RUAHA CATHOLIC UNIVERSITY

FACULTY OF LAW

CRITICAL ANALYSIS ON THE ROLE OF COURT IN COURT ANNEXED MEDIATION IN TANZANIA

Research Paper Submitted in Partial Fulfillment of the Requirements for the Award of

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By

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CERTIFICATION

The below signed certify that he has read and recommend for the acceptance by Ruaha Catholic University, a dissertation entitled “critical analysis on the role of court in court annexed mediation in Tanzania” in partial fulfillment of the requirement of the Degree of Bachelor of laws (LL.B) at Ruaha Catholic University.

Signed on ……day of……2024

……

ADV. BARNABAS NYALUSI

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DECLARATION

I, **Doris Mlimila** do hereby declare that this dissertation is my own original work and that it has not been submitted to any other University than Ruaha catholic university in Iringa for academic credit.

Signature ……. **Date**…….

DORIS MLIMILA

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I, **Doris Mlimila** put the name of Almighty God above everything for seeing me through the entire proposal writing period.

Many thanks go to my Supervisor Adv. Barnabas Nyalusi for his guidance and support during this entire research writing period. I am indebted to you for your guidance and mentorship. In addition, thanks to my colleagues and friends for their encouragement and support during this entire period. This final document is as a result of your participation and input.

DEDICATION

I, **Doris Mlimila** dedicates the research to my beloved family for their constant support and encouragement throughout my studies. I cannot forget my parents for their wisdom and inspiration which has been my pillar in search for knowledge.

INTERNATIONAL TREATIES

The African Charter on Human and People's Right of 1981

The UNCITRAL Model on Conciliation and Mediation

The United Nation Convention on International Settlement Agreement Resulting from Mediation (Singapore Convention)

The universal Declaration of Human right Resolution of 10 December 1948

NATIONAL LAWS

The Constitution of the United Republic of Tanzania CAP. 2 of 1977 as amended time to time

The arbitration (rules of procedure) regulations of 2021

The Arbitration Act [Cap.15 R. E 2020]

The Civil Procedure Code (CPC) [CAP. 33 R. E 2019]

The UNCITRAL Model on Conciliation and Mediation

CASE LAWS

Lewis v Barnett [2004] EWCA Civ 807

Halsey v. Milton Keynes General, HHS [2004] EWCA Civ 576

LIST OF ABBREVIATION

ADR	Alternative Dispute Resolution
CAM	Court Annexed Mediation
CAP	Chapter
CMA	Commission for Mediation and Arbitration
CPC	Civil Procedures Code
DRC	Dispute Resolution Centre
R.E	Revised Edition
RUCU	Ruaha Catholic University
UDHR	Universal Declaration of Human Rights
UNCISA	United Nations Convention on International Settlement Agreement
UNCTRA	United Nations Convention on International Trade
USA	United States of America

ABSTRACT

This study is mainly concern with the critical analysis on the role of court in court annexed mediation in Tanzania. This research has been divided into four chapters as follows chapter one gives an introductory aspect of the study paving a way to the background to the problem, statement of the problem, literature review, hypothesis, general and specific objectives. But also, it gives significance of the research, research methodology and scope and limitation of the research. Chapter two provides a brief summary and an overview of general concept of court annexed mediation focused on the legal framework of court annexed mediation by citing the domestic instruments, regional and international instrument .chapter three provides for research findings and chapter four it gives the recommendation as to what to be done and the conclusion of the research.

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CHAPTER ONE

GENERAL INTRODUCTON

1.0Introduction

1.1Background of the problem

The procedure of Alternative Dispute Resolution was borrowed from the United State of America. Court annexed mediators in this respect are judges or magistrates. It is done in all courts except for the primary court. In Tanzania court annex mediation is not private due to the fact that it is court annexed. As well it is not voluntary since it is a mandatory requirement in civil procedure code that all civil suits should go for mediation prior for adjudication as provided in the second schedule. Much more is binding on the parties. From the definition of mediation parties in the court annexed mediation do not appoint mediators but in Tanzania they are appointed by either magistrates or judges in charge.

