as the case would not proceed to trial. This mindset is often influenced by the way these litigants charge their clients, with some charging hourly and others charging for each day they appear in court. [79]Since advocates, who act as the guiding minds for parties in a dispute, often discourage the use of amicable dispute settlement for their interests, they typically do not cooperate with judges or registrars to ensure the success of the mediation process. This lack of cooperation from advocates hinders the effectiveness of mediation and undermines its potential for success.[80]

(F) Shortage of Mediators in the Commercial Court

The article revealed that there is an inadequate number of mediators in the Commercial Division of the High Court which does not correspond to the number of disputes which are going for mediation per year. Although Rule 9(1) of the Commercial Court Rules empowers the Chief Justice to appoint any person with mediation skills to serve as mediator in the court, practically this rule has never been implemented by the Chief Justice instead it is the Judges and registrars of the Commercial Court who serve as mediator in which they are also limited in number. [81]The article highlighted that the commercial court has a significant imbalance between the number of mediators and the number of disputes per year, leading to a high volume of cases and

[79] Brooker, P & Lavers, A (2000). Appropriate ADR: Identifying Features of Construction Dispute Which Affect Their Suitability for Submission to ADR', International Construction Law Review, vol. 17, no. 2, pp. 272-95.
[80]McEwen, CA, Rogers, NH & Maiman, RJ (1995), 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation', Minnesota Law Review, vol. 79, pp. 1317-411
[81] Rule 9(1) of The High Court (Commercial Division) Procedure Rules, 2012 as it was amended by G.N No 107/2019

difficulties in managing and resolving disputes efficiently.

For instance, the report of the Commercial Court Users' Committee of 2023 shows that in the year 2022, there were 118 disputes which were submitted for mediation and only 31 out of 118 disputes were settled successfully. Again in the year 2023, there were 131 disputes which were submitted for mediation but only 39 disputes were settled successfully. This evidences that there is a huge number of disputes per year which are submitted for mediation compared to the available number of mediators in the Commercial Court which undermines the benefits of mediation, such as reducing case backlogs and providing quicker resolution processes. Therefore, an adequate number of mediators is needed for optimal system functioning.[82]

(G)Lack of the Law Regulating Training and Qualification of Mediators

Mediation is a crucial dispute settlement mechanism that requires a mediator with skills like communication, negotiation, empathy, neutrality, emotional management, conflict resolution techniques, and innovation. However, court-annexed mediation in the Commercial Division of the High Court often involves Judges who serve as mediators. Most Judges lack these skills, which can be acquired through training, leading to failures in mediation processes and a backlog of cases in the judiciary. Most mediators in the Commercial Court rely on their university law studies skills only, since most of them are not purely ADR experts specifically in resolving commercial disputes through mediation resulting in poor implementation of mediation. Additionally, Rule 9(1) of the Commercial Court Rules does not specify the clear qualifications required for one to be appointed as a mediator, which is crucial for some complex disputes. The law mentions only a person with mediation skills which is too general when it comes to the issue of resolving commercial disputes. [83]Therefore, the absence of legal provisions addressing necessary training for mediators in the Commercial Division of the High Court results in poor dispute resolution in the Commercial Court.

VIII. CONCLUSION

The introduction of court-annexed mediation in the Commercial Division of the High Court, as examined in this paper, has largely proven to be ineffective. The ineffectiveness stems from its failure to meet the objectives for which it was initially introduced. These objectives include reducing the backlog of cases, expediting the resolution process, preserving the relationship between parties by promoting settlement and lowering litigation costs. Unfortunately, these

[82] The Commercial Court Users' Committee Report of 2023

[83]Rule 9(1) of The High Court (Commercial Division) Procedure Rules, 2012 as it was amended by G.N No 107/2019

anticipated benefits have not been fully realized, leading to the conclusion that court-annexed mediation in the Commercial Court has not effectively served its intended purposes.

(A) What is the way forward to overcome these challenges?

It is said that whenever there is a legal problem then there is a legal solution. Hereunder are some possible solutions to overcome the challenges facing court annexed-mediation in the High Court Commercial Division as follows;

Firstly; mediation should be optional and not mandatory, since the current legal framework forces parties to submit disputes for mediation out of their will, leading to significant failures in court-annexed mediation. This is due to poor participation and refusal to mediate. The study suggests amending the law to remove mandatory provisions that force parties to attend mediation, allowing only those willing to mediate. This would prevent parties from attending mediation as a matter of procedure and avoid legal consequences.

Secondly: The current legal framework for mediation involves filing pleadings and determining interlocutory applications, which can be challenging for amicable dispute settlements. Parties may use the weaker pleadings to refuse mediation and wait for the case's hearing. To avoid legal technicalities, the Judiciary should amend the law regulating court-annexed mediation to allow parties to mediate without filling pleadings. This will prevent parties from refusing to mediate and relying on technicalities during a hearing.

