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Legal Complexities in Mediation Insights in Civil Proceedings

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ABSTRACT

Mediation, as a pivotal alternative dispute resolution mechanism in Tanzania, offers a viable solution to alleviate court congestion and expedite the resolution of civil disputes. However, its effective implementation faces several legal complexities. This article delves into the critical challenges impacting mediation in Tanzanian civil proceedings, including issues of enforceability of mediated agreements, impartiality in mediator selection, and procedural fairness. Through an analysis of recent case studies and judicial precedents, the article highlights the evolving legal landscape and the judiciary's role in shaping mediation practices. It further proposes solutions such as standardized mediator training, legislative reforms to enhance enforceability, and public awareness campaigns to promote the benefits of mediation. By addressing these challenges, Tanzania can develop a robust mediation framework that not only empowers parties but also ensures justice and efficiency in civil dispute resolution. This comprehensive assessment aims to provide valuable insights for stakeholders, policymakers, and legal practitioners striving to optimize mediation practices in Tanzania.

***Keywords**: Mediation, Civil Dispute, Legal Challenges, Enforceability, Judicial Precedence.*

I. INTRODUCTION

Conflicts are inevitable, but their peaceful and effective resolution is crucial. As one author stated, "As long as human beings have conscience and intellect to think about the future, definitely there will be conflicts. Conflicts are made by human beings and methods to solve them must be created through human intelligence. It is wise to solve the conflict through dialogue, not through weapon."[2] This perspective highlights the necessity of amicable dispute resolution to maintain relationships and foster development.[3] Disputes naturally arise from human interactions, affecting our lives and relationships. Thus, finding effective ways to

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[2] Mashamba, C. (2012). *Alternative Dispute Resolution in Tanzania*: Law and Practice. Mkuki na Nyota Publisher Ltd. Dar es salaam-Tanzania

[3] Owasanoye, B. (2000). *Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa*. Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution (Harare, Zimbabwe 11 to 15 September 2000).

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address them is essential.

Historical texts, such as the Bible and the Qur'an, and various traditions describe ancient methods for peaceful conflict resolution. These accounts show that negotiation, mediation, arbitration, and adjudication have long been used to settle disputes. In modern times, these methods have evolved and are widely accepted worldwide. Dispute resolution generally falls into two categories: adjudicative processes, like litigation or arbitration, where judges or arbitrators determine outcomes, and consensual processes, like mediation or negotiation, where parties strive for mutual agreement.[4]

In Tanzania, court-annexed mediation is a crucial mediation process conducted after parties file a case. The judge or magistrate orders the parties to attend mediation before another judge or magistrate, offering a chance to settle their dispute amicably before litigation. This compulsory mediation is mandated by law before litigation, except in specific cases like human rights petitions, election petitions, constitutional interpretations, or applications for judicial review. The goal of court-annexed mediation is to create a conducive atmosphere and encourage parties to resolve their dispute voluntarily, promptly, fairly, and cost-effectively. If parties reach an amicable settlement during court-annexed mediation, the case concludes there.

II. HISTORICAL BACKGROUND OF ALTERNATIVE DISPUTE RESOLUTION

The movement for Alternative Dispute Resolution (ADR) of which mediation is amongst of its forms started in the United States of America in the 1970`s in response to the need to find more efficient and effective alternatives to litigation. ADR actually stands for a collective name used for several methods of dealing with disputes rather than going through the conventional court system.[5] In 1976 the US Chief Justice by then, Warren Burger, convened the National Conference (famously known as the Pound Conference) on the causes of popular dissatisfaction with the administration of justice aiming at developing proposals for judicial reform. In his speech, CJ Burger proposed for alternative dispute resolution methods that would reduce the problems facing the judiciary:[6] delays of cases, high costs and undue technicality. During his many visits to the United States of America, the late Chief Justice Nyalali learnt about the practice of ADR Mechanisms in the Superior Court of Washington D.C.

The idea appealed to him; and so, in 1993, he invited two Judges from the Superior Court of

[4] Hamis.T.H (2022) *Court-Annexed Mediation in Tanzania: Successes, Challenges and Prospects*: International Journal of Innovative Research and Advanced Studies (IJIRAS) Volume 9 Issue 11

[5] Ginkel ,E., "Court-Annexed ADR in Los Angeles County", accessed at http://www.businessadr.com/EvG/ Publications files/Court - Annexed%20ADR%20in%20LA%20County.pdf on 26/03/2024.

