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Court-Annexed Mediation In Tanzania: Successes, Challenges And Prospects

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Abstract: ***This Article intends to examine the practices of court-annexed mediation in Tanzania with the view of reflecting its backgrounds, aims for its introduction and real situation for the current trends. For the purpose of this Article, mediation involves settling of a dispute between the disputants with the assistance of a neutral third party. The neutral third party is called a mediator whose decision is not binding but only to facilitate the amicable settlement of the dispute. Mediation is often viewed as a more informal process of resolving disputes and it is normally done outside the court where an independent and neutral third party, the mediator, will be appointed in order to facilitate a discussion in which the parties are expected to resolve their disputes. During the mediation, the mediator will discuss the issues and try to help the parties to reach an agreement, but may generally not offer his own opinions or assessment. Generally, mediation is a process in which an impartial third party encourages and facilitates in an informal way of negotiation between the parties to the dispute. The mediator does not have power to impose a solution on the parties. The mediator has control over the process, but the decision and outcome are in control of the parties. On the other hands, court-annexed mediation is the mandatory mediation done by the court before proceeding to litigation. It is done according to the requirement of the law of which non- adherence to such legal requirement renders all the court proceedings nullity. Therefore, in Tanzania, under Order VIIIC, rule 24 of the Civil Procedure Code (CPC), Chapter (Cap) 33 of the laws of Tanzania, Revised Edition (R.E) 2019, the court is obliged to refer "every civil action" before it to negotiation, conciliation, "mediation" or arbitration, or similar alternative procedure before proceeding to trial. The requirement for court-annexed mediation is imposed for all civil suits except for few like election petition, human right petition, judicial review and the like. The court-annexed is aiming at speeding the dispensation of justice, decreasing the backlog of cases and maintaining causal relationship between the parties. Despites of such tremendous advantages, still in Tanzania court-annexed mediation has been relatively unsuccessful which make the good intention for its introduction to be less attained or rather remaining a mere compulsory legal requirement with no or less practical manifestation.***

Keywords; court annexed mediation, mediator, success, challenge and prospects

I. INTRODUCTION

Conflicts are unavoidable but its peaceful and effective settlement is what matters. One author wrote that: "*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."*.[1] Hence, so long as human beings interact for one another there are bound to be disagreements or conflicts which must be amicably resolved for friendly relationships to be maintained so as to enhance developments.[2] Hence, by nature disputes are by-product and an integral part of human interactions which affects life and our relationships with each other both individuals and groups, and it is important therefore to seek effective ways of address them. We find stories from the Bible, in the Islamic culture and many other traditions that describe processes which have

ISSN: 2394-4404

been used from the ancient time to find peaceful solutions to various disputes and much can be learned from the past.[3] *Ipso facto*, conflicts have been recorded from early days of human kind starting from the Bible, Qur`an and similar religious historical documents in different cultures but good enough is that conflicts from early days were resolved by various processes including negotiation, mediation, arbitration and adjudication. In this Century, various conflict resolution approaches have become widely accepted in many countries throughout the World. Nevertheless, there are generally two major types of dispute resolution, namely, *adjudicative processes* such as litigation or arbitration in which Judges/magistrates/arbitrator determines the outcomes and *consensual processes* such as mediation/negotiation in which parties attempt to reach mutual agreement to their dispute.

Court-annexed mediation in Tanzania is a mediation process conducted by the court after parties have filed a case. It is a form of mediation where judges/magistrate in charge make orders that the parties attend mediation before another judge/magistrate as an opportunity to settle their dispute amicably before going to litigation. This form of mediation is also known as compulsory mediation because the law requires the existence of mediation before litigation.[4] In this case, no civil case is adjudicated in Tanzanian Courts of law without passing through court-annexed mediation except those cases with limited exceptions like human right petitions, election petitions, cases requiring the interpretation of the Constitution or applications for judicial review. The purpose of court-annexed mediation is to create a conducive atmosphere as well as extracts willingness from the parties to come to the mediation table for the purpose of reaching voluntary resolution to their dispute in a timely, fair and cost-efficiency. In case parties reach the amicable settlement during court-annexed mediation, the case ends there.

A. THE ORIGIN AND BASIS OF COURT-ANNEXED MEDIATION

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. 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: delays of cases, high costs and undue technicality. Subsequently, ADR was adopted. Today, ADR is flourishing throughout the world because it has proven itself in multiple ways to be a better way to resolve disputes.[5] 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. Generally, mediation is the facilitation of a negotiated agreement by a neutral third party who has no decision-making power. 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) 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, VIIIB and VIIIC 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. 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 suits 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 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. 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.

B. WHY COURT-ANNEXED MEDIATION IN TANZANIA?

The introduction of court-annexed mediation into the civil justice system of Tanzania was ultimately caused by a number of factors. The foremost was the *need for efficiency of justice.* This was *ipso facto* attributed by the expensiveness in judicial process featured by cumbersome rules of procedure. Also, the judicial system was over-loaded by cases. Hence, there was a need for dispute settlement systems that could divert cases from the court and reduce case backlogs and provide efficient ways of providing access to justice. Furthermore**,** *need for better-quality processes and outcomes through judicial system***.** This was because the justice system did not provide a continuing social relationship amongst disputants in certain matters such as family, tenancy or employments. Hence, there was a need for consensual as opposed to adversarial approach and for processes that were more accessible and participatory, less formal, expensive, and less time-consuming. Therefore, its introduction aimed at speeding up the process of administration of justice by enabling the court to reduce a number of cases pending for litigation by looking for possibility of amicable settlement of the disputes by the parties themselves with the assistance of the court as the facilitator not as the adjudicator.

