

ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND THE RESOLUTION OF COMMUNITY LAND DISPUTES IN KENYA

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ABSTRACT

The recognition of community land under the Constitution of Kenya 2010 marked a significant departure from earlier land governance arrangements in which customary and communal interests often occupied an uncertain position within the formal legal system. Alongside this recognition, the Constitution elevated alternative dispute resolution mechanisms by requiring courts and tribunals to promote reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The Community Land Act 2016 subsequently developed a more specific dispute resolution framework for community land by recognising internal community processes, customary law, mediation, arbitration and eventual judicial intervention. Despite this elaborate legal architecture, community land disputes remained complex because they frequently involved overlapping customary and statutory claims, contested boundaries, collective resource use, community membership, pastoral mobility, natural resource extraction, compulsory acquisition and competing institutional mandates. This study examined the role of alternative dispute resolution mechanisms in the resolution of community land disputes in Kenya as at December 2019. It adopted a qualitative socio-legal desktop research design combining doctrinal legal analysis with empirical documentary review. Constitutional provisions, statutes, subsidiary legislation,

reported judicial decisions, policy materials and scholarly literature available by 2019 were analysed thematically. The study was anchored in Legal Pluralism Theory and the Access to Justice theoretical perspective. The findings demonstrate that Kenya had established a strong constitutional and statutory basis for alternative dispute resolution in community land matters, but effectiveness varied according to the nature of the mechanism and dispute. Traditional dispute resolution offered community legitimacy and contextual knowledge but raised concerns over representation, gender equality and constitutional compliance. Mediation was particularly suitable for relational disputes requiring negotiated accommodation, although voluntariness and enforcement remained problematic. Arbitration provided greater finality but could replicate the adversarial and cost characteristics associated with litigation. The study concludes that effective resolution of community land disputes requires a constitutionally regulated plural system in which community mechanisms, mediation, arbitration and courts perform complementary rather than competing functions.

Key Words: Alternative Dispute Resolution, Community Land, Customary Law, Mediation, Arbitration, Traditional Dispute Resolution, Access to Justice, Legal Pluralism, Kenya.

INTRODUCTION

Land has occupied a distinctive position in Kenya's political, economic and social history. Questions concerning ownership, access, allocation, occupation and control of land have repeatedly generated disputes at household, community and institutional levels. These disputes have been particularly difficult where land is communally held because community land cannot always be understood through the conventional private property model in which a clearly identifiable proprietor exercises exclusive rights over a demarcated parcel. Community land may sustain grazing, settlement, water access, forests, cultural sites, migration routes and other collective uses, while rights over the same landscape may be distributed among different users according to custom, season, membership and livelihood need. The constitutional recognition of community land therefore addressed not merely another form of property ownership, but a historically complex system of collective rights and social relationships. Article 63 of the Constitution recognises community land as a separate category and includes, among other forms, community forests, grazing areas, ancestral lands and land traditionally occupied by hunter-gatherer communities.

The constitutional transformation of community tenure occurred together with a broader reorientation of Kenya's justice system. Article 159(2)(c) requires courts and tribunals to promote alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The constitutional land principles reinforce this approach through Article 60(1)(g), which encourages communities to settle land disputes through recognised local community initiatives that conform to the Constitution. The National Land Commission was similarly assigned a role in encouraging traditional dispute resolution mechanisms in land conflicts. These provisions demonstrate that the post-2010 constitutional order did not regard justice as being delivered exclusively through formal judicial proceedings. Locally legitimate and consensual approaches were recognised as potentially important components of land justice, although their use remained subject to constitutional safeguards.

This constitutional approach was developed further through the Community Land Act 2016. Part VIII of the Act establishes a dispute resolution architecture that gives prominence to internal community mechanisms and alternative processes. Section 39 recognises traditional dispute and conflict resolution mechanisms and requires disputes between members of registered communities, or between registered communities, to be addressed through the internal mechanisms provided in community by-laws before external processes are pursued. The same section gives priority to alternative methods of dispute resolution and recognises the application of customary law provided it remains consistent with the Constitution and the requirements of justice and morality. Sections 40 and 41 provide respectively for mediation and arbitration, while section 42 permits recourse to the courts where attempts at resolution under the statutory framework fail.

The Community Land Regulations 2017 complemented this statutory framework by providing procedures relating to the recognition, adjudication, registration and administration of community land. The Regulations also contemplated alternative dispute resolution within disputes arising during community land processes, demonstrating that conflict management was relevant not only after registration but also during the difficult process of determining the identity of communities, boundaries and competing interests. The Environment and Land Court Act further strengthened the relationship between judicial and non-judicial processes by permitting the Environment and Land Court to adopt conciliation, mediation and traditional dispute resolution mechanisms consistent with Article 159(2)(c).

The existence of this framework did not, however, settle the more difficult question of effectiveness. Community land disputes frequently contain legal questions that are inseparable from historical grievances, social relationships, livelihood systems and competing understandings of legitimate entitlement. A boundary dispute between pastoral communities, for example, may concern much more than the location of a survey line. The disagreement may involve seasonal grazing patterns, water access, reciprocal arrangements during drought, migration corridors and historical understandings between neighbouring communities. A judicial decision may clarify the legal boundary while leaving unresolved the relationships and resource pressures that generated the conflict.

Alternative dispute resolution appears attractive in such circumstances because it creates opportunities for participation, negotiation, reconciliation and locally appropriate settlements. Nevertheless, the designation of a process as alternative does not automatically make it accessible, fair or effective. Traditional institutions may possess valuable knowledge and legitimacy while simultaneously reflecting unequal power relations within communities. Mediation may produce flexible agreements but depends heavily on voluntary participation and the willingness of parties to honour negotiated outcomes. Arbitration may offer expertise and finality but is ultimately adjudicative and may become expensive, technical and adversarial. The central concern is therefore not whether alternative dispute resolution is legally recognised in Kenya, but whether the available mechanisms are appropriately designed and institutionally supported to resolve the distinctive disputes arising from community land.

This study examined that question from a legal and socio-legal perspective as at 2019. The analysis deliberately treats the period ending on 31 December 2019 as the temporal boundary of the research. The paper therefore evaluates the constitutional, statutory, judicial and scholarly position that had developed by that date without incorporating subsequent reforms or jurisprudence into the findings.

HISTORICAL AND LEGAL CONTEXT OF COMMUNITY LAND DISPUTE RESOLUTION IN KENYA

Community Land and the Transformation of Kenya's Land Regime

The contemporary community land regime emerged from a much longer history of tension between formal land law and customary tenure. Colonial land administration substantially altered indigenous systems of access and control by introducing state-based concepts of ownership, registration and territorial boundaries. The resulting legal order tended to privilege formally documented interests even though many communities continued to organise access to land, grazing, water and other resources through customary institutions. Okoth-Ogendo (1991) situated Kenya's land question within this broader transformation of agrarian institutions and demonstrated how colonial and post-colonial legal structures reshaped indigenous relationships to land.

