Mediation Bill 2020

Proposed Changes to Civil Litigation and Mediation Practice Very Problematic for the Right of Access to Justice and the Independence of the Judiciary – Prof. T. Ojienda SC

A Response

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Is it courage or foolhardiness which drives me to challenge the writings of such an eminent Kenyan jurist as Professor Tom Ojienda SC?

Professor Ojienda writes eloquently from the perspective a loyal servant of justice in Kenya and seemingly as a believer that such new-fangled innovations as mediation represent a mortal threat to the traditional role of the law, and lawyers in its delivery. The idea that disputants may be able to arrive at a 'just' resolution of their disputes, without troubling the courts, must be an uncomfortable challenge to protectors of the *status quo*.

On reflection, my temerity in questioning the views of a great legal mind, is borne from my belief that whilst the provision by the state of a constitutional forum to resolve disputes is necessary, it cannot be necessary that every dispute goes to court. I also believe passionately in mediation as a better alternative to adversarial dispute resolution for *most* civil disputes.

It is also worth noting, that whilst Article 159 of the Constitution of Kenya is the source of judicial authority and mandates the Judiciary to promote Alternative Dispute Resolution, it does NOT mandate citizens to utilise the Judiciary, nor does it give the Judiciary exclusive control of 'justice' (a word which is not defined). Nor does Article 48, ensuring "Access to Justice" for all citizens, say that that access *must* be delivered through the courts.

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The State is therefore quite free, from a constitutional perspective, to promote ADR, outside of the courts, just as citizens are quite free to choose whatever means of resolving disputes that they like - provided or promoted by the State, or otherwise.

Professor Ojienda's paper[1] extends to 20 pages and includes the following main observations and conclusions:

1. Mediation can be either undertaken *prior* to instigation of court proceedings and outside of the purview of the courts, *or* it happens as part of Kenya's Court Annexed Mediation programme under the direct supervision of the courts.

2. That mediation is intended to "…supplement and not supplant the use of judicial proceedings…" but "…merely to enhance the quality and the process of delivery of justice…".[2]

3. That the statutory regime of the Mediation Bill will interfere with Court Annexed Mediation by "…removing it from the realm of the Judiciary…and placing it under the realm of the Attorney General…"[3] and that such a move will threaten the independence of the Judiciary.

4. That the Bill should be amended "to expressly state that any attempt to resolve a dispute by mediation is merely recommendary and voluntary and not mandatory".[4]

5. That the dual Constitutional rights of access to justice, and to have a dispute heard before a court or tribunal are restricted by the Bill.

[1] THE MEDIATION BILL, 2020: PROPOSED CHANGES TO CIVIL LITIGATION AND MEDIATION PRACTICE VERY PROBLEMATIC FOR THE RIGHT OF ACCESS TO JUSTICE AND THE INDEPENDENCE OF THE JUDICIARY, Prof Tom Ojienda, SC, 6th July 2020.
[2] *Ibid*., pp 4 & 5.
[3] *Ibid.*, p 4.
[4] *Ibid.*, p 10.

6. That the Constitutional requirement at Article 159(3) that "Traditional Dispute Resolution Mechanisms" must not be inconsistent with the Constitution, also applies by inference to modern mediation.

Of course most of Professor Ojienda's analysis and logic is sound, however, I do believe that nearly all of the pillars on which he builds his analysis are flawed, and as such, by kicking away but six of those pillars his whole paper and its conclusions fall to the ground. I therefore apologise to my reader that this paper is quite short and does not deal with much of the good quality timberwork that the Professor has crafted in his fallen structure.

Mediation is Not Just Court Annexed

First, is Professor Ojienda's dealing with Court Annexed, as opposed to what I would term "private" mediation and the notion that once proceedings have been commenced, mediation is necessarily court annexed.

The Professor builds his argument from the perspective that once a matter is in court, any mediation of the dispute is necessarily done under the control of the court (in the form of Court Annexed Mediation). But why should this be the case?

Are parties to a suit not free to negotiate a compromise of their dispute at any time and file a consent order? Are we to suggest that if that negotiation was brokered by a neutral third party (i.e. it was a mediation) then the court suddenly has some power or authority over that negotiation? Presumably not.

It is true that it is not possible to enter the Court Annexed scheme prior to a dispute entering the court system. But that is not to say that disputants cannot engage in private mediation at any time up to (and even after) trial.

It may be the case that the vast majority of mediation happening in Kenya at the moment is under the Court Annexed programme; that litigants and their lawyers have been slow to take up the services of mediators of their own volition. However, as the long title and other

content of the Bill makes clear,[5] it is all forms of mediation, and not just Court Annexed that is contemplated in the Bill.