[6] Warren Burger, "Isn't there a Better Way? 'Accessed at http://www.jstor.org/page/info/about/policies/ terms.jsp

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Washington D.C. to attend a Judges' Conference held at Arusha from 19th to 23rd April, 1993.[7] At that Conference, the two American Judges presented papers on the operation of Alternative Dispute Resolution Mechanisms as practiced in the United States of America and in their Court in particular. At the end of that Conference, it was resolved that efforts should be made to find out form of ADR that would suit Tanzanian circumstances.[8] In 1994, ADR in the form of mediation, negotiation and arbitration was adopted and incorporated into the Civil Procedure Code (CPC)[9] through the Government Gazette.[10] Today, ADR is flourishing throughout the world because it has proven itself in multiple ways to be a better way to resolve disputes.[11] More recently, ADR has been gaining popularities and has become incorporated into various legal systems and institutionalized as part of many court systems and justice system as whole throughout the world.[12] Generally, mediation is the facilitation of a negotiated agreement by a neutral third party who has no decision-making power.[13] Mediation is now recognized as one of the quickest and most cost-effective ways of resolving a dispute and is the most applicable common form of ADR.

In Tanzania, the root for court-annexed mediation is sourced from Article 107A (2)(d)[14] of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time, which requires courts in course of dispensing justice to promote and enhance dispute resolutions. Statutorily, the ADR was launched into Tanzanian civil justice system since 1994 when Orders VIIIA,[15] VIIIB[16] and VIIIC[17] were introduced into the first schedule to the Civil Procedure Code [Cap 33. R.E 2019] (hereinafter to be referred to as "the CPC") aiming to attain amicable settlement of disputes between the parties. Currently, court-annexed mediation is provided for under Order VIIIC, rule 24 – 34 of the Code.[18] Having its legality from both the constitution and the statute, court-annexed mediation in Tanzania is a compulsory dispute settlement mechanism of which each civil suit with some limited exceptional cases must pass through and non-compliance of it led to a serious legal consequence of declaring the whole proceedings to

[7] The Training Manual, the Judiciary of Tanzania, at p. 3.
[8] Ibid
[9] Order VIIIC of the Civil Procedure Code Act, [Cap. 33 R. E. 2002].
[10] GN.No.422 of 1994
[11] Hamis.T.H (2022) *Court-Annexed Mediation in Tanzania: Successes, Challenges and Prospects*: International Journal of Innovative Research and Advanced Studies (IJIRAS) Volume 9 Issue 11
[12] Ibid at Page 5
[13] Ibid at page 6
[14] Article 107A (2)(d) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time
[15] Order VIIIA of Civil Procedure Code [Cap 33. R.E 2019]
[16] Order VIIIB of Civil Procedure Code [Cap 33. R.E 2019]
[17] Order VIIIC of Civil Procedure Code [Cap 33. R.E 2019]
[18] Ibid Order VIII C Rule 24 -34 of Civil Procedure Code [Cap 33. R.E 2019]

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be null and void. In law and practice, court-annexed mediation in Tanzania is conducted during first pre-trial conferences after pleadings are complete and any preliminary objections are determined where the trial judge/magistrate assign the case file to the appointed mediator or another judge/magistrate appointed by the court to ascertain the possibility of resolving the dispute through ADR as a compulsory procedure as per Order VIIIB, rule 22(1) of the CPC.[19]

Hence, in Tanzania court-annexed mediation is mainly practiced when all the pleadings have been duly filed and there are no pending applications or any other preliminary matter to be disposed of.[20] Despite the tremendous advantages of court-annexed mediation in Tanzania, still its efficiency has been relatively low and perhaps the objectives for its introduction are not sufficiently and highly met as expected. Court-annexed mediation in Tanzania has its own downsides. It is argued that the aim of court-annexed mediation from the legal perspective is more towards institutional efficiency particularly in reducing case backlogs rather than parties" satisfaction and just outcomes through creative problem-solving. Hence, court-annexed mediation in Tanzania has turned out to be less productive and efficiency. Courts and other stakeholders, though they give priority to court-annexed mediation, the aims have not been fully realized due to a set of setbacks.

III. UNDERSTANDING MEDIATION IN TANZANIA CIVIL PROCEEDINGS

Mediation is the most important dispute resolution mechanism within the collective term known as ADR (Alternative Dispute Resolution) which encompasses innovative modes of dispute resolution as an 'alternative' to traditional litigation. Mediation encompasses instances where a third-party aid in reaching an agreement. It possesses a distinct structure, timetable, and dynamics that set it apart from conventional negotiation. The process is confidential, potentially backed by legal enforcement, and typically voluntary.[21] The mediator acts neutrally, facilitating rather than dictating the proceedings. Mediation is increasingly recognized globally as a peaceful conflict resolution method applicable to disputes of any scale.

According to **Boulle** and **Rycroft** [22] defines mediation as

A decision-making process in which the parties are assisted by a third party the mediator, who attempts to improve the process of decision making and to assist parties reach an outcome to

[19] Order VIIIB rule 22(1) of Civil Procedure Code [Cap 33. R.E 2019]
[20] Hamis.T.H (2022) *Court-Annexed Mediation in Tanzania: Successes, Challenges and Prospects*: International Journal of Innovative Research and Advanced Studies (IJIRAS) Volume 9 Issue 11
[21] Trenczek, T., Berning, D., Lenz, C. *Mediation und Konflikt management: Hand Buch, Baden-Baden,* Nomos Publishing House, 2013, p. 23.
[22] Boulle, L.& Rycoft, A., *Mediation Principles, Processes, Practice, London: Butterworths,*1997. p. 3.