Additional Dispute Resolution was transplanted into the Africa legal system in the 1980 and 1990 as results of liberation of Africa economies which accompanied by such conditionalities as reform of justice and legal sectors under the structural adjustment programme. However, most of the methods of ADR that are promoted for inclusion in African justice system are similar into precolonial African dispute settlement mechanisms that encouraged restoration of harmony and social bonds in the justice system

The involvement of judges or magistrates in court annexed mediation might be too forceful in their dealings with parties and may rely too much in their judicial authority to

bring the parties to an agreement[1]. judge or magistrate may find difficult in to change judicial hunch become more like facilitators in resolving disputes than being the decision maker. The involvement of judges or magistrates in court annexed mediation they might be motivated to produce settlement to overcome case load pressure as they have a lot of judicial function to do and also due to their traditional adjudication skills and directives style which might make court annexed mediation of different from litigation.[2]

1.2 Statement of problem

Court annexed mediation in Tanzania is compulsorily done pursuant to requirements of the laws[3] as provided under Order VIIIC Rule 24 that, before the suit going into the proceedings trial should be passed in the conciliation, mediation or arbitration, or similar alternative procedures. The same order requires no civil suits filled in the court to be heard before any court of law without being primarily resolved through Court-annexed mediation per Order VIII A, B, & C[4].

However, the process through which the same is undertaken seem to leave some questions as to whether the same is really a mediation or a pure litigation. This is because, despite of the reality that the law gives autonomy for parties to appoint mediators for themselves, but peoples who have been always acting as mediators during Court annexed mediation, are judges and magistrates who forms part and parcel of the Court.

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[1] A. A. Wahab, *Court-Annexed and Judge-led Mediation in civil cases: The Malaysian Experienc*e, October 2013

[2] H. T. Hamis, *Court annexed mediation in Tanzania*: *Success, challenges and prospect*, 23rd May, 2023

[3] Order VIII (C) of the Civil Procedure Code (Cap 33. R.E 2019)

[4] Order VIII A, B, X of the Civil a procedure [CAP 33 R. 2019]

The danger of letting judicial officers to mediate parties during Court-annexed mediation is that, they are in a great position to control the process and autonomy of parties thus becoming decision makers as they do in a normal litigation, this is contrary to rules of mediations. Furthermore, judicial officers (judges and magistrates) are claimed to have a very little knowledge in mediation, thus they are likely to apply legal principles and Court discretions while undertaking Court-annexed mediation, something which endanger parties' autonomy in reaching decisions of what they desire.

1.3 Literature reviews

C. Madeline[5], shows in brief court annexed mediation under the Civil Procedure Code (CPC)). This means the procedure integrated into the court system is mandatory in civil disputes requirement that have made for civil cases to be first referred to mediation before full trial is conducted. There is the provision of rule 1 of order V111C[6] that all filed cases must go through the mediation stages between the completion of pleading or interlocutory application and trial. The mediation is conducted by another judges or magistrate appointed by the court. If the parties fail to settle at mediation, the cases are returned to the allocated judges or magistrates for trial. Also, he tries to explain about the limitation period in court annexed mediation proceedings does not suspend the statutory limitation period for court claim. The parties can opt to ask the court to stay the proceeding which will have the effects of preserving the time limits within the proceedings.

[5]Retrieved from http//: resolve. co. tz. accessed on 23rd May, 2023 at 12:58hrs
[6] The Civil Procedure Code [Cap.33 R.E 2019]

Z. Lukumay[7] he tries to show judges and magistrate acting as mediator the court annexed mediation program in Tanzania makes the use of judges or magistrates as mediator. This procedure has been highly criticized as being one of the course ineffectiveness of alternative dispute resolution in Tanzania. On that cricks are cross who advanced in two reason for not proposing judges to be mediators. First judges make poor mediators used to decision and adjudication they have great difficulty patiently watching a noninterventionist process unfold. Secondly, they are already grossly overburdened. In agreement with the second reasons Malata G. was poise magistrates and judge have a lot of judicial responsibilities falling under civil and criminal matters. The law reforms commission of Tanzania puts it that the unpopularity of mediation in Tanzania is attributed to the facts that the same is court annexed and that the dual function of judges or magistrates as mediators and educators is not easy distinguishable in the eyes of litigats.it is recommended that the ADR mechanism in Tanzania should remain court annexed. However, the introduction of model which sees cases referred to mediators who are not serving judge or magistrates should be considered. The role of judge should be proposed center which would have many doors arbitration, conciliating, mediation, negotiation and early neutral evaluation depending on the choice of parties and the nature of disputes.