The consequences were particularly significant in areas where land supported collective livelihood systems. Customary tenure is not synonymous with an absence of rules. Rather, community land systems may regulate membership, access, seasonal use, exclusion, inheritance, resource sharing and obligations among users. Musembi and Kameri-Mbote (2013) observed that community property rights in Kenya are embedded within wider questions of mobility, marginality and livelihood organisation. Odote (2013) similarly argued that constitutional recognition of communal land rights created important possibilities for pastoral communities but could not by itself resolve the institutional problems surrounding implementation.

Kenya's National Land Policy of 2009 provided an important policy foundation for subsequent constitutional reform by recognising weaknesses associated with historical land injustices, tenure insecurity and the treatment of community land. The Constitution of Kenya 2010 then replaced the previous binary orientation toward government and private property with a threefold classification of public, community and private land. Article 63 gave community property a constitutional basis and required legislation to provide more fully for its recognition and administration. The Community Land Act 2016 was enacted pursuant to that constitutional requirement and entered into force in September 2016.

The constitutional shift was important for dispute resolution because formal recognition of community land necessarily required the legal system to confront the normative systems through which community rights had historically been created, remembered and enforced. A statutory framework that recognised communal property while disregarding the customary institutions surrounding that property would have produced an incomplete reform. The constitutional recognition of traditional dispute resolution must therefore be understood alongside the recognition of community land. Both reflect an attempt to accommodate social institutions that had continued to operate despite the historic dominance of state-centred land law.

The Constitutional Foundation of Alternative Dispute Resolution

Article 159 represents the principal constitutional foundation of ADR within Kenya's justice system. It requires judicial authority to be exercised in a manner that promotes alternative forms of dispute resolution while also recognising traditional mechanisms. This provision transformed ADR from a process dependent solely on private contractual choice into a constitutionally acknowledged component of justice administration. The importance of this shift becomes clearer when Article 159 is read together with Article 60(1)(g), which specifically encourages communities to resolve land disputes through recognised local initiatives.

The constitutional endorsement is nonetheless qualified. Article 159(3) prohibits the application of traditional mechanisms where they contravene the Bill of Rights, offend justice and morality, or conflict with the Constitution or written law. The limitation prevents cultural legitimacy from operating as an automatic defence of a dispute resolution practice. A traditional institution may command considerable authority within a community yet remain constitutionally unacceptable where its procedures systematically exclude women or deny affected persons a meaningful opportunity to participate. The constitutional model is therefore better described as regulated legal pluralism than as unrestricted recognition of customary jurisdiction.

This safeguard assumes particular importance in land governance. Article 60(1)(f) requires the elimination of gender discrimination in law, customs and practices relating to land and property. Witchger (2018) demonstrated why this requirement is directly relevant to community dispute resolution. Her analysis found that traditional land processes commonly relied on respected local elders because of their knowledge of community boundaries and history, but also cautioned that leadership structures dominated by male elders could reproduce unequal participation for women, unmarried women, young people and other less powerful community members. The constitutionalisation of traditional justice must therefore be interpreted simultaneously as recognition and regulation.

The Community Land Act and the Statutory Architecture of Dispute Resolution

The Community Land Act gives practical content to the constitutional commitment to plural dispute resolution. Section 39 recognises that a registered community may use traditional dispute and conflict resolution mechanisms where appropriate. It also locates internal community mechanisms within the dispute resolution architecture by requiring disagreements among members of a registered community, or between registered communities, to be addressed initially through mechanisms contained in community by-laws. The Act goes beyond merely permitting ADR by directing registered communities to give priority to alternative methods when disputes or conflicts concerning community land arise.

The statutory recognition of customary law is equally significant. Section 39(4) contemplates the application of customary law by courts and other dispute resolution bodies where that law is applicable to the parties and remains consistent with constitutional requirements. The provision acknowledges that a community land dispute may not be intelligible solely through formal statutory rules. Questions surrounding access, occupation, membership and resource use may depend partly on customary norms. At the same time, incorporation into the statutory framework subjects customary rules to external standards of justice and constitutional supremacy.

Section 40 provides the statutory framework for mediation. The parties may agree to refer a community land dispute to mediation, and the process may take place privately or informally. The Act allows the parties to participate directly in negotiation and in designing the settlement arrangement, while the mediator may convene meetings, structure the negotiation, clarify issues and assist the parties toward resolution. Where agreement is achieved, the settlement is to be reduced to writing and signed by the parties. This model gives mediation particular relevance to disputes where strict adjudication would be incapable of addressing the full range of competing interests.

Arbitration is separately recognised under section 41. Parties may agree to submit a community land dispute to arbitration and the Arbitration Act becomes relevant where disagreement arises over appointment of the arbitrator. Judicial intervention appears later in the architecture under section 42, which allows a party to approach the court once efforts at resolution under the Community Land Act have failed. Although these provisions should not be read as establishing an inflexible procedural staircase through which every dispute must travel, their combined effect demonstrates a clear legislative preference for attempting suitable non-judicial mechanisms before transforming every community disagreement into litigation.

The Environment and Land Court and the Doctrine of Institutional Restraint

The specialised jurisdiction of the Environment and Land Court did not render alternative mechanisms redundant. Section 20 of the Environment and Land Court Act permits the Court, with the agreement of the parties or where otherwise appropriate under the statute, to implement alternative dispute resolution mechanisms such as conciliation, mediation and traditional processes. Where resort to an alternative mechanism constitutes a condition precedent, proceedings may be stayed until the prescribed process has been undertaken.

Kenyan jurisprudence had already developed a broader principle that courts should not readily displace dispute resolution procedures specifically created by legislation. In *Mutanga Tea & Coffee Company Ltd v Shikara Limited & another* [2015] eKLR, the Court of Appeal reasoned that where the Constitution or legislation prescribes a specific mechanism, an aggrieved party should ordinarily use that procedure before invoking the court's jurisdiction. The Court linked this

approach to Article 159(2)(c) and observed that statutory alternative mechanisms may provide technical expertise, expedition and cost advantages.

The importance of this principle to community land is substantial. The effectiveness of Part VIII of the Community Land Act would be undermined if parties could routinely bypass community mechanisms and immediately seek judicial determination. Equally, exhaustion cannot become an absolute barrier where the alternative institution is incapable of granting the necessary relief, where constitutional rights require urgent protection or where the procedure itself is challenged as unlawful. The relationship between the Environment and Land Court and ADR is therefore one of supervision and complementarity rather than simple exclusion.