ISSN: 2394-4404

C. PRINCIPLES OF COURT-ANNEXED MEDIATION

Generally, in mediation the parties maintain significant control over the process and it is non-binding. Parties retain the right to pursue litigation should the mediation process marked failed. The Court-annexed mediation is the same like ordinary mediation except for slight differences. However, the same must be observe the following principles: -

Voluntariness. Provided that court-annexed mediation in Tanzania is compulsory, its outcomes should be voluntarily made and the parties are only with autonomy to settle their dispute. No one should compile parties to reach the amicable settlement of their claim. The principal role of the mediator is to facilitate communication between the parties in conflict with view to helping them reach a voluntary resolution to their dispute.[6]

Confidentiality. All the matters disclosed and discussed during the mediation are confidential. No one is permitted to reveal them or used as evidence against another party even if the mediation failed. The requirement for confidentiality is aiming to maintain the frank and open discussions between the parties.[7] Therefore, court-annexed mediation is a private process in which neither the parties nor the mediator can disclose the information or documents revealed during the mediation disclosed without the consent. (Order VIIIC, rule 31 of the CPC).

Impartiality. In court-annexed mediation, the appointed mediator who may be a judge/magistrate or any other trained mediator should be neutral and impartial. He or she has no authority to settle the dispute between the parties rather to facilitate them to reach the amicable settlement of their dispute.

Self-determination. It is the principle that during the court-annexed mediation, only the parties have a choice to settle their dispute amicably or go through litigation. No third party may induce them to settle out of their willing. Even when the Advocates or any recognized agents are involved, their main task is to advice their clients to settle the matter peaceful by pointing out the advantages of doing so and not forcing them to reach into settlement which they are unwilling to reach. Hence, in court-annexed mediation the outcomes of it are solely in the hands of parties themselves. Without consent in mediation, its promises of autonomy and self-determination are empty. The third party is there to impose no decision, but encourages the parties to agree on their own solution. He should only be neutral intermediary to facilitate progress towards settlement.

The finality of settlement order. Once the parties reach a mutual agreement on their claim either partly or wholly, there should be a written agreement to such effect. Such written agreement is called *deed of settlement.* The deed of settlement to be binding, it should be signed by the parties and registered by the court of competent jurisdiction. Once the deed of settlement is registered before the court, it becomes as valid as normal judgment capable of being executed. Such judgment is called *consent judgment* which is followed by the consent order issued by the court. The consent judgment cannot be challenged by way of appeal unless and until the court is satisfied that the same was improperly procured either by way of undue influence, coercion, fraud or involve incompetent party.[8]

D. COMPETENCE AND ROLE OF MEDIATOR DURING MEDIATION.

In court-annexed mediation, a mediator may be the appointed judge/magistrate or any trained mediator. However, the law is very clear about the competence of the mediator. For the private or trained mediator to be competent mediate, such person must be accredited as so provided under the Reconciliation, Mediation and Arbitration (Accreditation of Practitioners) Regulations, GN No. 147 of 2021. In Tanzania, it is an offence to practice as a private mediator without being accredited. For the appointed judge or magistrate as mediator, he or she should possess skills of mediation but not necessary to have specialized in such particular matter. The slight difference in the choice of mediator is that, if the parties decided to choose their own trained and accredited mediator, they have to cater the costs for the mediator`s services while in case the appointed mediator is the judge or magistrate, it is the judiciary that will be responsible for the remunerations of such mediator judge or magistrate.

Order VIIIC, rule 25 (1) and (6) of the CPC provides for the competence of mediator, that:

"25. -(1) The court shall require the parties to appoint and submit the name of a mediator of their choice within fourteen days after pleadings are complete.

(6) The following shall qualify to be nominated under sub-rule (1) to act as mediators-

- ✓ *A Judge;*
- ✓ *A registrar or deputy registrar;*
- ✓ *A magistrate in case of a magistrates' court;*
- ✓ *A person with the relevant qualifications and experience in mediation appointed by the Chief Justice;*
- ✓ *A retired judge or magistrate; or*
- ✓ *A person with the relevant qualifications and experience in mediation and chosen by the parties."*

Generally, any mediator to be competent must possess some skills of a good mediator. Such skills include but not limited to; active listening, good reasoning, persuasion, facilitation, information analysis, rational thinking, flexibility, creativity and problem-solving skills. Nevertheless, the appointed mediator has a fundamental role during the course of mediation. His/her roles are to help the parties think in new and innovative ways, to smooth and encourage discussion basing on mutual interests not position, to pilot the process of amicable settlement toward joint gains. Thus, a mediator should study the substance of the dispute and try to identify the issues in conflict, using tools such as re-framing, active listening, open-ended questions, and his or her analytical skills.