Accordingly, Professor Ojienda's tendency to argue his case on the basis that mediation *is* Court Annexed Mediation is defective from the beginning. For the Professor it appears to be an uncomfortable fact, that disputants may choose to negotiate, with or without the assistance of a third party, at any time after a dispute has arisen and that the Court often has no role in that process.

Mediation *is* an Alternative to Litigation

Second, is the rather shaky argument that mediation is not an alternative to litigation. It is true that in the Conclusion to his paper, Professor Ojienda states that "ADR mechanisms are merely an alternative to Court litigation" although I am not sure that such self-contradiction aides the witness's credibility. Self-evidently, mediation, and ADR generally, serve disputants as an alternative to litigation. The clue is in the name. 'A' stands for alternative. To suggest that because mediation is supervised by the courts and in the context of claims already filed, it is necessarily only a supplement to litigation, and that as such it must remain in the tight control of the Judiciary, is a circular argument that does not touch the ground and therefore cannot support any weight.

[5] "AN ACT of Parliament to provide for the settlement of all civil disputes by mediation; to set out the principles applicable to mediation; to provide for the establishment of the Mediation Committee; to provide for the accreditation and registration of mediators; recognition and enforcement of settlement agreements; and for connected purposes."
S.2 A "mediation agreement" is defined to include an agreement to mediate within a larger (presumably) commercial contract;
S.7(2)(g) provides for the Mediation Committee to set fees for mediators;
S.13(3) provides for separate elements of accreditation and registration for Court Annexed and private mediators respectively;
S.17(1)(a) provides for parties using mediation "on their own initiative";
S.22 in its entirety deals with parties' obligations to consider mediation before filing a suit;
S.23 deals with disputants' right to appoint a mediator or mediators (which is not in the parties' gift in the context of Court Annexed Mediation.

Mediation is *not* a Matter for the Courts to Control

This leads us directly into the third fundamentally unsound pillar of the Professor's construction – that mediation must be in the realm of the Judiciary because it is "the arm of the Government vested with judicial power and authority in the resolution of legal disputes"[6] and that removing it would threaten the independence of the Judiciary.

Let's break this down. People have disagreements and disputes. Often, very often in fact, they resolve their own disagreements and therefore have no need of any outside power or authority to resolve the dispute. One way or another, disagreements get resolved by some level of negotiation. If you and I, as private citizens, or legal personalities (a company for example) are able to negotiate our way out of a dispute what on earth would that have to do with the Judiciary?[7] Think of it this way, if you were told that the Judiciary was to superintend your negotiation (prior to any court filings) you would be quite right to wonder on what Constitutional basis it could do so.

Mediation is nothing more than an assisted negotiation. The mediator does not have or need any "power or authority" to help parties resolve their own dispute. The Judiciary's Constitutional mandate involves it having the power to decide in the absence of the disputants being able to. It has no mandate whatsoever, until the parties bring the matter before the court.

Here then is another of the Professor's circular arguments: (most) mediation happens post filling of a claim, therefore it is in the purview of the court, therefore it can't happen other than in the purview of the court.

Incidentally, contrary to Professor Ojienda's suggestion, the Bill does *not* remove Court Annexed Mediation from the control of the Judiciary. It expressly states, at section 44(2), that section 59A of the Civil Procedure shall be amended such that "The function of the Mediation Accreditation Committee shall be to oversee the conduct of the court annexed mediation process".

[6] Ojienda, *op. cit*. p 4.

[7] Indeed, even if you were negotiating a dispute with a government or other 'public' entity, what business would that be of the Judiciary unless and until one or other party files a suit?

Professor Ojienda also opines[8] that the Attorney-General is not fit to hold the supervisory mandate for mediation because the Attorney-General is often a party to cases and therefore not sufficiently neutral.

But why on earth shouldn't the Government, even if it is often a party to litigation, not take a regulatory interest in mediation, much as it takes a regulatory interest in dozens of other trades, professions and activities?

If we are talking about appointing individuals to positions with tangible power and authority over the rest of us, (such as Judges) it is of course necessary to think carefully about insulating the decision maker from vested interest. But we are talking about mediators who have no such authority – when they are involved in a dispute, the parties retain total control over outcomes.

If the Government cannot take democratically approved decisions about mediation, simply because it is sometimes an interested party in litigation, how can the Interior Secretary take executive decisions about policing policy, of the Health Secretary take decisions about hospitals, when both of those individuals may well be personally affected by their own decisions?

As regards the notion that stopping the Judiciary from controlling negotiation/mediations generally, threatens the independence of the Judiciary: as a Judge may say, *res ipsur loquitur* (the thing proves itself) or at least, it requires some positive argument from the positor. The Professor repeatedly tells us that the independence of the Judiciary is under threat but does not tell us why or how.