H. T. Hamis[8] shows the challenges, success and prospect of court annexed mediation in Tanzania. Success of court annexed mediation is to promote access of justice promote restoratives justice and preserve relationship between litigants. Hence mediation offers

[7]Retrieved from http//: journal.lst.ac.tz accessed on 23rd May, 2023 at 13:16hrs
[8] H. T. Hamis, *Court annexed mediation in Tanzania*, (2002)

the parties as good opportunity to settle their claim expeditiously as it gives the parties the ownership of the outcomes and restricts the number of cases to be filed in judiciary according to late Mandela of south Africa said negotiation and discussion are the greatest weapon, we have for promoting peace and development. Therefore, court annexed mediation aimed at producing fair, to meet party's satisfaction and to preserve parties respect for and confidence in justice system.

The reluctant of attitude of some advocates is one among the challenge of court annexed mediation in Tanzania it is pertinent that whenever the advocates are assisting their parties during the course of mediation the settlement have been easy to reach. Nevertheless, it has been observed that despite the role played by advocates in reaching the mediated agreement in mostly cases mediation are marked failed due to reluctant of some advocates by having some monetary interest with the case.

Due to some observable weakness in the real practiced of court annexed mediation in Tanzania it is in facts that the trends in not worth and its future success are doubt due to its efficiency. The reflection of objectives for introduction of court annexed mediation shows that the ultimate goals are not fully realized there are some impediment for its success so this study will advise on how court annexed mediation practiced in Tanzania should be improved so as to meet its aim for being emended as part and procedure in civil justice.

Dr Campbell. A and Chong[9] in their book 'the notion of justice has been a highly debatable constructed notion in mediation both mediators and participates rely on their

[9] Dr Campbell. A and Chong, *achieving justice in mediation cross-cultural perspective paper*: presented fourth Asia-Pacific mediation forum mediation conference, Kuala, Lumpur, 2008

ideas of justice to seek emotionally and practically fair outcomes'. However, justice is a socially constructed concept embedded in social and cultural norms and reflecting ways of knowing that arises from our cultural. The study will show the concept of justice and its application in mediation.

W. A. Alwi[10] on his book, the Malaysian experience highlighted on the lack of procedure safeguard while the flexibility of court annexed mediation in allowing the parties to come their own agreement is a key advantage it also represent a key criticism. It critics have argued that the relaxation of procedural safeguard and due to the process protection which otherwise to disputants in the formal justice system could present the greatest danger of abuse. For instance, Brunet (1987) argued that mediation lack effectives discovery of procedure to require parties, who may be unwilling to give substantives disclosure needed to reach an agreement. Therefore, some of procedural safeguard in formal court system which are not available in mediation include guarantee place in trial in which to present his or her case, the ability to test evidence and to rebut the other disputant case a guarantee of procedural justice.

1.4 Research Hypothesis

It appears that the role of court in court annexed mediation undermines party autonomy.

1.5 The objectives of the study

The study covers both general and specific objectives.

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[10] W. A. Alwi, *Court annexed and judge led mediation in civil cases: The Malaysia experience published thesis submitted in total fulfilment of the requirement for the doctor degree of philosophy, college of Law and justice Victoria University of Melbourne*, 2013

1.5.1 General objectives

The research is going to analyze the court annexed mediation and role of the judges or magistrates on seeking amicable settlement in compliance to the context of mediation.