E. QUALITIES AND CODES OF CONDUCTS OF A GOOD MEDIATOR

A good mediator should possess the following fundamental qualities: - (a) *Trust*. This is the foremost and important quality to be possessed by a good mediator. If the

parties do not trust the mediator, the chances for success are small. (b) *Patience.* A mediator must have the patience to work with the parties to bring them to the point where agreement is possible. (c) *Intelligence*. A mediator must be resourceful and attentive to understand not only the nature of the dispute but also the motivations of the parties. (d) *Good communication skills*. A mediator needs to have good communication skills, and (e) *Impartiality.* A mediator must be impartial. What is needed by the mediator is the power of persuasions. If the mediator is not viewed as impartial or neutral, any option will carry no weight and there is likelihood of mediation to fail.

Basically, mediators have some characteristics which help them carry out their duties effectively in any society they find themselves in. *They have gifts of empathy* as they share a sincere curiosity about the depths of human nature. They're skillfully in agreement to their own thoughts and feelings, but they yearn to understand the people around them as well. For Mediators, an ideal relationship of any kind is one in which both people feel comfortable sharing not just their wildest hopes and dreams but also their secret fears and vulnerabilities. *Mediators also have a talent for self-expression.* They may reveal their innermost thoughts and secrets through metaphors and fictional characters.[9]

Despite these characteristics, mediators have some kind of codes of conducts to be observed in the performance of their duties. These are: - (a) *Impartiality***.** Mediators are expected to exhibit a sense of impartiality. It means freedom from favoritism, bias or prejudice both in conducts and appearances. Mediators may be challenged on grounds of impartiality by any mediation party and when this happens, they are expected to withdraw and be substituted by new mediators. (b) *Avoidance of conflict of Interest.* A mediator has the duty and obligation to disclose to the parties any actual or perceived conflict of interest as soon as he/she becomes aware of it whether prior to accepting to act or at any time during the mediation process. **(c)** *Confidentiality.* This is the cornerstone of the mediation process. It is a principle that everything said during the course of mediation, including all communications between the parties and the mediator are confidential and no evidence of anything said or documents produced during the mediation process are admissible in any litigation proceedings. Moreover, the mediator cannot be summoned as a witness on what took place and on what came to his/ her knowledge during mediation. This setting is conducive for parties to make concessions without concerns over its disclosure should mediation fail (Bingham 2008; Parke & Bristow 2001).

Now therefore, during court-annexed mediation, the mediator should conduct him/herself in the following manners: - (i) listens courteously and with understanding, (ii) critically analyses the parties' presentation, (iii) ask relevant questions and clarifications, (iv) appear relaxed and eager for the parties to reach decision, (v) demonstrates skills and confidence throughout in oral communication, and (vi) give explanations in ways that influence the parties positively. Generally, the mediator in court-annexed mediation only acts as a facilitator in order to facilitates communication, promote understanding, focuses the parties on their interests and uses creative problem-solving techniques to enable the parties to reach their own mutual settlement/agreement. According to Sturrock (2010), the parties' control in mediation is about the democratization of justice.

F. CASES WHICH ARE MORE APPROPRIATE FOR SUCCESSFUL MEDIATION

- ✓ Where parties have on-going relationship. E.g., in family, business etc.
- ✓ Parties want prompt resolution. E.g., in commercial contracts.
- ✓ Where privacy is desired by the parties.
- ✓ Parties desire a negotiated outcome after knowing its advantages.

Basically, mediation should be encouraged or considered when the parties involved in the disputes have a relationship they want to preserve. Consequently, when family members, neighbors or business partners have a dispute, mediation may be the best alternative resolution procedure to use. Hence, mediator should use facilitative mediation to facilitate communication and encourages dispute resolution through a joint problem-solving approach which satisfies the needs and interests of both parties (Menkel-Meadow 1993).

II. PROCEDURAL STAGES IN COURT-ANNEXED MEDIATION IN TANZANIA

In Tanzania, court-annexed mediation is commenced soon after a case file is assigned to a particular judge/magistrate. The duration for mediation is a period not exceeding thirty days running from the date of the first session of mediation (Order VIIIC, rule 32 of the CPC. See also, *CRDB Bank Ltd vs Seif Ahmed Sharji*, High Court of Tanzania at Mbeya, Civil Case No. 11 of 2002 (Unreported). For the effective mediation to be successfully conducted, the following procedures are to be complied:

A. APPOINTMENT OF MEDIATOR

The appointment of mediator should be done within fourteen days after the pleadings are complete (Order VIIIC, rule 25(1) and (2) of the CPC). Parties are free to appoint the mediator of their own choice but if such mediator is a private one, he/she should be accredited. In general, training and experience in mediation are required for effective mediation, hence in addition to academic qualifications which may offer some insights to the appointed mediator, a person who act as the mediator is required to demonstrate competence. Order VIIIB, rule 25(6) of the CPC has set the qualifications for being appointed as a mediator. In case parties fail to submit the name of the appointed mediator, the court through the judge/magistrate in charge should proceed to appoint the mediator and notify the parties. The practices in Tanzania show that most of court-annexed mediations are conducted by the assistance of appointed judge/magistrate as most parties either worry for the costs of engaging a private accredited mediator or have no or less knowledge about the appointment of mediators. But all in all, the mediator's role is slightly

ISSN: 2394-4404

passive in chairing the session and helping to develop options to reach settlement.