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which each of them can assent.[23]

According to **Foberg** and **Taylor** [24] a statutory definition of mediation is given by the Australian Family Law Rules.

Mediation is considered as a decision-making process in which the approved mediator assists the parties by facilitating discussions between them so that they may communicate with each other regarding the matters in dispute.

The aim is to find satisfactory solutions which are fair to each of the parties and reach agreement on matters in dispute. The main purposes of mediation are to: promote access to justice, promote restorative justice, and preserve relationships between litigants or potential litigants which may become strained or destroyed by the adversarial nature of litigation. It also facilitates an expeditious and cost-effective resolution of a dispute between litigants or potential litigants and assist litigants or potential litigants to determine at an early stage of the litigation or prior to commencement of litigation. It also dispenses with litigation procedure and rules of evidence; and provides litigants or potential litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers.[25]

(A) Type of Mediation

a. Private Mediation

Private mediation services are those offered on a fee-paying basis by mediators independently of courts, government agencies or community organization whose fees are generally determined by market forces.[26] In private mediation, the parties choose their own mediator. In some countries like South Africa, some organizations such as the Alternative Dispute Resolution Association of South Africa (ADRASSA), Africa Centre for the Constructive of Disputes (ACCORD), Community Conflict Resolution Services (CCRS) and Mediation and Conciliation Centre (MCC) provide mediation services and some have their own contract clauses, mediation agreements and codes of conduct. They assist parties to get to the mediation table by arranging premises and offer a panel of mediators.

b. Court- Annexed Mediation

Court-Annexed mediation is that which specifically ordered by the Court.[27] It can also mean mediation which is directed, encouraged or promoted by the courts in the context of anticipated

[23] Ibid at pg. 3
[24] Foberg J. &Taylor A., *A Comprehensive Guide to Resolving Conflict Without Litigation*, 1984, p. 7
[25] Boulle, L. & Rycoft, A., *Mediation Principles, Processes, Practice, London: Butterworths,* 1997. p.6.
[26] Ibid at p. 56
[27] Ibid

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or ongoing litigation. In court-annexed mediation, the parties to a pending case are directed by the court to submit their dispute to a neutral third party (the Mediator), who works with them to reach a settlement of their controversy. The Mediator acts as a facilitator for the parties to arrive at a mutually acceptable arrangement, which will be the basis for the court to render a judgment based on a compromise.[28] Tanzania has preferred court-annexed mediation in which a mediator is appointed by the Judge in-charge or the Magistrate in-charge of the court in which the suit has been filed.[29]In the Court-annexed mediation, the court as a part and parcel of the same judicial system provides services.

(B) Principle Governing Mediation in Tanzania

a. Voluntary Participation

The parties shall participate on their own motion in the procedure and may withdraw at any time. Under Order VIIIC Rule 26(1) (b) of the Code,[30] First of all, this procedure may be started only if there is an agreement between the parties. This decision should be their choice. It should be party's adequate step based on their free will. No one has the right to involve parties in the procedure of mediation by force. This action will not be only violation of this principle, but also violation a meaning of mediation. The third party in mediation (mediator) needs to know how to explain the advantages of such dispute resolution to the parties, so that they themselves voluntarily agree to be part of such process. Both parties can stop mediation process at any time, so they should be informed on the possibility to interrupt this process at any stage, if they express need for such. This principle, principle of willingness applies at all stages of the mediation. What is the mediator's right based on this principle. A Mediator can interrupt mediation if parties he/she feels that parties turn away from the solution or that are even more opposed than they were at the start of mediation, because important basic principle in the process of mediation is that this procedure should not harm the parties in any way. Based on this principle in situation of conflicts hen too or more parties come together voluntarily to resolve the dispute by taking a help of a third party this process known as voluntary mediation.

b. Neutrality

One very important (perhaps the most important) principle of mediation states that the process must be neutral and free. The third party (mediator) of this procedure is normally called the

[28] Meggit, G., *"The Case For (and Against) Compulsory Court-Annexed Mediation in Hong Kong",* Asian Law Institute (ASLI) Conference, Singapore, May 2008, accessed at http://papers.ssrn.com/sol3/papers. cfm?abstract_id=2290134 accessed on 29/06/2024.
[29] http://attylaserna.blogspot.com/2008/07/court-annexed-mediation.html accessed on 29/06/2024.
[30] Order VIIIC Rule 26(1) (b) of the Civil Procedure Code [Cap 33 RE 2019]