Statement of the Problem

The constitutional and statutory framework existing by 2019 appeared, on its face, to provide a comprehensive basis for resolving community land disputes outside conventional litigation. The Constitution recognised community land and encouraged locally grounded dispute resolution. Article 159 elevated mediation, reconciliation, arbitration and traditional mechanisms within the administration of justice. The Community Land Act subsequently placed internal community procedures, customary law, mediation and arbitration within a statutory dispute resolution framework and contemplated judicial intervention where those processes failed. The Environment and Land Court Act reinforced the possibility of incorporating ADR into specialised land adjudication.

The strength of the formal framework nevertheless concealed substantial difficulties. Community land disputes are rarely uniform. Some involve disagreement over the location of boundaries, while others concern membership, customary access, grazing rights, inheritance, leadership, resource extraction, compulsory acquisition or competing claims between communities and public institutions. The dispute may involve a relatively clear legal question, or it may represent a manifestation of a much deeper conflict involving historical grievances, livelihood insecurity and community identity. Treating all such matters as though they require an identical dispute resolution process risks confusing legal availability with institutional suitability.

Judicial developments before the end of 2019 illustrated this difficulty. In *Mwasi Kithika v Munyu Kithika & another* [2017] eKLR, the Environment and Land Court acknowledged the constitutional promotion of traditional dispute resolution and recognised that Kamba customary practice commonly placed land disputes before sub-clan structures. The case demonstrates the continuing social relevance of customary forums even after the establishment of specialised land courts. It also raises a more difficult legal issue concerning when courts should recognise a customary decision, when they should examine its procedural fairness and when constitutional standards require judicial intervention.

The difficulties surrounding mediation became visible in *Sahara Ahmed Hillow v Mohamed Hassan Jillo & 2 others* [2018] eKLR. The dispute concerned land characterised in the proceedings as unregistered community land, and the court considered an agreement by the parties to pursue mediation. The court described that commitment as essentially a gentleman's agreement, exposing uncertainty over the extent to which a party could be compelled to remain in a voluntary mediation process. The decision illustrates the tension between mediation's dependence on consent and the need for a dispute resolution system to produce reliable finality.

Questions of institutional competence and exhaustion were also becoming important. In *Richard Rutto Chelang'a & another v David Chelang'a Yego & 2 others* [2019] eKLR, the dispute concerned land the court considered to be community land occupied by clan members, and the record included proceedings conducted by elders. The litigation raised questions about prior dispute resolution structures and the relationship between those mechanisms, land adjudication institutions and subsequent court proceedings. In *Reuben Mwongela M'Itelekwa v Paul Kigea Nabea & 2 others* [2019] eKLR, the court similarly engaged with the requirement that parties use established statutory procedures for determining interests in land rather than treating court proceedings as an automatic substitute for those mechanisms.

The problem was not confined to conflicts within communities. *County Government of Turkana v National Land Commission & another* [2019] eKLR arose from intended compulsory acquisition associated with petroleum development and the LAPSET corridor. The consolidated litigation involved both the county government and members of the Turkana community and raised questions concerning consultation, community land, compulsory acquisition and the alternative procedures applicable to intergovernmental disputes. The Environment and Land Court found that the county government had not exhausted the constitutionally and statutorily prescribed intergovernmental dispute mechanisms before approaching the court. The case illustrates how a single community land controversy could implicate community rights, national institutions, county governments, development projects and several distinct dispute resolution regimes.

The legal architecture itself was still undergoing scrutiny. In *Kelly Malenya v Attorney General & another; Council of Governors (Interested Party)* [2019] eKLR, several provisions of the Community Land Act were challenged on constitutional grounds. The High Court found the Act's definition of community land constitutionally problematic because of the ambiguity created by the language used in section 2, while upholding other aspects of the statutory structure relating to community administration and registration. The decision demonstrated that the legislation establishing the new community land regime was itself still being judicially interpreted and refined.

Existing scholarship had identified important aspects of the problem but remained fragmented. Witchger (2018) concentrated on equality and representation within traditional community land

dispute processes and demonstrated that formalisation of local mechanisms could also formalise exclusion where leadership structures were not inclusive. Njuguna (2019) examined arbitration and questioned whether its adjudicative character was fully suited to community land conflicts that required reconciliation and continuing relationships. His analysis proposed greater attention to hybrid dispute resolution because community land conflicts could not always be reduced to clearly defined legal disputes. Muigua (2019) similarly examined the potential and challenges associated with traditional dispute resolution in Kenyan land conflicts, with particular concern for practical application and the constitutional limitations governing traditional mechanisms.

What remained inadequately integrated was a socio-legal examination of the community land dispute resolution architecture as a whole. Scholarship frequently examined customary justice, mediation, arbitration, access to justice or land tenure separately, while judicial decisions dealt with particular disputes arising before them. There remained a need to assess how these mechanisms related to each other and whether they collectively provided an effective means of resolving community land disputes. This study addressed that gap by examining the legal framework and documentary evidence through the interconnected criteria of legitimacy, accessibility, participation, constitutional compliance, enforceability, relational sustainability and institutional coordination.

Study Objective and Research Focus

The study sought to examine the role of alternative dispute resolution mechanisms in the resolution of community land disputes in Kenya as at December 2019. Within this broad purpose, the analysis considered the legal and institutional framework governing community land ADR, the contribution and limitations of traditional dispute resolution, the suitability of mediation and arbitration for different categories of community land conflict, and the institutional conditions affecting the effectiveness of those mechanisms. The inquiry was consequently concerned with whether ADR was legally available, how the mechanisms operated within Kenya's plural land justice system and the circumstances under which they could provide meaningful resolution rather than merely postponing litigation.

The research was guided by the broader question of how effectively Kenya's alternative dispute resolution framework responded to the distinctive characteristics of community land disputes. Attention was given to the compatibility of traditional processes with constitutional standards, the capacity of mediation to accommodate continuing community relationships, the appropriateness of arbitration for conflicts involving collective interests and the role that courts should perform where alternative mechanisms fail or threaten protected rights.

LITERATURE REVIEW

Legal Pluralism Theory

The study was principally anchored in Legal Pluralism Theory as developed within socio-legal scholarship by Griffiths (1986) and elaborated by Merry (1988). Griffiths challenged the assumption of legal centralism, according to which law is understood primarily as a single, unified system created and administered by the state. His account of legal pluralism drew attention to the coexistence of multiple normative orders operating within the same social environment. Merry subsequently demonstrated that legal pluralism was not merely an historical feature of colonial societies but an important means of understanding the relationship between formal law and social regulation more broadly.