B. NOTIFICATION FOR THE COMMENCEMENT OF MEDIATION

After the appointment of the mediator, the court should notify the parties on the fixed date and time for commencement of mediation session. (Order VIIIC, rule 25(3), (4) and (5) of the CPC). During this stage, parties are informed to appear either themselves or with their respective representatives and with all documents necessary for settling their claim. The practices in Tanzania show that the notification for the commencement of mediation is done orally soon after a judge/magistrate in charge has appointed the mediator judge/magistrate.

C. MEDIATION SESSIONS

After notification for the commencement of mediation, what follows is the parties 'appearance before the mediator for the first mediation session. During this stage, unless the court orders otherwise, parties may appear in person or may appear with their advocates and sometimes third party may appear if such third party is liable to satisfy all or party of the claim (Order VIIIC, rule 27 of the CPC). Parties who are required to attend the mediation are those with *authority to settle the claim*. That is, parties should have mandate to settle the existing dispute (Order VIIIC, rule 28 of the CPC). Any dispute settled by parties with no authority, such mediated agreement is liable for being challenged and if proved may be set aside for lack of competent parties as a contractual requirement.

a. PHASES IN MEDIATION SESSIONS

Usually, mediation involves three phases, namely; first joint session, separate session and final joint session. These three phases are not necessary to be passed throughout but are done consecutively:

First Joint Session

At the first day of mediation, first thing to be done is that the mediator introduces himself and the parties and continue explaining the process of mediation and his/her role and role of advocate if any in the course of mediation. At this session, the procedures and rules covering mediation process, order of presentation and confidentiality at the proceeding are presented. The role of mediator who may be a judge/magistrate is to assist parties to communicate thus moving beyond position to explore possible solutions. The mediator does not give a formal evaluation but rather prompt the parties to assess their relative interests and to evaluate their solution through the exchange of information, ideas and alternatives for settlement.[10]

In summary, during the first joint mediation session, the mediator has to do the following: (a) *Establish neutrality.* The mediator should exhibit his/her neutrality to the parties and the dispute. The neutrality of the mediator will be manifested by the use of appropriate words, body language and appropriate eye contacts that shows equal treatment to the parties. During mediation, the appointed mediator should not show any preference to either party. (b) *Describe the role of mediator and advocates if any.* The mediator should tell the parties that his/her role is simply to facilitate/assists them to come to a settlement which may be concluded by their will. Thus, the role of a mediator is facilitative and not to decide the dispute between the parties (Order VIIIC, rule 26(1) (b) of the CPC). Likewise, if parties have advocates, the mediator should tell the parties the way advocates will be involved and at which point they will be necessary for amicable settlement of the dispute. Advocates are necessary to attain mediation agreement for certain reasons: the most important is that because most disputes involve complex legal matters, legal training and experience are necessary to bring matter to a satisfactory conclusion and guaranteed justice. This is of paramount important as advocates are traditional gatekeepers of the justice system. (c) *Address confidentiality.* The mediator should explain to the parties that the mediation proceedings are confidential so that they may feel more comfortable in giving their options towards resolution of dispute. (d) *Establish a conducive environment for mediation*. The mediator should be calm and relaxed during the mediation. He should not be in a complete control over the session instead he/she should diplomatically handle it. (e) *Generate a momentum toward an agreement.* The mediator should develop a positive mindset to the parties by expressing the advantages of mediations. Likewise, the mediator should insist the parties to respect the options of each other during the proceeding. That is, one party should not interrupt the other in the proceedings. (f) *Determine whether the mediation process has been understood***.** The mediator should avail opportunity to the parties to ask any question or doubt about the process of mediation.

Generally, all what are done as the first things during the first joint mediation session is what is called mediator`s introductory remarks. After such introduction the mediation will now commence officially. On the commencement of mediation, the mediator will allow parties to choose who to start making the brief introduction of the case and if none of them volunteers then the mediator will ask the plaintiff or his representative to give the brief introductory statement about the case. Likewise, the defendant will then be given equal chance to respond to what said by the plaintiff about the nature of the case. However, during this time, mediator may interrupt by asking questions for clarifications. The objective of first joint mediation session is to gather general information, the nature of dispute, demands or interests of the parties and willingness of the parties toward the settlement. It is at this phase when the mediator will assess whether there has to be separate session or not. It should however be noted that sometime parties reach the mutual agreement at this stage and the dispute ends there.

Separate Session Or Caucus

This session is not mandatory to be reached for every case scheduled for mediation. It depends the way the parties behaved during the first joint session. If in joint session parties

showed some dissatisfactions or unwillingness to settle their claim, it is necessary for the mediator to call each party independently. The goals of separate session are for mediator to understand the dispute at a deeper level, to provide a forum for parties to disclose confidential information which they do not wish to share with each other, understand the underlying interests of the parties and encouraging parties to find terms that are mutually acceptable.