'neutral third party' because the process places the responsibility of neutrality on the mediator. Phrase 'neutral third party' means that, mediator have to be neutral as a usual person. Mediator does not present any party in this procedure; he has to remain neutrality and objectivity, regardless of identity of parties and issue of dispute. Neutrality is commonly cited as one of the fundamental principles of mediation. Indeed, it's often one of the key concerns for anybody who has had the responsibility for selecting a mediator. The principle of neutrality is central to the success of mediation and as we know, it is an essential principle of mediation. Parties come to the table with fear, anxiety as a result of lack of trust for each other and they turn to the process for solace and solution as they show confidence and belief in the mediator to help salvage a desperate situation. By choosing Mediation, they lay their fate in the hands of the mediator, expecting to be shown the 'light'. Neutrality characterizes the mediator and between the parties to the relationship. Mediator, as a rule with the contracting parties is not related to the social environment. Neutrality also means that the mediator does not expect any profit or compensation from either party in exchange for a useful result. People are going to be independent mediators in negotiations for procedural assistance. They do not need an intermediary who only protects the interests of one party.

c. Impartiality

Represents the situation when the mediator must remain neutral position and does not serve the interests of each party in the negotiation process. Under Order VIIIC Rule 26(2) (a) code,[31]However, Impartiality does not necessarily mean that the mediator is totally remote from the parties during the process and discussed issues. So, impartiality's exact definition will be "multilateralists". In the nutshell, impartial mediator's main task is to achieve a satisfactory result for the parties. Impartiality does not necessarily mean that the mediator should not have a personal opinion about the desired outcome; it also has some kind of sympathy towards any party. No one can be absolutely impartial. Impartiality emphasizes that the mediator must be able to separate personal attitude towards the process and the parties, also his/her obligations and must be oriented to assist the parties to reach agreement without giving priority to any of them. The main measure of mediator's impartiality is parties' assessment- they should consider the mediator to be sufficiently impartial in order to trust their case. Impartiality is one of the essential principles to mediation process; mediator should maintain objectivity despite the subject of identity and dispute. Contrary to this opinion, some say that mediator uses balancing techniques to achieve equality between the parties in the process. Many mediators, depending

[31] Order VIIIC Rule 26 (2) (a) of the Civil Procedure Code [Cap 33 RE 2019]

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on the flexible nature of mediation, tries to fit process to the specificity of the dispute in every particular case. Different approaches create imagination that, it is not possible to create an ethics code. It is hard to establish concept of impartiality correctly, so it is important to have a detailed reviewing of this concept.

d. Confidentiality

If the two parties dismiss the mediator from this obligation, then the obligation will no longer exist. Such dismissal does not require a special form and can be performed in a conciliatory manner. Confidentiality is one of the most important issues under the ICC ADR Rules. The dissemination of the requirements related to the parties shall be allowed only if they decide to hold mediation in accordance with the ICC ADR Rules. If one of the party's addresses starting of the mediation procedure, the rules of confidentiality will not apply to both sides until the other side agrees. The obligation to protect the confidentiality of mediation shall apply not only to the mediator but to the persons who might be in touch with this procedure. For example, if the mediator holds a meeting with the parties in his/her office, the obligation to protect the confidentiality is also responsibility of the company's employees, for which the details of the case may be known, for instance: the secretary who may ask the mediator to help in the preparation of the transcript, also the practitioners who may attend the mediation process.

e. Avoiding Conflicts of Interest

One of the principles of professional ethics is inadmissibility conflicts of interest. The principle of neutrality is closely related to the conflict of interests. Under VIIIC Rule 26(2) (d) of the Code,[32] Here exists the question how the neutral should be a mediator to the parties, their lawyers or representatives. Ethics dilemma exists even when one of the parties is a former partner or client, regardless of their attitudes towards dispute. Even more problem may arise if mediator provides legal or psychological services to one of the participants of the process. In fewer societies where mediator knows large part of society, such restriction impedes mediation practice development. After many years of mediation practice the situation is created when legal firms and private mediators are not able to carry out their representative function, because of their participation in mediation processes. If the mediation process will be completed without the agreement between the Parties and after that party wants to carry out a case in court or arbitration and / or the other party has deprived the right to be represented by a mediator who was guiding the mediation process.

[32] Order VIIIC Rule 26(2) (d) of the Civil Procedure Code [Cap 33 RE 2019]

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(C) Scope and Applicability in Tanzania

a. Scope of mediation under Civil Procedure Code Cap 33

The scope of mediation under the amended Civil Procedure Code is extensive, encompassing a wide range of civil actions as mandated by Order VIIIC Rule 24.[33] This inclusive approach aims to position mediation as a crucial preliminary step in resolving civil disputes before they escalate to full litigation. By requiring that all civil actions, unless expressly excluded by other laws, undergo negotiation, conciliation, mediation, or similar alternative dispute resolution (ADR) methods, Order VIIIC Rule 24[34] underscores the judiciary's commitment to promoting amicable settlements and reducing the burden of prolonged court proceedings. This provision not only encourages parties to explore mutually acceptable solutions early in the dispute resolution process but also emphasizes the importance of mediation in fostering efficiency and minimizing adversarial confrontation in legal disputes.