Mandatory Mediation

The fourth plank on which Professor Ojienda builds his edifice, and it might just be the central and thickest support, is the argument that disputants must not be mandated to attempt mediation.

[8] Ojienda, *op. cit.* p 13.

This one is dismissed most easily. No such provision has been proposed. The Bill is perfectly clear in that it mandates that parties must 'consider' mediation (and that advocates must advise parties to consider mediation).

The Professor reproduces the relevant clauses in his paper, so I shall not do so, however I refer the reader to sections 22(1)(a) and 22(2)(a)-(d), which instruct disputants to "take reasonable measures to resolve a dispute by mediation before resorting to judicial proceedings" and explains that such "reasonable measures" are satisfied if a party has communicated and shared relevant documents with the other party and by "considering whether the issues could be resolved through mediation process (*sic*)".

Curious to note is the fact that mediation as controlled by the court, and accordingly with the apparent approval of Professor Ojienda, *is* in fact currently a mandatory process (albeit that the parties are free having attended mediation to cross their arms and decline to reach any settlement agreement). The Professor rails against mandatory mediation in general, even thought the Bill does not propose it, but at the same time, raises no objection to it when it is a matter of policy for the Judiciary.

Access to Justice and Right to go to Court

Of course, this broken plank immediately puts its neighbour under pressure: that parties' access to justice and rights to go to court will be tarnished under the Bill.

The good Professor brings to the table in his support, the famous case of *Halsey*, from the UK, the jurisdiction in which I was trained, to say that encouragement "in the strongest terms" to mediate would be acceptable but outright compulsion to mediate would not. It is perhaps a good job then, that the Bill goes no further than expecting litigants to *consider* mediation before filing a suit.

What the Professor does not mention is that *Halsey* remains a precedent that supports the imposition of costs sanctions if parties unreasonably fail to attempt mediation (or other ADR processes). In giving the judgment of the court, Lord Dyson says[9]:

[9] At para 13

> *In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule* [that costs follow the event]*. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR.*

Further, since that 2004 precedent, Sir Alan Ward, also in the England and Wales Court of Appeal considered the issue in 2013 in *Wright* v *Michael Wright Supplies Ltd and anor*[10] and commented, o*biter*, "perhaps, therefore, it is time to review the rule in *Halsey*" and in 2014, Norris J in *Bradley & anor* v *Hesline & anor*[11] found that (courtesy of the *Halsey* precedent), he could not "oblige truly unwilling parties to submit their disputes to mediation" but he could not see why in boundary and neighbour disputes:

> *directing the parties to take (over a short defined period) all reasonable steps to resolve the dispute by mediation before preparing for a trial should be regarded as an unacceptable obstruction on the right of access to justice.*

With the English courts released from the obligation to follow the jurisprudence of the European Court of Justice, some would say that it is unlikely to be long before the English Supreme Court, relaxes its restriction on mandatory mediation.

As regards the right for citizens to take their issues to court, it must be remembered that even where mediation is compelled, there is no compulsion on parties to reach agreement. The parties enter the mediation with the right to go to court. If the mediator (sometimes to the surprise of one or more disputants) manages to bring about settlement well and good – the parties drop their right to go to court quite voluntarily. If a party or parties don't like the best settlement deal on the table, the right to go to court is untouched.

[10] [2013] EWCA Civ 234
[11] [2014] EWHC 3267 (Ch)

Holistic Interpretation of the Constitution

The last of the Professor's foundations to be kicked away, (although it is perhaps only holding up the porch), is the notion that mediation and 'traditional dispute resolution' are analogous for the purposes of a 'holistic' interpretation of the Constitution.

Professor Ojienda wants us to believe that a Constitutional provision, which unambiguously restricts its application to 'traditional dispute resolution', should be read as to include any other form of dispute resolution, leaving one to wonder why, if the drafters of the Constitution wanted that provision to mean other than what it says, it was not drafted accordingly.

The Professor leads us to a Supreme Court judgment[12] that he argues tells us that the context of a provision and the history of the issues in dispute and the prevailing circumstances, can allow such a defeating of the plain meaning of the words of the Constitution. However, he does not explain what this context or history or prevailing circumstances are so as to justify such editing of the Nation's core text.

In fact, the precedent case that the Professor cites to support his argument appears to find the exact opposite.

The applicant in the case enjoined the court to "find that Article 163(6) of the Constitution does not mean what it says, through a holistic interpretation" (which quote appears at paragraph 26, immediately before the words of the opinion quoted by the Professor). But this imploration was then soundly rejected by the court, on the basis of the final sentence of the Professor's quote: "Such scheme of interpretation does not mean an unbridled extrapolation of discrete Constitutional provisions into each other, so as to arrive at the desired result".