1.5.2 Specific objectives

To analyze the applicability of court annexed mediation in Tanzania by complying with the major context of mediation

To analyze the failure of court annexed mediation by judges or magistrates to comply with the context of mediation out of the court litigation system

To analyze what should be done on the system of solving conflicts under court annexed mediation related to the normal mediation

1.6 Significance of the study

This study is useful as a source of knowledge to others who will be conducting research on this matter, also it provides awareness on legal laws and practice especially in relation to court annexed mediation as the kind of mediation, and also the study is useful to me because knowledge I got helps to reach the objective of the study and it will always remain throughout all the effort used in this study. Apart from that, this research is significant that one, it will gain and enriches the existing body of knowledge on the question of court annexed mediation, the findings of the study intend to benefits people like law students, lawyers, researchers and society as the study in examine the law and practice of the duty of the court in relation to the court annexed mediations

1.7 Research Methodology

The methodology of collecting data which employed to conduct this research proposal include both primary and secondary data collection.

1.7.1 Primary Method of Collecting Data

Primary method data for collection includes field research particularly direct observation, interview and reading of laws and cases relating to the problem

1.7.1.1 Interview method

The method involved collection of information via making an interaction with respondents selected. Structured interview employed in collection of data as early questions setup enables researcher to remain focused on what he desires to collect. The researcher chose interviews because the information collected aimed at qualitative study on the role of court in court annexed mediation. The method involved face to face the advocates, magistrates and other ordinary people.

1.7.1.2 Field research

It the method through which information is collected by the researcher after visiting the area for inquiry in order to realize the extent of the problem studied. that end, researcher is expected to pay visit in courts, Law firms and lecturer from their respective institute and in the selected residential areas in Iringa region for the purpose of witnessing the extent of recognizing the law in the society and the extent of its applicability.

1.7.2 Secondary Method of Data Collection.

The method involved in collecting data was literature review, where the researcher was collecting data through published and unpublished resource materials, published reports, and websites. This method enabled the researcher to get more knowledge on the problem to be researched and also to know what has been addressed by other researchers that should not repeat the same thing. To get all these materials the researcher made the use of the library, published report and internet in order to get current information

1.7.2.1 Documentary Review

With regard to physical library a visit was made at Ruaha Catholic University library where a number of books Particularly on the field of Alternative Dispute Resolution (ADR). Therefore, various books and research help this study to discover between the research found RUCU library and also what the writers provides the load map on this research.

1.7.3 Primary source

The major sources of data collection in research in relation to primary source of data are legal binding materials such as statutes, in relation to my research the primary data source which have used is the civil procedure code of RE 2019 CAP 33.

1.7.4 Secondary source.

The researcher used secondary source of data such as textbook, journals, article and newspaper from the Ruaha Catholic University and legal document. The researcher got plenty of data from these libraries as they are comparatives equipped with such source that other library. Also, researcher used interment materials in his work so as to get extra materials on topic researcher.

1.7.5 Sample and sample size.

The researcher used purposively sampling because helps to get ready made information such as books, journals, article, academic reports from institution which helps researcher to get exactly information about court annexed mediation so that he can she can analyze research problem well especially on the role of curt in court annexed mediation.

Sample size a researcher uses sample size of at least 20 secondary sources that helps the researcher to get concrete information from the source, including domestic laws which enable the researcher to examine the role of court in court annexed mediation.

1.8 Scope and Limitation of the Research

1.8.1 Scope of the study.

The research under this title of proposal will focuses on the critical analysis on the role of court in court annexed mediation in Tanzania: a case study at Iringa. limited to the Iringa Region within Iringa Municipality in Tanzania Mainland. Therefore, researcher is able to examine the laws and rules that govern the ADR under court annexed mediation.

Research collected data from different institution in order to void repetition of information and saving time so as researcher can write comprehensive legal research.

1.8.2 Limitation of the study

This are some of limitations faced by researcher, which are availability of resources to accomplish the study where most of them are difficult to find such as journals, articles, and some of books. Whereas, in the library there is few possible materials needed in this study. Also, the financial is one among the challenge which a researcher faces in collection of data, so a researcher uses other alternative way so as to accomplish the research.