b. It's Applicability

The applicability of mediation rules under the amended Civil Procedure Code covers all stages of civil litigation, detailing specific procedures and responsibilities. According to Rule 25,[35] parties must propose a mediator within 14 days of completing pleadings, encouraging early engagement; if they fail, the court appoints one, ensuring mediation moves forward despite initial disagreements. Mediators, including judges, registrars, and other qualified individuals, offer diverse expertise. Rule 26[36] outlines fair mediation practices: facilitating communication, identifying issues, and seeking resolution through joint or separate meetings, expert input, and settlement proposals, fostering transparent negotiation and fairness. Attendance requirements (Rules 27-28)[37] mandate the presence of parties, their advocates, and potentially liable third parties, promoting comprehensive participation in dispute resolution. Rule 29[38] penalizes unjustified non-attendance by potentially dismissing the case or imposing costs, reinforcing mediation's mandatory nature and encouraging sincere engagement. Rules 31-32[39] safeguard mediation confidentiality, prohibiting the use of its proceedings in subsequent trials, thereby promoting candid dialogue essential for effective conflict resolution. A 30-day mediation period from the initial session Rule 32[40] ensures timely dispute resolution by maintaining efficiency

[33] Order VIIIC Rule 24 of the Civil Procedure Code [Cap 33 RE 2019]
[34] Order VIIIC Rule 24 of the Civil Procedure Code [Cap 33 RE 2019]
[35] Ibid Rule 25 of the [Cap 33 RE 2019]
[36] Ibid Rule 26 of the [Cap 33 RE 2019]
[37] Ibid Rule 27 and 28 of the [Cap 33 RE 2019]
[38] Ibid Rule 29 of the [Cap 33 RE 2019]
[39] Ibid Rule 31 and 32 of the [Cap 33 RE 2019]
[40] Ibid Rule 32 of the [Cap 33 RE 2019]

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and focus. Rule 33[41] dictates the conclusion of mediation upon reaching a settlement, declaring mediation futile, or after the 30-day period, promptly transferring records for unresolved cases to proceed to trial without delay.

(D) Benefits Compared to Traditional Litigation

a. Increasing Access to Justice

Justice Sundaresh Menon, the former Chief Justice of Singapore,[42] emphasized the importance of enhancing access to justice through both traditional court systems and alternative dispute resolution mechanisms during the launch of the subordinate courts. He articulated that true access to justice should encompass both the ability to reach the courts and the capacity to resolve disputes consensually outside of the courts. The International Consortium for Court Excellence further elaborates that access to justice thrives within a judicial ecosystem focused on four critical metrics: timeliness, equality, fairness, and integrity; independence and accountability; and public trust and confidence. In Tanzania, the implementation of court-annexed mediation has substantially improved access to justice. By integrating mediation within the judicial system, it offers a parallel mechanism to the formal court system, ensuring that parties can resolve disputes equitably and efficiently. This dual approach to justice enables a significant number of cases to be settled at the pre-litigation stage through mediated agreements, thereby reducing the backlog of cases in the courts and ensuring that justice is both accessible and timely. The mediation process not only expedites the resolution of disputes but also upholds the standards of fairness and procedural integrity akin to those of formal court proceedings. This system ensures that all parties receive equal protection under the law, fostering a judicial environment where justice is more readily attainable. Thus, the benefits of court-annexed mediation in Tanzania are profound, offering an enhanced, accessible, and efficient means of resolving disputes while maintaining the principles of fairness and justice.

b. Less Cost-Effective System

Mediation, by its very nature, is less costly compared to traditional litigation due to its informal and expedited process. In Tanzania, this cost efficiency is further enhanced by the practice of appointing judges and magistrates as mediators, who are remunerated by the judiciary itself. Consequently, the parties involved in mediation are spared the expenses typically associated with hiring independent mediators, making the process financially accessible. The early

[41] Ibid Rule 33 of the [Cap 33 RE 2019]
[42] Chief Justice Sundresh Menon, Address at the Joint Launch of the state Court Centre for Dispute Resolution and "Mediation in Singapore: A Practical Guide 4th March 2015 at p. 5

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intervention characteristic of mediation ensures that disputes are addressed promptly, minimizing the preparation and procedural costs that usually accumulate during prolonged litigation. This cost-effectiveness is particularly beneficial in a judicial landscape where resources are often limited, and the financial burden of lengthy court cases can be prohibitive for many parties. Moreover, parties who reach a mediated agreement avoid the unnecessary costs associated with prolonged legal battles. This financial relief is a significant advantage, as it allows individuals and businesses to allocate their resources more effectively, fostering a more economically stable environment. By reducing the financial barriers to justice, court-annexed mediation in Tanzania promotes a more inclusive and accessible judicial system.

c. Facilitating Communication Between Parties in Conflict

Court-annexed mediation significantly enhances communication between parties in conflict, fostering an environment conducive to rebuilding and maintaining relationships. Unlike litigation, which often results in a win-lose outcome, mediation encourages mutual understanding and collaboration, leading to mutually satisfactory resolutions. This is particularly beneficial in cases involving matrimonial proceedings or commercial disputes, where maintaining relationships is crucial. The mediation process brings parties together in a structured yet informal setting, allowing them to openly discuss their issues and work towards a resolution. This collaborative approach not only resolves the immediate dispute but also lays the foundation for better communication and cooperation in the future. In the context of business relationships, such as partnerships or other commercial dealings, this can be instrumental in preserving and strengthening professional ties. By promoting better relationships and mutual outcomes, court-annexed mediation contributes to a more harmonious and cooperative society. It transforms the adversarial nature of disputes into a constructive dialogue, where parties can resolve their differences amicably. This relational aspect of mediation is a key factor in its success, making it a valuable tool in the Tanzanian judicial system.