Thirdly, the article suggests that Judges should not be used as mediators in court-annexed mediation, as this can lead to conflict of interest and undermine the process. The traditional "winner wins all and the loser loses all" system is often used, but this approach is not conducive to amicable settlements. The study suggests that Court-annexed mediation should be limited to accredited professionals with specialized skills, rather than judges and registrars. Employing skilled and impartial mediators trained in negotiation, communication, and conflict resolution can ensure amicable settlements, increase the likelihood of successful resolution, and improve party satisfaction and confidence.

Moreover, the article suggests the creation of a register of accredited mediators in the Commercial Division of the High Court to enhance the court-annexed mediation process. The register would include mediators with clear qualifications and standards. It would be publicly accessible and regularly updated, requiring stringent qualifications such as educational background, mediation training, practical experience, and understanding of commercial law and dispute resolution. Parties could also mutually agree on and select a mediator from the list.

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IX. REFERENCES

- Brooker, P & Lavers, A (2000). Appropriate ADR: Identifying Features of Construction Dispute Which Affect Their Suitability for Submission to ADR', International Construction Law Review, vol. 17, no. 2, pp. 272-95.
- Brown, K. (1991) Confidentiality in mediation: Status and implications. *Journal of Dispute Resolution, 1991*(2), 1
- Choy, C.Y, Tie, F. H. & Siang, C.O (2016) "Court-Annexed Mediation Practice in Malaysia: What the Future Holds" University of Bologna Law Review, Vol. 1, pp. 271-308.
- Cortes, P. (2022). Embedding alternative dispute resolution in the civil justice system: a taxonomy for ADR referrals and a digital pathway to increase the uptake of ADR. *Legal Studies*, *43*(2), 312–330.
- Dickerson,J(2021).*" Overview of Commercial Alternative Dispute Resolution in Africa"* Available on http://www.businessconflictmanagement.com/blog/2012/06/adr-in-africa/ Accessed on 27/10/2023
- Fiadjoe A. (2004). *ADR: A developing World Perspective.* Cavendish Publish Ltd. London. P.59
- Gaffney, I.(2022)Impartiality and neutrality in mediation. *Journal of Mediation and Applied Conflict Analysis* p.59
- Hamis, T.(2022) *Court-Annexed Mediation In Tanzania: Successes, Challenges And Prospects*. International Journal of Innovative Research and Advanced Studies (IJIRAS) Volume 9 Issue 11, November 2022. P.6
- Honeyman, C., & Yawanarajah. Beyond intractability: A free knowledge base on more constructive approaches to destructive conflict. Retrieved from http://www.beyondintractability.org/essay/mediation last accessed on 25th May, 2024
- king. (2023). The Dilemma and Optimization of Pre-Litigation Mediation of Administrative
- Kohlhagin, D.(2012) "Alternative Dispute Resolution and Mediation: The Experience of French Speaking Countries" Presentation at EACC Conference: How to Make ADR Work, in Addis Ababa, Ethiopia, p.6.

- Kovach, K(2005) *Meditation, in The Handbook of Dispute Resolution*, Jossey-Bass, P 305.
- Li, Y. (2016) "From "Access to Justice" to "Barrier to Justice"? An Empirical Examination of Chinese Court-Annexed Mediation", Asian Journal of Law and Society, Vol. 3, pp. 377-397.
- Lukumay, Z. N. (2016). A reflection on court-annexed mediation in Tanzania. LST Law Review, p.55.
- Mackie, K. J., & Mackie, K. (2013). *A Handbook of Dispute Resolution*. Routledge. http://books.google.ie/books?id=-HiZRtQr_60C&printsec=frontcover&dq=ADR&hl=&cd=5&source=gbs_api
- Maiese, M (2005). "Neutrality." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Available on https://www.beyondintractability.org/essay/neutrality accessed 06/06/2024
- Mashamba ,C.(2014) *Alternative Dispute Resolution in Tanzania: Law and Practice*. MkukinaNyota Publishers Ltd p.103
- McEwen, CA, Rogers, NH & Maiman, RJ (1995), 'Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation', Minnesota Law Review, vol. 79, pp. 1317-411
- Mzee, M& Ahmad, O. (2020). Towards Effective Court-Annexed Mediation on Commercial Disputes in Zanzibar. International Journal of Law, Government and Communication. 19(2), 192-198
- Nandan, D. (2020). Role of mediator, & what are its advantages and disadvantages of mediation? Available at SSRN: http://dx.doi.org/10.2139/ssrn.3625710 last accessed on 25th May, 2024
- Sourdin, T. (2014). Alternative Dispute Resolution (ADR) Principles: From Negotiation to Mediation. *SSRN Electronic Journal*. https://doi.org/10.2139/ssrn.2723652

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