At this phase, the mediator may call one party after the other on the same day or different times, however the mediator should not talk negative about either party. The intention of separate session is for the parties to address their shortcomings in absence of the other party. Sometimes the mediator may call only advocates of the parties to grab their attention of assisting the parties to settle their claim. It is on this stage where the mediator should invest higher mediation strategies as he has already known the actual facts about the parties' dispute and their wants or interests. During separate session, the mediator should encourage the parties to generate more options to settle their claim. The mediator should keep emphasizing the advantages of mediation and should keep reminding the parties about the confidentiality of all information to be provided at this stage. It is advised that at this stage, the mediator should orally confirm a settlement and note down the terms of such settlement which should be completely affirmed during final joint session.

Final Joint Session

Here the mediator meets the parties altogether again in order to make clear of the matters which were not agreed upon during first joint session. The mediator will ask the parties to present the more favorable offers to each other. Here the mediator should encourage and promote communication and effectively manage interruptions by the parties to assist the parties to reach the mutual agreement. At this process it is expected the parties to reach the agreement. If the parties reach the agreement, the dispute ends there by having a written agreement called *deed of settlement*. The deed of settlement should contain terms of agreement which are clear complete, concise, and specific and preferably in active voice. If happen that the parties have failed to settle their dispute amicably then the case file should be reverted to the trial judge/magistrate for a final pre-trial conference and scheduling conference (Order VIIID, rule 40(1) of the CPC).

In summary, stages of court-annexed mediation session involve the following:

1st Step: *Mediator's opening statement.* After the disputants are seated on negotiation table, the mediator introduces himself, welcome the parties to introduce themselves, explains the goals and rules of the mediation, and encourages each side to work cooperatively toward a settlement.

2nd Step: *Disputants' opening statements.* Each party is invited to describe the dispute and its consequences, financially and otherwise. The mediator might entertain general ideas about resolution as well. Here the mediator will give opportunity for either side to start and where none volunteers, the plaintiff`s side will be the first to explain the nature of his dispute briefly.

3rd Step: *Joint discussion*. The mediator might encourage the parties to respond directly to the opening statements in an attempt to further define the issues.

4th Step: *Private caucuses/joint session*. The private caucus is a chance for each party to meet privately with the mediator. Each side will be placed in a separate room. The mediator get chance to discuss the strengths and weaknesses of each position and to exchange offers. The mediator continues the exchange as needed during the time allowed. These private meetings comprise the guts of mediation.

5th Step: *Joint session.* After caucuses, the mediator may if appears appropriate brings the parties back together to negotiate directly. This stage is not always conducted. It occurs where it appears necessary.

6th Step: *Closure.* If the parties reach an agreement, the mediator will require the parties to sign the mediated agreement and register it before the court to become as a court decree. If the parties fail to agree, mediator will mark the mediation as failed and remit the case file to the trial judge.

b. PARTIES` NON-APPEARANCE IN MEDIATION AND CONSEQUENCES

The law is very clear with serous consequence for non-appearance of parties in mediation session. Order VIIIC, rule 29 of the CPC provides that:

"29.- *Where it is not practicable to conduct a scheduled mediation session because a party fails without good cause to attend within the time appointed for the commencement of the session, the mediator shall remit the file to the trial judge or magistrate who may-*

- ✓ *Dismiss the suit, if the non-complying party is a plaintiff, or strike out the defense, if the non-complying party is a defendant;*
- ✓ *Order a party to pay costs; or*
- ✓ *Make any other order he deems just."*

c. REMEDY FOR NON-APPEARANCE IN MEDIATION

In making sure the court facilitates the parties to reach an amicable settlement of their dispute, still the law gives an avenue where parties may continue with mediation despite being dismissed for non-appearance of the plaintiff. Hence, if the plaintiff or defendant failed to appear before the mediation session and consequently the mediation marked failed due to non-appearance of a party/parties at the mediation session, the remedy is restoration of a suit dismissed for party` non-appearance in mediation. The law under Order VIIIC, rule 30 of the CPC provides that:

"30. -(1) Any party aggrieved by an order made under the above rule shall, within seven days from the date of the order, file in court an application for restoration of a suit or a written statement of defense.

(2) The court shall hear and determine such application within fourteen (14) days from the date of lodging the application.

(3) Upon the applicant showing good cause the court shall set aside orders made under rule 29 of this Order and

ISSN: 2394-4404

restore the suit or the defense and remit the case to the mediator who shall issue a notice for mediation."

The application for restoration of the dismissed suit for non-appearance of parties in mediation is made by chamber summons supported by an affidavit (Order XLIII, rule 2 of the CPC). The emphasize is that such application must be made within seven days after the dismissal order. The application should show sufficient causes/reasons. There are no fixed reasons for restoration of the dismissed suit for parties` non-appearance in mediation however reasons such as serious sickness, admission for hospital treatments, attending death of closest relative/spouse, not being served with notice for commencement of mediation session and the like may be sufficient if reasonably proved. If happen that the aggrieved party hasn't made the application within seven days after the dismissal order, still he has a legal avenue to go. The available avenue is that the aggrieved party has to make an *application for the extension of time* to file application for restoration of dismissed suit for non-appearance of party in mediation. Such application should be made by chamber summons supported by an affidavit and in the affidavit, there should be sufficient and reasonable causes showing why such party didn't file the application for restoration of the dismissed suit for party` non-appearance in mediation within seven days from the date of the dismissal order.