CHAPTER TWO

CONCEPTUAL FRAME WORK ON ROLE OF THE COURT IN RELATION TO COURT ANNEXED MEDIATION

2.0 Introduction

This chapter provides for the conceptual and legal framework of court annexed mediation in Tanzania over resolving different disputes, in which the theme of the study covers several stages, principles and concepts such as mediation, court annexed mediation and defining the key terms which used to examine the justice and a discussion on the legal framework.

2.1 Conceptual framework of the study

2.1.1 Mediation

Mediation is a form of dispute resolution that allows individual and or organization involved in a dispute to work together towards resolving their dispute to work together towards resolving their own authority. Also, mediation is the informal process in which a neutral third party helps litigants resolve the problem through a mutually acceptable solution[11]. Using communication skills, the mediator's main goal is to facilitate dialogue between the parties, empowering them to solve their own dispute[12]. The idea of having someone help litigants find a middle ground for their conflict is not new, and all societies have had their own ways of implementing some kind of dispute resolution with some

[11] A. A. Wahab, Court-Annexed and Judge-led Mediation in civil cases: The Malaysian Experience, October 2013

[12] M. J. Clement, Alternative Dispute Resolution in Tanzania: Law and Practice, Dar es salaam, Mkuki na Nyota

mediation components. However, modern mediation as a structured process was developed in America in the 70s and nowadays it is the ADR method most widely used in the world. In Tanzania this in the civil procedure code of 1966[13] that, the parties supposed to file their case first in the mediation before filing to the court for other proceedings, where the court allow parties to choose the mediator who stands as the neutral part to the case.

2.1.2 Types of mediation

There are two types of mediation namely private mediation and court annexed mediation;

2.1.2.1 Private mediation

Is another tool for trying to settle a dispute without going to trial. Is similar to settlement conference or a dispute resolution center (DRC) mediation session where the parties make their decision but the mediator are often more knowable in the particular topic being disputed and more skilled helping the parties reaching an agreement[14]. The mediator is selected by an agreed by the parties themselves. This private session there can be some flexibility in who attend but generally it will only be the parties to the legal action and their attorney in addition to the mediator[15]. The structure of private mediation is conducted in way has been selected by the mediator this may include the

[13] Order V111 Rule 25(1) of the Civil Procedure Code [Cap,33 R. E 2019]
[14] A. A. Wahab, Court-Annexed and Judge-led Mediation in civil cases: The Malaysian Experience, October 2013
[15]M. C. Magiri, An analysis of Alternative Dispute Resolution as a communication strategy in conflict resolution: A case study in court annexed mediation, 2019

opening statement by the mediator and possibly by the parties, legal counsels, a negotiation process and settlement if an agreement is reached[16].

2.1.2.2 Mediation and its Purpose

Generally, mediation is the most important dispute resolution mechanism within the collective term known as ADR (Alternative Dispute Resolution) which encompasses innovative modes of dispute resolution as an 'alternative' to traditional litigation.[17] Boulle and Rycoft183 defines mediation as a decision making process in which the parties are assisted by a third party the mediator, who attempts to improve the process of decision making and to assist parties reach an outcome to which each of them can assent[18]

2.1.2.3 Court annexed mediation

Is type of mediation which means settling the dispute outside the court under the major cause the court annexed mediation a judge can order the parties in civil case to submit to mediation. As a neutral third party the mediator acts as a link between the parties to resolve their dispute. Throughout the cause of negotiation, the mediator conducts the confidential settlement focusing to issue in a dispute, identifying the parties' interest and the need and generating settlement option[19]. Ultimately the parties decide which issue are important to them and whether they can resolve them in mediation. The parties are

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[16] K. James, Mediation Secrets for Better Business Negotiations: Top Techniques from Mediation Training Experts, Harvard Law School, 2014
[17] Ibid
[18] M. J. Clement, Alternative Dispute Resolution in Tanzania: Law and Practice, Dar es salaam, Mkuki na Nyota
[19] M. J. Clement, Alternative Dispute Resolution in Tanzania: Law and Practice, Dar es salaam, Mkuki na Nyota

under no obligation to settle during mediation and if no settlement is reached the case is retuned to court.