The theory is particularly useful in the study of community land because rights and obligations over communally held resources may arise from several normative sources at the same time. A community member may possess rights recognised under the Constitution and Community Land Act while also being subject to community by-laws, customary rules of membership and locally negotiated arrangements governing grazing or water access. Courts, land registrars, county governments, customary elders and community land management institutions may each exercise forms of authority over different dimensions of the same social and geographical space.

Legal pluralism therefore assists in explaining why a purely state-centred model of dispute resolution may inadequately capture community land relations. A formal cadastral boundary may identify the spatial extent of a parcel, yet community understandings may recognise seasonal rights that cross that boundary. A written title may establish legal ownership, while customary norms continue determining how different households or groups access resources located within the land. The dispute that ultimately reaches a court may thus involve both state law and an underlying normative system that existed before the formal claim was filed.

The theory does not require the conclusion that every customary rule should be accepted as law without qualification. That interpretation would be inconsistent with Kenya's constitutional framework. The Constitution expressly recognises traditional dispute resolution while simultaneously subjecting it to the Bill of Rights, justice, morality and written law. Kenya's approach therefore reflects a constrained or constitutionalised form of legal pluralism in which different normative systems coexist but do not occupy identical positions in the hierarchy of law. This qualification is central to the present study. It enables the analysis to recognise the legitimacy and social knowledge embedded within community institutions without romanticising them. The same customary institution that remembers historical boundaries and facilitates reconciliation may also reflect entrenched hierarchies concerning age, gender or lineage. Witchger's (2018) analysis is particularly important in this respect because it shows that the formal recognition of traditional

dispute resolution can reproduce unequal access if the individuals who historically controlled customary institutions continue monopolising participation.

Legal Pluralism Theory consequently provides a strong explanation for Kenya's community land dispute architecture. Section 39 of the Community Land Act does not simply tolerate customary law; it incorporates it into the statutory system subject to constitutional conditions. Courts similarly encounter disputes in which customary processes and formal procedures overlap. The theory therefore allows the study to analyse ADR not as an informal alternative operating outside law, but as part of a broader plural legal order whose effectiveness depends on how the constituent institutions interact.

Access to Justice Theory

The analysis was also informed by the Access to Justice perspective associated with Cappelletti and Garth (1978). Their work challenged narrow understandings of justice that equated legal rights with the formal availability of courts. Access to justice requires attention to whether individuals can realistically use institutions to vindicate rights and obtain meaningful remedies. Their scholarship highlighted barriers associated with cost, procedure, legal representation and institutional design, thereby shifting attention from formal entitlement to the practical effectiveness of justice systems.

The relevance to community land is substantial. Recognition of community property under Article 63 is of limited practical value where the persons entitled to those rights cannot obtain an accessible and effective remedy when the land is threatened. Community members living far from judicial institutions may face transport costs, legal expenses, unfamiliar court procedures, documentary evidentiary requirements and prolonged proceedings. Some disputes may concern interests that are difficult to translate into the language of individual title and exclusive ownership. Access to justice must consequently be assessed according to the practical ability of affected communities to participate in dispute resolution and obtain outcomes capable of protecting their interests.

ADR can address some of these obstacles because proceedings may occur within or near the affected community, may rely on familiar languages and may permit greater procedural flexibility. Traditional mechanisms may draw on community knowledge that would be difficult to present through conventional documentary evidence. Mediation may allow parties to pursue remedies that a court would have little authority to order, such as shared seasonal access, negotiated grazing arrangements, joint resource management or continuing consultation.

An access to justice analysis nevertheless requires more than measuring physical proximity or financial cost. A locally available mechanism is not genuinely accessible if significant sections of the community cannot participate in it. Witchger (2018) demonstrated that community dispute resolution processes can disadvantage women, young people and other marginalised groups where

representation is channelled primarily through traditional male leadership. Similarly, a voluntary mediation process may be inexpensive but provide little practical justice if a stronger party can withdraw strategically after delaying the weaker party's claim. Access must therefore encompass procedural fairness, effective participation, substantive equality and the capacity to implement the outcome.

The theory complements Legal Pluralism Theory in an important way. Legal pluralism explains why different systems of dispute resolution coexist, while access to justice provides criteria for evaluating whether those systems actually make legal and customary rights meaningful. A process may possess considerable cultural legitimacy but perform poorly when judged against equality and representation. Conversely, a formal court may offer strong procedural protections while remaining difficult for remote communities to access. The theoretical framework adopted in this study therefore avoids assuming that formality is equivalent to justice or that informality is inherently accessible.

Alternative Dispute Resolution and the Nature of Community Land Conflict

Alternative dispute resolution encompasses processes with materially different institutional characteristics. Negotiation leaves control over both procedure and outcome largely with the disputants. Mediation introduces an independent third party whose role is to facilitate agreement rather than impose a decision. Arbitration permits parties to select an adjudicator but transfers authority over the substantive determination to that arbitrator. Traditional dispute resolution may contain elements of negotiation, mediation, conciliation or adjudication depending on the customs of the community concerned.

The distinction is especially important in community land because not every disagreement has the same structure. Njuguna (2019) draws a useful distinction between disputes that may be settled and deeper conflicts that require broader resolution. His analysis cautions against assuming that arbitration is automatically appropriate simply because the Community Land Act recognises it as an ADR mechanism. Arbitration remains adjudicative, meaning that a party ultimately succeeds and another fails on the contested issue. Where land conflict involves identity, historical grievance and continuing interdependence, a binding arbitral award may determine rights without transforming the relationship that generated the conflict.

The distinction has practical implications. A disagreement concerning interpretation of a benefit-sharing agreement between a registered community and an investor may be well suited to arbitration because the disputed obligations can be identified and a binding legal determination may be desirable. A conflict between neighbouring communities over access to pasture during drought may require a different approach. A sustainable settlement in the latter situation may depend on reciprocal accommodation, resource-sharing arrangements and continuing communication rather than a definitive declaration that one community has defeated the other.

Traditional Dispute Resolution and Community Land

Traditional dispute resolution has particular significance in community land governance because customary institutions frequently predate contemporary state land administration. Community elders may possess knowledge of land boundaries, migration patterns, customary allocation, inheritance and historical agreements that cannot easily be reconstructed from formal registers. The Environment and Land Court acknowledged this social reality in *Mwasi Kitheka v Munyu Kitheka & another* [2017] eKLR, where the court recognised that Kamba customary law traditionally used sub-clan structures in resolving land disputes.

The advantage of such mechanisms lies partly in their capacity to interpret disputes within the community's own normative and historical context. Land may carry social, cultural and spiritual meanings that do not correspond neatly with the economic conception of property. Community institutions may also be more concerned with restoring workable relations than allocating victory and defeat. This feature can be particularly valuable where the parties are relatives, clan members or neighbouring communities who will continue interacting after the immediate dispute.