D. MEDIATION AGREEMENT

In court-annexed mediation, although the mediator facilitates the process and is in charge of the proceedings, he/she should not impose solutions or decisions and has no power to force a settlement. The solution should only be reached by parties themselves. They are responsible for the ultimate resolution of their dispute. Furthermore, a mediator has no right or duty to provide legal advice to the parties. The parties should seek legal advice solely from their legal counsel. The mediator, however, may raise issues and help parties explore options. During mediation parties may be assisted by an advocate or any individual designated by them whether before or during the mediation proceedings. At the end of mediation when parties have successful settled their dispute, there should a mediated agreement. Here the mediator will request the parties to sign the deed of settlement with agreed terms.

E. ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENT

Settlement agreements arising out of mediation have the effect of a binding contract to the consenting parties. Once the parties reach the mediated agreement, such agreement are signed and executed by the parties and termed as a *deed of settlement.* Such deed of settlement should be registered before the court as consent judgment where the court will issue an order called consent order. Now, once there is consent judgment accrued from settlement agreement such mediation agreement is enforceable like any other civil judgments using the normal execution procedures. Order VIIIC, rule 33(a) of the CPC provides that; **"***A mediation shall come to an end when- (a) the parties execute a settlement agreement."* The issue of the enforceability of mediated agreement arises if one party defaults on its terms and the other seeks remedies for its breach.

F. CHALLENGING AGAINST THE MEDIATED SETTLEMENT AGREEMENT

Once the mediation agreement is signed, it binds the parties. Hence, no party can challenge its validity except where there are sufficient grounds. Such grounds should be manifested on the face of record, or the existence of vitiating factors such as misrepresentation, coercion, undue influence, fraud or mistake as well as capacity of the parties. Hence, if happen that there was any vitiating factor or one of the parties had no authority to settle the dispute, the settlement agreement may be challenged and be set aside.

G. COURT`S INTERVENTION IN COURT-ANNEXED MEDIATION PROCESS

Unlike litigation, in court-annexed mediation, the court has minimal role in such proceedings. The court is involved only in the following: (i) Reference of the case to mediation (Order VIIIC, rule 24 of the CPC). (ii) During the appointment of a mediator (Order VIIIC, rule 25(2) of the CPC). (iii) Power in relation to a party's non-appearance in mediation session (Order VIIIC, rule 33(a) of the CPC). (iv) Execution of settlement agreement (Order VIIID, rule 40 of the CPC), (v) Determination of unresolved issues through litigation.[11]

III. SUCCESSES OF COURT-ANNEXED MEDIATION IN TANZANIA

The main purposes of mediation are to promote access to justice, promote restorative justice and preserve relationships between litigants.[12] Hence, mediation offers the parties a good opportunity to settle their claim expeditiously as it gives the parties the ownership of the outcomes and restricts the number of cases to be filed in judiciary. According to the late Nelson Mandela of South Africa, **"***Negotiation and discussion are the greatest weapons we have for promoting peace and development."* Significantly, court-connected mediation programs aim to achieve certain objectives which include: to produce fair and just outcomes, to meet a party's satisfaction and to preserve a party's respect for and confidence in the justice system. The benefits of court-annexed mediation over court systems have not been lost on the public funders of judicial services across the world. The reduction in drain on the public purse by the simple expedient of encouraging parties to settle their differences in a self-funding process while improving access and speed of resolution is most likely seen as a vote winner. Successes of court-annexed mediation are measured by the number of mediations held and the number of cases resulted in mediated settlement. It is measured by the increasing settlement rates of pending cases in courts (Mack 2003).

In general, court-annexed mediation has brought some success in administration of justice in Tanzania. Some of them include the following:

- ✓ *Increasing access to justice***.** Justice Sundaresh Menon, the then Chief Justice of Singapore stated at the launching of the subordinate courts 2013 that:
  "Access to justice can and should be enhanced by both access to court as well as access to the mechanisms for reaching consensual outcomes outside the courts." Also, according to the International Consortium for court excellence "The context and quality of access to justice can only be nurtured within a judicial ecosystem whose operational framework focuses on four metrics: i) expeditious and timeless, ii) equality, fairness and integrity, iii) independence and accountability and iv) public trust and confidence."
  Thus, the benefits of installing court-annexed mediation in Tanzania is that it has provided access to justice on the same level as the formal court system and it ensures equal protection of standards of fairness of outcomes and processes. The access to justice has been improved due to facts that some cases are ending up pre-litigation stage where parties succeed to make a mediated agreement and leave the court with no much backlogs of cases and make the dispensation of justice to be easily accessible and timely.
- ✓ *Less cost efficiency system.* Because mediation require no much preparation or formalities and occurs at early stage of a dispute, it is always less expensive. In Tanzania it has been a tendency that most of the cases referred to mediation involve judges/magistrates who are appointed by the court itself and are remunerated by the judiciary, therefore parties bare no costs for mediator. Due to its nature the parties who successful reach the mediated agreement always avoids unnecessary costs.
- ✓ *Facilitating communication between the parties in conflict*. Due to the nature of court-annexed mediation once the mediated agreement is reached, there is higher likelihood that parties will save and rebuild their relationships like in matrimonial proceedings or commercial cases. This is because mediation brings parties together and maintain their relationship. This has been a fruit in succession of contractual relations like partnerships or any other business relationships. Hence, court-annexed mediation has been promoting better relationships as mediation generally resulted in a mutual outcome unlike a win-lose in litigation.
- ✓ *Easy enforcement of mediated agreements.* Some authors have figured out that, court-annexed mediation results into easy and friendly enforcements of mediated agreement because the parties themselves were the determinants of the solution for their dispute. Hence, it reduces the possibility of non-compliance with the agreement unless sufficient grounds are enumerated and proved to the satisfaction of the court to invalidate the settlement reached.
- ✓ *Maintenance of peace and harmony in the society*. Because court-annexed mediation seeks peaceful resolution of disputes**,** it is seen by some researchers as a bridge builder and promoter of industrial harmony and peaceful co-existence. It preserves the good relationships of the parties unlike court trial in which parties may becoming enemies. The tendency of amicable settlements attracts the atmosphere for peace and harmony.
- ✓ *Reducing delays in getting to settlement*. The increase in litigation, scarcity of resources, time consuming and procedures had precipitated an almost choking congestion of cases at all levels of the court system. All these have contributed not only to delays in justice delivery in our courts but also adversely affected the quality of that justice. But, with the introduction of court-annexed mediation into the judicial system of Tanzania, it has attracted early settlements of disputes when the mediation agreements are reached and executed.