d. Easy Enforcement of Mediated Agreements

One of the notable advantages of court-annexed mediation is the ease and friendliness of enforcing mediated agreements. Since the parties themselves determine the solution to their dispute, they are more likely to comply with the terms of the agreement. This self-determined resolution reduces the possibility of non-compliance, as parties have a vested interest in upholding the agreement they helped create. The involvement of the court in the mediation process lends an additional layer of legitimacy and enforceability to the agreements reached. Should a party fail to comply, the court can intervene to enforce the terms of the agreement,

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provided sufficient grounds are presented and proven to invalidate the settlement. This judicial oversight ensures that mediated agreements are respected and adhered to, maintaining the integrity of the mediation process. The ease of enforcement is a significant advantage, as it ensures that the outcomes of mediation are not merely symbolic but are effectively implemented. This reliability fosters greater confidence in the mediation process, encouraging more parties to opt for this dispute resolution mechanism. In Tanzania, this has translated into a more efficient and effective judicial system, where mediated agreements are not only reached but also reliably enforced.

e. Maintenance of Peace and Harmony in Society

Court-annexed mediation plays a crucial role in maintaining peace and harmony within society by facilitating the peaceful resolution of disputes. Unlike traditional court trials, which can exacerbate tensions and turn parties into adversaries, mediation seeks to bridge differences and promote industrial harmony and peaceful coexistence. This approach preserves the relationships between parties, fostering an atmosphere of mutual respect and understanding. The tendency towards amicable settlements in mediation attracts an environment conducive to peace and harmony. By resolving disputes amicably, parties can move forward without lingering animosities, contributing to a more cohesive and stable society. This is particularly important in a diverse and dynamic society like Tanzania, where maintaining social harmony is essential for national development and prosperity. Researchers and practitioners alike recognize the value of mediation in promoting societal harmony. By addressing conflicts through dialogue and mutual agreement, mediation reduces the likelihood of future disputes and fosters a culture of cooperation and collaboration. This societal benefit underscores the importance of court-annexed mediation as a tool for building and sustaining peace within the community.

f. Reducing Delays in Getting to Settlement

The introduction of court-annexed mediation in Tanzania has significantly reduced delays in reaching settlements. The traditional court system, characterized by an increasing number of cases, limited resources, and time-consuming procedures, often leads to a congested and inefficient judicial process. These delays not only hinder the delivery of justice but also compromise the quality of the outcomes. Court-annexed mediation addresses these issues by facilitating early settlements of disputes. By engaging parties in the mediation process at an early stage, disputes are resolved more swiftly, reducing the backlog of cases in the courts. This expedites the delivery of justice, ensuring that parties can resolve their issues without the prolonged wait associated with traditional litigation. The timely resolution of disputes through

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mediation enhances the overall efficiency of the judicial system. It alleviates the pressure on the courts, allowing them to focus on more complex cases that require formal adjudication. This streamlined process improves the quality of justice delivered, as cases are resolved promptly and fairly. In Tanzania, the adoption of court-annexed mediation has been instrumental in reducing delays and improving the overall effectiveness of the judicial system**.**

IV. LEGAL CHALLENGES CONFRONTING MEDIATION

(A) Judicial Involvement in Mediation: Challenges and Controversies

The participation of judges and magistrates as mediators has sparked a contentious debate within scholarly circles. Critics argue that judicial figures may exert undue influence during mediation, relying heavily on their authoritative roles to compel parties to settle. This approach contradicts the fundamental principles of mediation, which prioritize facilitation over adjudication. Critics further contend that judicial involvement risks transforming court-annexed mediation into a process akin to litigation. The pressure to manage heavy caseloads and the entrenched directive styles of judges and magistrates may hinder their ability to adapt to the collaborative nature of mediation, potentially compromising its effectiveness.

(B) Advocates' Reluctance and Role in Mediation

The reluctance of some advocates to fully engage in mediation presents a significant hurdle to its success. While advocates play a pivotal role in advising their clients during mediation, concerns over financial interests and perceptions about their role often lead to failures in reaching mediated agreements. Some advocates hesitate to actively promote settlement, fearing financial repercussions or believing that it isn't their responsibility to facilitate agreements. This reluctance underscores a broader debate among scholars about the necessity of advocate involvement in mediation. While some argue that advocates bring valuable legal expertise and can balance power dynamics between parties, others contend that their presence may not always be essential in less formal mediation settings.