The difficulty arises when local legitimacy is treated as sufficient proof of fairness. Traditional institutions differ considerably across communities and cannot be assessed as though they constitute a uniform national mechanism. The authority of elders, rules of evidence, participation by women, opportunities for review and methods of enforcement vary according to community and context. Muigua (2019) identified practical and constitutional challenges associated with the effective application of traditional dispute resolution to land conflicts, including the relationship between informal processes and formal enforcement.

Witchger (2018) makes the equality problem particularly explicit. Her examination of Kenya's community land dispute mechanisms found that the elders traditionally responsible for resolving land disputes may possess valuable historical knowledge but may not represent all affected interests. Women, unmarried women, young people and other marginalised groups may have less influence over institutions in which senior male leaders dominate decision-making. The constitutional value of traditional justice therefore depends on mechanisms being capable of adaptation. Recognition must not freeze custom at the point at which it most strongly reflected historical exclusion.

Mediation and Community Land Disputes

Mediation differs from adjudication because the mediator does not ordinarily determine the substantive rights of the parties. The process allows disputants to identify interests underlying their legal positions and develop an agreement they can accept. Section 40 of the Community Land Act reflects this understanding by permitting mediation in a private or informal setting and enabling the parties to participate in the negotiation and design of the settlement.

These characteristics correspond closely with the relational nature of many community land conflicts. Where neighbouring pastoral communities dispute access to a water source, a court may be capable of determining legal ownership but incapable of eliminating the ecological circumstances that force both groups to depend on the same resource. Mediation can accommodate arrangements concerning seasonal access, timing, conservation obligations, monitoring or compensation. The resulting agreement may address interests that lie outside the conventional remedies available in adjudication.

Mediation also creates an opportunity to widen participation where a dispute affects more people than the named litigants. A community land conflict may involve elders, women, livestock owners, young people, community organisations, public authorities and investors. An appropriately designed mediation can incorporate those interests instead of limiting participation to parties possessing formal standing in litigation. This flexibility becomes important where durable settlement depends on acceptance by those who will be expected to comply with the outcome.

The principal weakness lies in the dependence of mediation on consent. *Sahara Ahmed Hillo v Mohamed Hassan Jillo & 2 others* [2018] eKLR provides an important illustration. The court's description of the parties' commitment to mediation as a gentleman's agreement exposed the difficulty of compelling a reluctant party to continue a consensual process. The decision does not demonstrate that mediation is ineffective; rather, it shows that effectiveness requires a distinction between voluntary entry into a process and the legal status of agreements once reached. Section 40's requirement that settlements be reduced to writing offers some formality, but by 2019 questions remained concerning how community mediation could be sufficiently enforceable without becoming so proceduralised that its accessibility was lost.

Arbitration and Community Land

Arbitration offers stronger decisional finality because an arbitrator receives authority from the parties to determine the dispute. The Community Land Act expressly recognises arbitration and connects the appointment of arbitrators to the Arbitration Act where the parties cannot agree on selection. This can make arbitration particularly useful where a community land dispute involves technical questions, contractual interpretation, valuation, benefit sharing or obligations arising from investment agreements.

The mechanism may also allow the parties to select an arbitrator with specialised expertise in land law, customary tenure, natural resources or commercial arrangements. Court proceedings do not always offer the same freedom in selecting the decision-maker. Arbitration may additionally provide greater procedural flexibility and privacy than conventional litigation.

The limitations identified by Njuguna (2019) are nevertheless important. Arbitration remains an adjudicative process and therefore differs fundamentally from reconciliation-oriented mechanisms. Njuguna argues that the distinction between conflict management and dispute

settlement matters in community land because the existence of an arbitral award does not necessarily remove the underlying social conflict. He consequently supports greater use of hybrid approaches capable of combining consensual and adjudicative processes according to the nature of the controversy.

There is also a potential access to justice concern. Arbitration can become dependent on professional expertise, lawyers, arbitrator fees and formal documentation. Communities with limited financial resources may therefore discover that private adjudication reproduces some of the economic barriers associated with courts. The value of arbitration in community land matters should consequently be determined by mechanism fit rather than by its classification as ADR.

Empirical Literature and Research Gap

Musembi and Kameri-Mbote (2013) examined community property rights in Kenya through the relationship between mobility, marginality and tenure transformation. Their analysis is significant because it demonstrates why community property cannot be understood entirely through fixed boundaries and individualised rights. Odote (2013) similarly examined constitutional recognition of communal land rights in pastoral areas and argued that constitutional reform offered an important opportunity while recognising that legal recognition required appropriate institutional arrangements for practical implementation.

The literature became more specifically concerned with dispute resolution following enactment of the Community Land Act. Witchger (2018) examined the procedural equality implications of traditional mechanisms and identified the risk that formalisation could institutionalise existing patterns of exclusion. Njuguna (2019) focused on arbitration and argued that the legal distinction between dispute settlement and conflict resolution should influence the mechanisms selected for community land controversies. Muigua (2019) examined traditional land dispute resolution and emphasised both the potential of indigenous mechanisms and the legal and practical challenges surrounding their application.

The literature had therefore established that traditional mechanisms could improve community participation, that arbitration was not suitable for every conflict and that constitutional safeguards were necessary. What was less developed was an integrated analysis of the entire statutory dispute resolution architecture using actual judicial experience as documentary evidence. The present study addresses this gap by bringing constitutional provisions, the Community Land Act, judicial decisions and socio-legal literature into a single analytical framework. Rather than seeking to identify one universally superior mechanism, the study examines the conditions under which different mechanisms contribute to effective resolution.

METHODOLOGY

The study adopted a qualitative socio-legal desktop research design. The approach combined doctrinal legal research with empirical documentary analysis because the research question concerned both the content of the law and the way dispute resolution questions had manifested within actual legal controversies. A purely doctrinal analysis would have been capable of explaining the constitutional and statutory provisions governing ADR but would have provided limited insight into the implementation problems emerging before the courts. The documentary empirical component therefore used reported cases and institutional materials as evidence of how the legal architecture was being encountered in practice.

The temporal scope ended on 31 December 2019. Legal materials enacted after that date and judicial decisions delivered subsequently were excluded from the substantive analysis so that the paper reflects the position that could reasonably have been assessed in 2019. Earlier sources were retained where they were necessary to explain the theoretical, historical or legal development of the subject.

Primary documentary materials consisted of the Constitution of Kenya 2010, the Community Land Act 2016, the Community Land Regulations 2017, the Environment and Land Court Act 2011 and related statutes governing land administration and dispute resolution. The analysis also considered reported judicial decisions in which community land, customary dispute resolution, exhaustion of statutory processes, mediation or related questions arose. Cases were purposively included where their facts or reasoning illuminated one or more of the study's central themes rather than merely because the words “community land” appeared in the judgment.