2.1.2.4 The origin and basis of court-annexed mediation

The movement for Alternative Dispute Resolution (ADR) of which mediation is amongst of its forms started in the United States of America in the 1970`s in response to the need to find more efficient and effective alternatives to litigation. ADR actually stands for a collective name used for several methods of dealing with disputes rather than going through the conventional court system. In 1976 the US Chief Justice by then, Warren Burger, convened the National Conference (famously known as the Pound Conference) on the causes of popular dissatisfaction with the administration of justice aiming at developing proposals for judicial reform. In his speech, CJ Burger proposed for alternative dispute resolution methods that would reduce the problems facing the judiciary: delays of cases, high costs and undue technicality. Subsequently, ADR was adopted. Today, ADR is flourishing throughout the world because it has proven itself in multiple ways to be a better way to resolve disputes.5 More recently, ADR has been gaining popularities and has become incorporated into various legal systems and institutionalized as part of many court systems and justice system as whole throughout the world. Generally, mediation is the facilitation of a negotiated agreement by a neutral third party who has no decision-making power. Mediation is now recognized as one of the quickest and most cost-effective ways of resolving a dispute and is the most applicable common form of ADR. In Tanzania, the root for court-annexed mediation is sourced from Article 107A (2)(d) of the Constitution of the United Republic of Tanzania

of 1977 as amended from time to time, which requires courts in course of dispensing justice to promote and enhance dispute resolutions. Statutorily, the ADR was launched into Tanzanian civil justice system since 1994 when Orders VIIIA, VIIIB and VIIIC were introduced into the first schedule to the Civil Procedure Code [Cap 33. R.E 2019] (hereinafter to be referred to as "the CPC") aiming to attain amicable settlement of disputes between the parties. Currently, court-annexed mediation is provided for under Order VIIIC, rule 24 – 34 of the Code. Having its legality from both the constitution and the statute, court-annexed mediation in Tanzania is a compulsory dispute settlement mechanism of which each civil suits with some limited exceptional cases must pass through and non-compliance of it led to a serious legal consequence of declaring the whole proceedings to be null and void. In law and practice, court-annexed mediation in Tanzania is conducted during first pre-trial conferences after pleadings are complete and any preliminary objections are determined where the trial judge/magistrate assign the case file to the appointed mediator or another judge/magistrate appointed by the court to ascertain the possibility of resolving the dispute through ADR as a compulsory procedure as per Order VIIIB, rule 22(1) of the CPC. Hence, in Tanzania court-annexed mediation is mainly practiced when all the pleadings have been duly filed and there are no pending applications or any other preliminary matter to be disposed of.

2.1.3 Stages of mediation

Mediation involves two stages, which are first joint session and separate session (caucuses). So, the court annexed mediation is accomplished through these two main stages:

2.1.3.1 Joint Session

In the mediation typically the mediator begins with a joint session that serves to educate the mediator to uncover any differing views of the facts, and to clarify what each side considers a satisfactory resolution to be. In this stage includes direct parties to the dispute, representors if is possible, and other required by the laws. The session begins with mediator to encourage participants to introduce themselves and present what they view to be the facts and desire outcome of the dispute. Also, the mediator will ask questions that enable him to better understand the dispute and its underlying changes.

2.1.3.2 Separate meeting (caucuses)

Is the stage of mediation in which the mediator moves to it after the first stage (joint session). This stage known as caucuses because each party known caucuses, where the mediator begins session separate session with each party[20]. In this stage mediator collect information about each side regarding to the interest of every one, in order to know the underlying needs or concerns implicated in the dispute. Where through the collected information the mediator begins moving back and forth between the teams for a series of conversation, suggestions, proposal, and counter proposal aimed at building a resolution that will satisfy each party's interests.

2.1.3.3 Final Joint Session

Here the mediator meets the parties altogether to make clear of the matters which were not agreed upon the first joint session. The mediator will ask the parties to present the

[20] K. James, *Mediation Secrets for Better Business Negotiations: Top Techniques from Mediation Training Experts, Harvard Law School*, 2014

more favorable offers to each other. Here the mediator should encourage and promote communication and effectively manage interruption by the parties to assist the parties to reach the mutual agreement. At this process it is expected the parties to reach an agreement. If the parties reach an agreement the dispute eds there by having the written agreement called deed of settlement. The deed of settlement should contain terms of agreement which are clear, complete, concise, and specific and preferable in active voice.