IV. CHALLENGES FACING COURT-ANNEXED MEDIATION IN TANZANIA

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:

- ✓ *The involvements of judges/magistrates as mediators.* The question whether or not judges and magistrates should act as mediators has led to a debate amongst scholars. The argument is that judges/ magistrates might be too forceful in their dealings with parties and might rely too much on their judicial authority to bring the parties to an agreement. The Judges/magistrates may find it difficult to change judicial hunch to become more like facilitators in resolving disputes than being the decision makers. This is in conflict with the core principles of mediation. Some writers are very clear in their critics against judges and magistrates as mediators. They are arguing that the involvements of judges and magistrates dictates the principles of mediation as they might be motivated to produce settlement to overcome caseloads pressure as they have a lot of judicial functions to perform and also due to their traditional adjudication skills and directive styles which might make court-annexed mediation to be of no difference to litigation.
- ✓ *The reluctant attitudes of some advocates*. It is pertinent that whenever the advocates are assisting their parties during the course of mediation the settlement have been easy to reach. Nevertheless, it has been observed that despite the role played by the advocates in reaching the mediated agreements, in most cases mediations are marked failed due to the reluctant of some advocates by having some monetary interests with the case.[14] Advocates are susceptible to the failure of mediations due

ISSN: 2394-4404

to their fear of losing income and their belief that it is not their job to advise clients to reach the mediated agreement. Hence, it appears that advocates are prone to litigation more than ADR. There is a strong discussion among scholars to the issue of whether or not disputants should be represented in mediation as some established literatures provides that due to the informality of, and fewer technicalities in mediation, the presence of advocates is seen as unnecessary. On another view, as lawyers can appreciate the significance of facts in determining legal liability better than their clients, can give advice on the terms of settlement in mediation, and can help to balance power, these are reasons why lawyers should be present (Agusti-Panareda 2004). Nevertheless, it is a good concern that that lawyers should play a role in persuading and advising their clients to use mediation.

- ✓ *Revengeful character of the parties*. It has been observed that most of the court-annexed mediations are marked failed due to the revenge motive carried by the parties. Some parties never attend the mediation sessions or even if they attend never be willing to mediate by opting for stronger terms which cannot be met or agreed by the other party. This has contributed to the failure of mediations as parties do attend the mediation sessions as the matter of procedures and not as opportunity to settle their dispute amicably. Sometimes the revenge character is contributed by the factor that parties have already incurred some costs in filling pleadings, determination of preliminary applications and where necessary it includes payment of instruction fees to advocates. Thus, most of the parties attend court-annexed mediation as the matter of procedure not for settling their dispute because the same could be resolved before approaching the court for litigation.
- ✓ *Poor negotiating skills of the mediators.* Despite the existence of a manual on how to conduct mediation in Tanzania, still it has observed that the appointed judges and magistrates who act as mediator are not much skillful on how to conduct a successful mediation. This has been contributed by the nature of adjudication and the role judges and magistrate play in the course of litigation. It is observed that in conducting court-annexed mediation by judges/magistrates as appointed mediators, the mediators may not have the requisite knowledge and experience to handle some technical issues, thereby defeating the essence of its existence.
- ✓ *Unwillingness of either party to settle or misuse by parties wishing to delay settlement*. Mediation is also vulnerable to misuse by parties wishing to delay settlement. This is particularly common in construction and engineering sectors where disputes are common, for a stronger party to attempt to delay settlement and bring considerable commercial pressure on a dispute to gain more favorable settlement or even avoid the debt altogether by forcing the failure of the other party. Unwillingness by the parties may be observed when parties are only willing to hear options that will support their view or react in a negative way to any suggestion of the other side.
- ✓ *Insufficiency knowledge and awareness to the public about ADR.* According to some literatures, lack of knowledge and awareness presents a form of indirect resistance by the public to mediation. Due to insufficient knowledge on the advantage of court-annexed mediation, parties are unwilling to settle by showing negative emotions and having negative hope toward the other party. Sometimes, both parties may agree as to the facts but disagree on the preferred outcome. This has been caused by absence of enough knowledge on the advantages of ARD to the individual and community as whole. According to surveyed literatures, Lack of knowledge and awareness presents a form of indirect resistance by the public to mediation. There should not be a notion that disputes should be resolved by a court and that there must be a winner and a loser. This perception will prevent the public from considering mediation seriously.