The principal judicial materials included *Mwasi Kitheka v Munyu Kitheka & another* [2017] eKLR, *Sahara Ahmed Hillow v Mohamed Hassan Jillo & 2 others* [2018] eKLR, *Kelly Malenya v Attorney General & another*; *Council of Governors (Interested Party)* [2019] eKLR, *County Government of Turkana v National Land Commission & another* [2019] eKLR, *Richard Rutto Chelang'a & another v David Chelang'a Yego & 2 others* [2019] eKLR, *Reuben Mwongela M'itelekwa v Paul Kigea Nabea & 2 others* [2019] eKLR and *Daudi Omar Bare & another v County Government of Tana River* [2019] eKLR. The latter case involved objections concerning the Community Land Act and the procedures available through mechanisms including mediation, arbitration and land adjudication, further illustrating the developing relationship between judicial proceedings and statutory community land processes.

Secondary documentary materials consisted of books, journal articles, conference papers, policy materials and socio-legal studies available by 2019. Documentary selection was guided by relevance to community tenure, customary law, traditional dispute resolution, mediation, arbitration, access to justice and Kenyan land governance. Particular weight was given to sources

addressing the Community Land Act directly and to literature capable of illuminating the relationship between formal law and customary institutions.

The materials were analysed using qualitative thematic content analysis. Coding focused on legal recognition, accessibility, community legitimacy, participation, procedural fairness, constitutional compliance, cost, relational preservation, enforceability, finality, institutional jurisdiction and judicial supervision. The mechanisms were not ranked by a single numerical measure of effectiveness because the documentary evidence did not support such quantification. Instead, effectiveness was evaluated according to whether a mechanism was capable of addressing the legal and social characteristics of the particular category of dispute while providing a fair and implementable outcome.

Reliability was strengthened through triangulation across different forms of documentary evidence. Statutory provisions established the formal legal framework, judicial decisions demonstrated how courts were interpreting or encountering that framework, and scholarly literature provided theoretical and socio-legal interpretation. This approach also reduced the risk of treating the existence of a statutory provision as evidence that the mechanism was operating effectively in practice.

FINDINGS AND DISCUSSION

The Legal Framework Had Moved ADR from the Periphery to the Centre of Community Land Justice

The documentary analysis demonstrates that ADR had acquired a strong constitutional and statutory position in community land matters by 2019. Article 159(2)(c) established the general constitutional recognition of reconciliation, mediation, arbitration and traditional mechanisms. Article 60(1)(g) provided a more specific connection between community initiatives and land dispute settlement, while the Community Land Act translated those principles into a statutory framework centred on internal community processes, mediation, arbitration and eventual judicial intervention.

This framework is significant because it undermines a common conceptual distinction between “law” and “ADR” in which courts represent the legal system while alternative mechanisms exist outside it. Within the community land regime, ADR is itself legally recognised and partially regulated. The state legal order expressly creates space for processes whose authority may arise partly from custom or party agreement.

The finding supports Legal Pluralism Theory. Kenya's community land framework acknowledges that normative authority is distributed across courts, statutes, community by-laws, customary institutions and consensual processes. Yet the pluralism is hierarchical rather than absolute. Article

159(3) and the Community Land Act ensure that customary mechanisms remain subject to the Constitution. The resulting structure represents neither legal centralism nor complete customary autonomy.

Community Land Disputes Require Mechanism Fit Rather Than a Uniform ADR Preference

The review demonstrates that the phrase “community land dispute” encompasses controversies that differ materially in parties, subject matter and remedial needs. Some disputes arise between members of the same community, while others occur between different communities. Additional conflicts involve county governments, the National Land Commission, national government agencies, investors or extractive projects. The legal character may range from a boundary or membership disagreement to constitutional litigation concerning compulsory acquisition.

The Turkana litigation illustrates this multiplicity. *County Government of Turkana v National Land Commission & another* [2019] eKLR arose in connection with intended acquisition of land for petroleum development and the LAPSET corridor and brought together community land interests and an intergovernmental dispute. The court treated exhaustion of the alternative processes prescribed for disputes between levels of government as a substantial jurisdictional consideration rather than a procedural inconvenience. The case demonstrates why mechanism selection cannot be based solely on the fact that the subject matter is land. The identity of the parties and the legal source of the dispute can determine which process is applicable.

The finding also supports Njuguna's (2019) concern about the distinction between disputes and conflicts. A dispute concerning interpretation of an agreement may lend itself to adjudication or arbitration. A conflict concerning access to land and resources between communities that have interacted for generations may require negotiated arrangements capable of preserving future coexistence. The policy objective should therefore not be to maximise the numerical use of ADR, but to match the mechanism to the underlying structure of the conflict.

Traditional Dispute Resolution Possesses Contextual Strength but Requires Constitutional Discipline

Traditional dispute resolution emerged from the documentary analysis as particularly valuable where the dispute depends on local historical and customary knowledge. In *Mwasi Kithaka*, the court's acknowledgement of the customary role of sub-clan structures in Kamba land disputes demonstrates that such processes remained socially relevant within Kenya's contemporary legal order. *Richard Rutto Chelang'a* similarly involved community land occupied by clan members and evidence of dispute consideration by elders. These cases show that customary forums were not merely historical remnants; they continued to shape the factual background of disputes appearing before formal courts.

Their contextual advantage is considerable. Elders may understand historical occupation and local boundaries in circumstances where documentary records are incomplete. They may also understand reciprocal arrangements governing grazing, access routes or family and clan relationships. Because their authority is socially embedded, they may possess a capacity for reconciliation that an external adjudicator lacks.

The same embeddedness creates vulnerability. Existing community hierarchies may influence who is heard, who sits as a decision-maker and whose understanding of custom is treated as authoritative. Witchger's (2018) findings concerning the gendered structure of traditional land forums make this concern particularly serious. A process cannot satisfy the constitutional conception of justice merely because it reflects longstanding practice.

The appropriate legal response is not the displacement of traditional institutions but their constitutionalisation. Article 159(3) already provides the normative foundation for such an approach. Traditional processes should retain procedural flexibility and cultural legitimacy while ensuring that affected persons have a meaningful opportunity to participate and that outcomes do not infringe protected rights. The strongest form of community justice is therefore adaptive rather than frozen custom.

Mediation Was Particularly Well Suited to Relational Community Land Conflicts

The findings indicate that mediation has a strong substantive fit with community land disputes in which the parties must continue interacting after resolution. Section 40 of the Community Land Act is important because it gives parties control over negotiation and settlement design rather than prescribing a narrow remedy. This flexibility permits resolution to engage with livelihood and resource interests that may be difficult to address through conventional litigation.