(C) Parties' Revengeful Behavior in Mediation

The failure of court-annexed mediations often stems from parties' vengeful motivations rather than a genuine intent to settle disputes amicably. Many parties attend mediation sessions perfunctorily, driven more by procedural obligation than a willingness to negotiate in good faith. Revengeful behavior manifests when parties demand unrealistic terms or refuse to compromise, often fueled by prior expenditures on legal fees and procedural costs. This adversarial mindset undermines the collaborative spirit essential for mediation's success, reflecting a broader

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challenge in encouraging parties to embrace mediation as a meaningful alternative to litigation.

(D) Challenges with Mediators' Negotiation Skills

Despite guidelines for conducting mediation in Tanzania, appointed judges and magistrates frequently lack the specialized negotiation skills required for effective mediation. Their background in adjudication and accustomed roles in litigation settings may hinder their ability to navigate the subtleties of mediation, particularly when handling complex technical issues. This skills gap highlights the importance of targeted training and experience for mediators to enhance the quality and efficacy of court-annexed mediation processes.

(E) Tactics to Delay Settlement and Party Unwillingness

Mediation faces challenges from parties employing delaying tactics or displaying outright unwillingness to settle. In sectors like construction and engineering, stronger parties may exploit mediation's flexibility to postpone settlements, leveraging commercial pressures to secure more favorable outcomes or evade financial obligations entirely. Such strategic behaviors undermine the efficiency and fairness of mediation as a dispute resolution mechanism, emphasizing the need for robust procedural safeguards and mediator oversight.

(F) Public Awareness and Understanding of ADR

Limited public awareness and understanding of court-annexed mediation pose indirect barriers to its widespread adoption. Misconceptions about mediation's advantages and entrenched beliefs in court-based resolutions contribute to public skepticism and resistance towards ADR processes. Educating the public about the benefits of mediation, including its potential to foster mutually agreeable resolutions without winners or losers, is crucial for overcoming these barriers and promoting mediation as a viable alternative to traditional litigation.

V. CASE STUDIES AND PRECEDENTS

Legal practitioners view that court annexation mediation as threat to their legal practice. For some this process leads to unnecessary delays and expenses. It’s also contended that the compulsory referrals of cases to mediation goes against the voluntary nature of mediation. In the case of *Subira.G. Komba vs Mwanaharusi Saidi*,[43] in this case the appellant complains in the issues of confidentiality that after failure of the mediation, the proceedings were left in the same file and returned to the assigned magistrate to proceed with hearing. The appellant cited provision VIII rule 31 which requires communication to be confidential. The same was witnessed in the case of *M/s Cide Company v Tanzania Forest services (TFS) agency and*

[43] DC Civil Appeal No 08 0f 2022

another,[44] and *Ruth Twisssa v Isael Salth Mwakila and 5 others*,[45] in summing up the court held that it was wise for the mediator to complay with requirement of the law because laws are enacted to be obeyed and not others. The proceedings are there flawed for failure to comply with on rule of fundamental rules of mediation. Further more Court Annexed limits disputant right to access justice through court system. Its in this context that the intends to find the place of court annex mediation and how it impacts the civil matters justice system.

VI. PROPOSED SOLUTION AND BEST PRACTICES

(A) Government support and the consistent exposure to mediation.

The literatures show that the use of mediation is significantly boosted when the courts and governments show an interest in developing it through policies stimulating its use. Therefore, it is observed that there should be Government supports and encouragements, consistent exposure to and training in mediation and the cultural use of mediation in the society. The seriousness of the government, non-governmental organizations, academic institutions and the legal profession should build public confidence about the advantages of court-annexed mediation. Together these factors are found to drive the interest of stakeholders, particularly judges and magistrates to encourage the use of mediation to resolve disputes in civil cases. Some judges and magistrates should be supported to keep travelling overseas to learn about the successful practices of court-annexed mediation in other jurisdictions. Likewise, there should be frequent mediation workshops and training for judges, magistrates and advocates. This should also be supported by legal associations like Tanganyika Law Society (TLS) in conducting mediation training for its members. The willingness of the Government in supporting mediation will enhance its awareness to its citizens.

(B) Raising awareness on court-annexed mediation amongst the public.

Traditional approaches to mediation are prevalent even at the village level in Tanzania. Disputes are often referred to village and hamlet leaders for settlement, where chairpersons act as neutral third parties and advise disputants on how to resolve their issues. While traditional village mediation, particularly in ward land tribunals and village councils, may differ slightly from court-annexed mediation, it is evident that Tanzanian citizens have a strong inclination towards mediation. The role of mediators in both forms of mediation is to facilitate and develop options for the parties to make their own decisions. The community should be informed about the

[44] Land case No 65 of 2015

[45] Land case No 65 of 2015. the court had this to say *"unlike the potential publicity of court proceedings everything said at mediation is entirely confidential to the parties (unless specifically agreed otherwise)"*

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advantages of settling disputes with court assistance rather than opting for litigation. Literature has identified key factors affecting the success of mediation in other jurisdictions, including increased public awareness. Therefore, the Tanzanian community should be made aware of the high costs and long delays associated with court trials so that the public may choose mediation in the civil justice system for quicker resolutions at lower costs. Despite some controversy over whether mediation costs are cheaper than litigation, particularly concerning lawyers' fees, the benefits of mediation generally outweigh those of litigation. Public awareness is likely to increase and strengthen as various bodies, including governments, courts, and lawyers' associations, continue to promote the advantages of mediation.