Comparative Law

Part V of Professor Ojienda's paper undertakes a comparative study of Court Annexed Mediation in two other jurisdictions, New South Wales, Australia and South Africa. It is not

[12] In the Matter of Kenya National Commission on Human Rights [2014] eKLR, Supreme Court Advisory Opinion Reference No. 1 of 2012.

immediately obvious what the Professor is seeking to demonstrate with these studies, as the reality on the ground in these jurisdictions do not appear to support his notions that mediation should come with no compulsion to so much as consider mediation, and that the courts should remain in control of mediation.

In the case of New South Wales, courts *can* mandate parties to mediate and "the Court expects that parties will have considered mediation of their dispute as an alternative to a contested hearing".[13] The Supreme Court of New South Wales's website page on mediation makes clear that in addition to its Court Annexed Mediation scheme, in which court officers act as mediators, private mediation is undertaken by private mediators.[14]

In the case of South Africa, where Professor Ojienda reports on the voluntary nature of Court Annexed Mediation (it could hardly be otherwise as the state does NOT pick up the cost of mediation),[15] the message appears to be that mediation should be controlled by the courts and there should be no mandation to mediate or to consider use of mediation.

It is perhaps unfortunate then that Professor Ojienda did not refer to the fact that in February of this year (2020), under the Rules Board for Courts of Law Act 1985, new Rule 41A, concerning 'Mediation as a dispute resolution mechanism' was inserted into the Rules of Court.[16] This new rule provides that on filing a summons, or defence to a summons in court, a party must indicate to their counter-party whether they agree to or oppose referral of a dispute to mediation. Further, at any stage prior to judgment of a dispute in court, the court may direct the parties to consider referral of the dispute to mediation.

In other words, a very similar regime to that proposed in the Kenyan Mediation Bill 2020 – Court Annexed Mediation under the control of the judiciary and a compulsion to at least consider mediation prior to filing a suit, are much what is in place in at least two other jurisdictions.

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13 http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_mediationinthesc/sco2_mediationinthesc.aspx (Accessed 7th July 2020)

14 *Ibid*.

15 https://www.justice.gov.za/mediation/mediation.html (Accessed 7th July 2020)

16 https://www.justice.gov.za/legislation/notices/2020/20200207-gg43000rg11038gon107-RulesBoard_MC.pdf See pages 31-34 (Accessed 7th July 2020)

Further, in South Africa at least, the accreditation of mediators and appointments as Court Annexed Mediators, falls under the Executive and not the Judiciary – exactly the situation proposed in Kenya to which the Professor objects.

Conclusion

Many lawyers in Kenya, are fundamentally opposed to the idea of mediation. It is quite literally anathema to them: not what they learned in law school; not what they have ever practiced; and in their eyes a threat to their very professional existence.

As an aside, I would argue that the ability to assist disputants to resolve their matters in a fraction of the time and at a fraction of the cost of traditional adversarial dispute resolution offers a huge opportunity to all Kenyan lawyers. At the moment we could estimate that not more than 10% of serious legal disputes find their way to a lawyer's office - disputants are in little doubt that they cannot afford a formal legal approach to their issue. By embracing mediation and substantially lowering the dispute resolution price point, lawyers can open up an enormous market of disputes, and money to resolve them, to keep them busy for years to come.

Further, the notion of compelling parties to mediate does tend to inflame an impulse reaction in lawyers, that this might be interfering with parties' fundamental rights to have access to a court. However, it is worth reflecting on Harvard Professor Frank E A Sander's incisive statement: "There is a difference between coercion into mediation and coercion in mediation."[17]

I do wonder if even an eminence such as Professor Ojienda, may have fallen into that time worn trap of putting desired conclusions before analysis. As I immersed myself in his paper, I was optimistic that his depth of knowledge and experience may assist me with my current task of evolving improvements in the Bill (and there are many, many needed). Instead I found myself grappling with a hard-bitten "maintain the *status quo"* agenda. From a pure old-fashioned lawyer's perspective – bring us disputes and we will line them up at the door of the

[17] "Could COVID-19 see the end of Halsey?", Alan Limbury, Kluwer Mediation Blog http://mediationblog.kluwerarbitration.com/2020/06/22/could-covid-19-see-the-end-of-halsey/?doing_wp_cron=1594153460.8984680175781250000000 (Accessed 7th July 2020).

court, Professor Ojienda's resistance based on any argument that can be found, is quite understandable.

The question for legislators and for Kenyans, rather than for lawyers, is how can we make resolving disputes better? The question for Professor Ojienda is when it comes to helping people with disputes (and rest assured it will be lawyers to whom such people turn for some time yet) how far outside of pure legal thinking can you go?