V. PROSPECTS OF COURT-ANNEXED MEDIATION IN TANZANIA

Due to some observable weakness in the real practices of court-annexed mediation in Tanzania, it is in fact that the trend is not worth and its future successes are in doubt due to its efficiency. The reflection of the objectives for the introduction of court-annexed mediation shows that the ultimate goals have not fully realized, there are some impediments for its successes. Basically court-annexed mediation in Tanzania has some of its weaknesses including the facts that that parties may be forced to go for trial in a situation where they are not able to come together on an issue. Besides, parties cannot be compelled to participate effectively in during mediation sessions and this serves as a disincentive to some parties in using it as an option. In Tanzania, there has been no formal study to measure the success of court-annexed mediation except for the records of statistics kept and maintained by the judiciary on the number of cases disposed by way of court-annexed mediation. However, the future of court-annexed mediation in Tanzania depends on what happens on each and every one of us. Judiciary alone cannot change the trends on its success, stakeholders and the entire community should be highly encouraged to participate in mediation rather than litigation. As court-annexed mediation has become part of judicial system, we should now move to see the success of mediation through high rates of settlements.

If the practices of court-annexed mediation in Tanzania will continue of current trend and practices, it is likely that in the near future no one will be willing to settle the claim through court -annexed mediation and will remain a s the procedures to pass through with no successes. It is therefore highly advised that the awareness and good altitudes toward court-annexed mediation is what matter most to both legal practitioners and the public at large. The study to ensure the success of court-annexed mediation is attained is not solely on the Government rather on everybody since disputes have no one, we always have some conflicts with others which require quicker and amicable settlement. It therefore advised that the practice of court-annexed mediation in Tanzania should be improved to meet its aim for being embedded as part and procedures in civil justice.

ISSN: 2394-4404

THE WAY FORWARD TO IMPROVE THE PRACTICES OF COURT-ANNEXED MEDIATION IN TANZANIA

Now therefore, to witness a high rate of success in mediation agreements, Tanzania is advised and encouraged to observe and implement the following recommendations:

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.

Raising awareness on court-annexed mediation amongst the public. It has been found that traditional approach to mediation is found even at the level of the villages in Tanzania. Disputes are referred to the village and hamlet persons for settlement where the chairpersons act as a neutral third party who may advise the disputants on how to settle the disputes. Although the traditional practices of mediation in villages particularly in ward land tribunals and village councils may have a slight difference with court-annexed mediation, but still, it appears that Tanzanian citizens have spirit of mediation since the role of mediators in either form of mediation is generally to facilitate and develop options for parties to make their own decision. Hence, the community should be made clear on the advantages of settling disputes through court assistance rather than opting for litigation. Some literatures have identified key factors impacting on the success of mediation in other jurisdictions which include the increase level of awareness amongst the public. Hence, Tanzanian community should be made aware of the effects of high litigation costs and long delays in court trials so that the public may opt for mediation in the civil justice system to achieve quicker resolutions at lower costs. Despite the controversy, whether the costs of mediation are actually cheaper than litigation particularly on the lawyers' fees, still the benefits of mediation prevail over litigation. The public level of awareness can be expected to increase and become stronger as the coordinated effort of various bodies including governments, courts and lawyers' associations in promoting the advantages of resolving the disputes by way of mediation continues (Gray 2006; Spencer & Brogan 2006).

Cooperation from the legal profession. The lawyers' attitudes towards mediation are also one of the main reasons for the success of court-annexed mediation. In Tanzania, it has observed that sometimes the mediations are marked failed due to reluctant attitudes among advocates. However, there is a tremendous roles and cooperation to be extended by lawyers and their associations as a way to manage their clients' interests prior to litigation in courts. Most of the literatures portray that lawyers' attitudes about mediation are likely to affect both the disputants' decision to use mediation and their perceived satisfaction with its processes and outcomes (Wissler et al. 1992). But scholars have been writing to require lawyers to be problem solvers, working collaboratively with the disputants, assisting them to understand the issues in the case, thereby enabling them to exercise their self-determination and ensuring that the agreement reached by them is based on informed consent (Gutman 2009).

VI. CONCLUSION

Court-annexed mediation in Tanzania has brought about tremendous success since its introduction as compared to litigation. However, its practices have been limited by some prevailing challenges which should be addressed so as to harvest what were planted for easy and satisfactory dispensation of justice. In improving the efficiency of court-annexed mediation, there are some strategies to overcome the barriers to, and increase the uptake of court-annexed mediation in Tanzania. These include: providing information, awareness and publicity especially to the public and lawyers on the effectiveness of mediation in resolving disputes, training of mediators including appointment of more judges as special mediators and that the court must have a system in place to ensure the effectiveness of court-connected mediation including administrative process to monitor and supervise the cases referred to mediators and cases which return to court if mediation fails. In doing so, the practices and trends of court-annexed are expected to flourish and the dispensation of justice will be easy, satisfied and timely.

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