(C) Cooperation from the legal profession.

The attitudes of lawyers towards mediation significantly contribute to the of court-annexed mediation. In Tanzania, it has been observed that mediation sessions sometimes fail due to the reluctance of advocates. However, lawyers and their associations have a crucial role to play in managing their clients' interests before resorting to litigation. Much of the literature suggests that lawyers' attitudes towards mediation can influence both the disputants' willingness to use mediation and their satisfaction with the process and outcomes. Scholars advocate for lawyers to adopt the role of problem solvers, working collaboratively with disputants, helping them understand the issues in their cases, thereby enabling self-determination and ensuring that agreements are made based on.

VII. CONCLUSION

The exploration of mediation within Tanzanian civil proceedings reveals significant legal complexities that need to be addressed to enhance its effectiveness. One of the primary challenges lies in the enforceability of mediated agreements. Currently, there is ambiguity regarding the legal status of such agreements, which undermines parties' confidence in opting for mediation as a dispute resolution method. Clarifying the enforceability of mediated settlements through robust legislative frameworks would provide certainty and encourage more widespread adoption of mediation. Another critical area of concern is the impartiality and qualifications of mediators. Ensuring that mediators are properly trained, accredited, and adhere to strict ethical standards is essential for maintaining trust in the mediation process. Standardizing mediator training programs and implementing rigorous certification procedures would go a long way in enhancing the professionalism and credibility of mediators in Tanzania. Procedural fairness is also a key issue that needs attention. Parties involved in mediation must be assured of fair treatment throughout the process, including equal access to information and

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opportunities to present their case.

Establishing clear guidelines for procedural fairness and ensuring adherence to these standards would help safeguard the integrity of mediation proceedings. To improve mediation as a viable dispute resolution method in Tanzania, concerted efforts are needed to address these challenges comprehensively. Legislative reforms should prioritize clarity on the enforceability of mediated agreements while enhancing the accountability and qualifications of mediators. Furthermore, public awareness campaigns are crucial to educating both legal professionals and the general public about the benefits and procedural safeguards of mediation. By implementing these measures, Tanzania can foster a more reliable and efficient mediation system, contributing to a more just and accessible legal environment for resolving civil disputes. Embracing mediation as a preferred alternative to traditional litigation holds the potential to alleviate court congestion, reduce costs, and promote amicable resolutions tailored to parties' specific needs. This approach not only enhances access to justice but also reinforces Tanzania's commitment to effective dispute resolution mechanisms aligned with international best practices.

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VIII. REFERENCES

1. C Mashamba, *Alternative Dispute Resolution in Tanzania: Law and Practice* (Mkuki na Nyota Publisher Ltd 2012).
2. Chief Justice Sundresh Menon, Address at the Joint Launch of the State Court Centre for Dispute Resolution and 'Mediation in Singapore: A Practical Guide' (4 March 2015) 5.
3. E Ginkel, 'Court-Annexed ADR in Los Angeles County' accessed at <http://www.businessadr.com/EvG/Publications%20files/Court-Annexed%20ADR%20in%20LA%20County.pdf> accessed 26 March 2024.
4. G Meggit, 'The Case For (and Against) Compulsory Court-Annexed Mediation in Hong Kong' (Asian Law Institute (ASLI) Conference, Singapore, May 2008) accessed at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290134> accessed 29 June 2024.
5. G Meggit, 'The Case For (and Against) Compulsory Court-Annexed Mediation in Hong Kong' (Asian Law Institute (ASLI) Conference, Singapore, May 2008) accessed at <http://attylaserna.blogspot.com/2008/07/court-annexed-mediation.html> accessed 29 June 2024.
6. J Foberg and A Taylor, A Comprehensive Guide to Resolving Conflict Without Litigation (1984).
7. L Boulle and A Rycroft, Mediation Principles, Processes, Practice (Butterworths 1997).
8. Owasanoye, 'Dispute Resolution Mechanisms and Constitutional Rights in Sub-Saharan Africa' (Paper written following a UNITAR Sub-Regional Workshop on Arbitration and Dispute Resolution, Harare, Zimbabwe 11-15 September 2000).
9. T Trenczek, D Berning and C Lenz, Mediation und Konfliktmanagement: Handbuch (Nomos Publishing House 2013).
10. TH Hamis, 'Court-Annexed Mediation in Tanzania: Successes, Challenges and Prospects' (2022) 9(11) International Journal of Innovative Research and Advanced Studies (IJIRAS).
11. Warren Burger, 'Isn't there a Better Way?' accessed at <http://www.jstor.org/page/info/about/policies/terms.jsp>.

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