A community boundary conflict illustrates the difference. Judicial determination may clarify which community possesses the stronger legal claim to the disputed territory, but it may not resolve seasonal dependence on a water source located within that territory. Mediation can preserve the legal status of the land while simultaneously establishing rules governing access. The process can therefore separate questions of ownership from questions of practical coexistence.

This distinction is especially important in pastoral and natural resource contexts where ecological conditions may make exclusive approaches to access socially or economically disruptive. Community members may require agreements that can adapt to rainfall, drought, grazing conditions or resource availability. A judicial decree tends to be relatively static, while a negotiated arrangement can incorporate review, monitoring and adjustment.

The principal limitation is enforceability. *Sahara Ahmed Hillow* demonstrates that agreement to participate in mediation may remain fragile where the process depends entirely on continuing

consent. The Community Land Act attempts to reduce uncertainty by requiring successful mediated agreements to be documented and signed, but the case illustrates the importance of distinguishing between the enforceability of the agreement to mediate and the legal effect of a settlement eventually reached.

The finding does not justify transforming mediation into another form of litigation. Excessive formalisation would increase cost and weaken the flexibility that makes mediation useful. A more appropriate approach would establish sufficient procedural certainty around representation, documentation and recognition of settlements while preserving informality in the negotiation itself.

Arbitration Provided Finality but Could Reproduce the Limitations of Adjudication

Arbitration occupies a more complicated position within the community land framework. Its strongest advantage is that it can produce a binding determination without requiring full court litigation. The parties can also choose an arbitrator with expertise relevant to the dispute. These features make arbitration potentially suitable for technical or contractual issues connected with community land.

Its limitations arise from the same characteristic that produces finality. Once parties transfer decision-making authority to an arbitrator, the process ceases to be principally consensual regarding the substantive outcome. The arbitrator determines the dispute. This can be useful where parties require certainty but less appropriate where the central need is reconciliation.

Njuguna (2019) makes this concern central to his analysis of community land arbitration. His argument that community land conflicts may require hybrid processes is supported by the documentary evidence. An arbitral award can determine legal entitlement but cannot compel communities to rebuild trust or cooperate in the continuing use of shared resources.

Cost also influences suitability. Arbitration requiring specialised counsel, professional arbitrators and technical evidence may be inaccessible to communities for whom the expense of litigation is already a barrier. The mere movement of adjudication from a public courtroom to a private forum does not necessarily improve access to justice. Arbitration should consequently be used where its technical expertise and finality solve an identifiable problem rather than because it carries the general label of ADR.

Exhaustion Strengthened ADR but Could Not Replace Judicial Protection

The case review demonstrates increasing judicial willingness to respect dispute resolution mechanisms established outside the courts. The reasoning in *Mutanga Tea & Coffee Company Ltd v Shikara Limited & another* established that courts should generally require parties to use prescribed statutory processes rather than bypassing them. This principle later became relevant in

land matters where litigants attempted to obtain judicial determination despite the existence of specialised procedures.

Reuben Mwongela M'Itelekwa illustrates the operation of this reasoning in relation to land adjudication. The court treated the statutory procedure for determining interests in land as materially relevant to jurisdiction and relied on the broader principle that specialised dispute resolution arrangements should be respected. *County Government of Turkana* likewise demonstrates that exhaustion could apply even where a land controversy possessed constitutional significance, particularly where a component of the dispute was intergovernmental and therefore subject to its own statutory mechanisms.

This approach strengthens ADR because it prevents parties from treating non-judicial mechanisms as optional preliminaries that may simply be ignored. If parties could bypass internal community processes whenever litigation appeared strategically attractive, the priority accorded to ADR under section 39 would have limited practical significance.

The principle must nevertheless remain sensitive to the quality of the alternative remedy. Access to justice would be undermined if exhaustion forced a vulnerable party into an institution incapable of protecting constitutional rights. Judicial supervision is therefore not antagonistic to ADR. Courts are necessary to ensure legality, determine difficult constitutional questions, protect persons facing unequal power and provide enforcement where voluntary mechanisms cannot secure compliance.

Equality and Representation Were Central to Effectiveness

A recurrent weakness in discussions of ADR is the tendency to measure effectiveness through speed and cost alone. Those factors matter, but they are insufficient for community land. A mechanism that resolves a dispute quickly by excluding affected community members cannot be considered effective within Kenya's constitutional framework.

Community land is owned collectively, which makes representation a substantive question rather than an administrative detail. Decisions concerning boundaries, conversion, use or dispute settlement can affect people who are not personally present at negotiations. The Community Land Act's broader governance structure recognises the role of the community assembly and community land management institutions, while judicial consideration of the Act in *Kelly Malenya* confirmed the importance of the statutory architecture governing community participation and administration.

Traditional mechanisms face the strongest equality concern because their authority may historically have been concentrated within particular demographic groups. Witchger (2018) shows why the issue cannot be resolved merely by stating that elders represent the community. Constitutionally valid representation requires attention to whether women, younger members and marginalised sub-groups are able to influence decisions affecting their land rights.

Mediation and arbitration are not immune from the same problem. A community representative may enter into a negotiated settlement without adequately consulting the people whose rights are affected. The legitimacy of a community land settlement therefore depends not only on the procedural consent of the persons sitting at the table but also on whether those persons possessed authority to bind the relevant community interests.

Institutional Fragmentation Complicated Access to an Appropriate Forum

The documentary analysis indicates that community land disputes frequently intersected with several legal institutions. Depending on the nature and status of the land, a controversy could involve community governance bodies, customary elders, land adjudication officers, county governments, the National Land Commission, registrars, mediators, arbitrators and the Environment and Land Court. The presence of multiple institutions increases the number of possible pathways to justice but can also generate uncertainty regarding jurisdiction.

Daudi Omar Bare & another v County Government of Tana River [2019] eKLR illustrates the procedural complexity surrounding community land recognition and registration. The dispute generated arguments concerning the Community Land Act, Community Land Regulations and alternative processes that included mediation, arbitration and adjudication mechanisms. *Richard Rutto Chelang'a* similarly involved interaction between community land, elders' proceedings and land adjudication structures.

The problem is not solved simply by creating additional mechanisms. Effective access to justice requires communities to understand which institution possesses authority over a particular dispute and how one process connects with another. Otherwise, the availability of several forums may produce procedural circulation in which parties move among institutions without reaching substantive resolution.

A stronger framework would consequently emphasise referral and coordination. Community institutions should be capable of identifying disputes that can be handled internally and those requiring mediation, arbitration, administrative adjudication or court intervention. Courts should similarly be able to direct suitable matters toward non-judicial mechanisms without relinquishing their constitutional supervisory function.

Effective Community Land ADR Depends on Integration Rather Than Institutional Competition

The overall findings support neither unrestricted customary justice nor exclusive reliance on courts. Traditional mechanisms possess contextual knowledge and social legitimacy but require constitutional safeguards. Mediation offers the greatest flexibility for relational disputes but depends on meaningful consent and credible implementation. Arbitration provides certainty for

defined legal or technical disagreements but is less capable of addressing deeper social conflict. Courts offer authoritative interpretation and enforcement but may be costly, adversarial and poorly suited to maintaining community relationships.

These characteristics indicate that the different mechanisms should be viewed as complementary components of a plural system. The legal framework itself supports this interpretation. The Community Land Act does not abolish courts in favour of customary institutions, nor does it recognise mediation and arbitration as interchangeable. Instead, it creates institutional space in which disputes can be directed toward processes appropriate to their nature.

A hybrid approach is especially useful where a single controversy contains several layers. Parties may use customary dialogue to clarify historical understandings, mediation to negotiate future access arrangements and arbitration to determine a remaining technical issue. Judicial involvement may then be necessary only for enforcement or constitutional supervision. Njuguna's (2019) support for hybrid approaches is consistent with this functional interpretation of the statutory framework.

This finding also reconciles Legal Pluralism Theory with the Access to Justice perspective. Pluralism recognises the legitimacy of different normative systems, while access to justice demands scrutiny of whether those systems are actually fair and usable. The resulting model is one in which institutional diversity is valuable only when communities can move through the system without sacrificing constitutional rights.

CONCLUSION

The constitutional recognition of community land and alternative dispute resolution fundamentally altered Kenya's legal approach to communal property disputes. By December 2019, the Constitution, Community Land Act, Community Land Regulations and Environment and Land Court Act had created a legal architecture in which internal community processes, customary law, mediation, arbitration and courts could all contribute to resolving disputes concerning community land. This represented an important shift away from the assumption that legitimate dispute resolution necessarily required immediate resort to adversarial litigation.

The documentary evidence nevertheless demonstrates that statutory recognition did not eliminate the practical difficulties associated with community land conflict. The cases reviewed reveal continuing questions concerning jurisdiction, exhaustion, constitutional validity, enforceability, representation and the relationship between formal and customary institutions. *Mwasi Kithaka* demonstrated continuing judicial recognition of customary approaches to land disputes, while *Sahara Ahmed Hillow* exposed uncertainty surrounding voluntary mediation. *Richard Rutto Chelang'a* illustrated the intersection of elders' processes, community land and statutory

institutions. *County Government of Turkana* demonstrated the institutional complexity produced when community land rights intersected with compulsory acquisition and intergovernmental relations.

The study therefore rejects the proposition that the effectiveness of ADR can be established merely by demonstrating that the law recognises it. A dispute resolution mechanism becomes effective when it is institutionally appropriate to the dispute, accessible to affected persons, procedurally fair, consistent with constitutional rights and capable of producing an outcome that can be implemented. Traditional institutions perform particularly well where local knowledge and continuing social relationships are central, but their legitimacy depends on inclusive participation. Mediation is strongly suited to conflicts requiring accommodation and preservation of relationships, although its effectiveness requires greater clarity around implementation of settlements. Arbitration offers valuable finality in appropriately defined disputes but should not be confused with reconciliation.

The relationship between ADR and courts should consequently not be framed as a choice between informal and formal justice. Courts remain indispensable for interpretation, constitutional supervision, protection of vulnerable parties and enforcement. Community and consensual mechanisms remain indispensable where strict adjudication cannot adequately respond to social relationships and customary land use. Kenya's constitutional design is strongest when these institutions operate as complementary parts of a regulated plural justice system.

Legal Pluralism Theory explains this institutional coexistence, while the Access to Justice perspective demonstrates why pluralism must be evaluated against practical accessibility and substantive fairness. The most defensible interpretation of Kenya's community land framework as at 2019 is therefore one of constitutionally regulated legal pluralism. Customary and alternative mechanisms are recognised because they can bring justice closer to communities and address dimensions of land conflict that courts may struggle to resolve. Their recognition remains conditional upon compliance with constitutional values because local legitimacy cannot justify exclusion, discrimination or denial of protected rights.

Recommendations

Implementation of the Community Land Act should place greater emphasis on the quality of internal community dispute resolution arrangements. Community by-laws should clearly identify how disputes are initiated, who may participate, how neutral persons are selected and how outcomes are recorded. These procedures should remain sufficiently flexible to preserve the accessibility of customary justice while providing basic safeguards against arbitrary decision-making. Particular attention should be paid to meaningful participation by women, young people, minority groups and other community members whose interests may be affected but whose voices have historically been weaker within customary institutions. Such reform would give practical

effect to Article 159 without separating traditional dispute resolution from the wider equality commitments contained in the Constitution.

Mediation should be developed as the preferred mechanism for community land conflicts in which continuing relationships, resource sharing and negotiated accommodation are more important than authoritative declaration of a winner. The legal framework should make the transition from voluntary negotiation to enforceable settlement clearer without transforming mediation into conventional litigation. Written settlements contemplated under section 40 should record the parties represented, the interests affected and the obligations undertaken, while straightforward procedures should permit lawful agreements to receive judicial recognition where enforcement becomes necessary. Mediators dealing with complex community land matters should also possess sufficient understanding of customary tenure, constitutional land rights and natural resource governance to prevent apparently consensual settlements from overlooking underlying legal or social vulnerabilities.

Arbitration should be used selectively where disputes are sufficiently defined to benefit from expert and binding adjudication. Contractual disputes, valuation questions and clearly identifiable technical disagreements may justify arbitration more readily than conflicts grounded in community identity, ancestral occupation or continuing resource interdependence. Hybrid procedures should be encouraged where different dimensions of the same controversy require different forms of intervention. A dispute may therefore move from community dialogue to mediation and only refer unresolved technical issues to arbitration or judicial determination.

Greater coordination is also required among institutions involved in community land administration. Communities should not be expected to navigate overlapping mandates without clear guidance concerning the appropriate forum. Land administrators, county governments, the National Land Commission, community land management institutions and the Environment and Land Court should develop consistent referral practices capable of distinguishing disputes suitable for internal resolution from matters requiring professional mediation, administrative adjudication, arbitration or court intervention. Judicial deference to ADR should continue where effective mechanisms exist, but exhaustion should not be applied mechanically where the alternative process cannot protect constitutional rights or provide an effective remedy.

The long-term legitimacy of community land ADR ultimately depends on legal empowerment. Communities cannot meaningfully exercise statutory options that they do not understand. Registration and community land governance initiatives should therefore include education on the legal status of customary processes, mediation, arbitration and judicial remedies. Greater awareness would reduce unnecessary litigation while helping community members recognise when an apparently informal dispute involves rights requiring stronger legal protection.

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