2.1.4 Court annexed mediation.

Is the alternative dispute resolution measure which aims to reach a negotiated settlement between parties and avoid the substantiation costs of litigation as well as avoiding the time delays often experienced in our court system[21]. Court annexed mediation conducting in the court room under the supervision of the court of law, where judges or magistrates being appointed as the mediators. Despite that court annexed mediation is different from private mediation but is the kind of mediation in general since introduced under the motives of mediation in the country over civil matters as recognized under the Tanzania civil procedure code (CPC)[22]

2.1.4.1 Why court annexed mediation.

The advantage of court annexed mediation is that the judges, lawyers and magistrates become the participant there in there by giving them feeling that negotiated settlement is achieved by all the three actors in justice delivery system. Court annexed mediation offers parties an opportunity to resolve their dispute outside of traditional litigation

[21]M. J. Clement, *Alternative Dispute Resolution in Tanzania: Law and Practice,* Dar es salaam, Mkuki na Nyota

[22] Under the Tanzania Civil Procedure Code (CPC) [Cap. 33 R.E 2019]

through the assistance of trained mediator[23]. Also court annexed mediation provides opportunity for parties to participate actively in resolution of their dispute potentially saving time, costs and the adversarial nature of litigation.it offers a collaborative and less formal environment for parties to communicate explore option and crafts solution that meet their interest by encouraging settlement and reducing the burden in court system. Court annexed mediation plays a vital role in access to justice and facilitating efficient dispute resolution.

2.1.4.2 Principles of court annexed mediation

2.1.4.2.1 The Principle of Voluntariness

This is respected both at the start of the procedure (the procedures cannot begin if one part does not agree to the mediation) and throughout the mediation procedures[24]. The part may withdraw the consent to mediation at any time during the proceedings and the dispute will be resolved in the regular proceedings before the judge. The mediator may also withdraw consent (if they find that the parties are using the mediation to delay the court proceedings). This principle recognized in the case of Halsey v. Milton Keynes General [25], the Court of Appeal provided a definitive judgment on two issues: whether the court can order parties to mediate against their consent and whether the court can impose costs on a successful party who refused to mediate[26]. On the first issue, the Lord Justice Dyson stated: 'It is one thing to encourage the parties to agree to mediation, even

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[23] A. A. Wahab, *Court-Annexed and Judge-led Mediation in civil cases: The Malaysian Experience*, October 2013

[24]H. T. Hamis, *Court annexed mediation in Tanzania: Success challenges and prospect*

[25] HHS [2004] EWCA Civ 576

[26]A. A. Wahab, *Court-Annexed and Judge-led Mediation in civil cases: The Malaysian Experience, October 2013*

to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their rights of access to the courts'.

This decision demonstrates the voluntary nature of mediation uptake in the UK that the parties cannot be ordered to mediate without their consent

2.1.4.2.2 The Confidentiality Principle

This state that all information originating from and related to mediation is kept between the participants and is not disclosed to third parties[27]. Confidentiality in the relationship between mediation and court proceeding is conditional on the facts that even after the mediation is completed as little mediation-related information as possible leaks into the court proceedings[28]. If the court proceedings end in mediation, only the signed court settlement or its draft remains in the court file. If the procedures do not end with mediation only the information that the procedures were carried out but did not results in resolution of the dispute remain in the file.

2.1.4.2.3 The Principle of Impartiality

In court-annexed mediation the appointed mediator who may be a judge/magistrate or any other trained mediator should be neutral and impartial[29]. He/she has no authority to

[27] Section 39(2) of the Arbitration Act [Cap.15 R. E 2020]
[28] Order V111C Rule 31 of the Civil Procedure Code [Cap.33 R.E 2019]
[29] C. A. McEwen & R. L. Wissler, *finding out if it is True: Comparing Mediation and Negotiation through Research*, 2002

settle the dispute between the parties rather to facilitate them to reach the amicable settlement of their dispute[30].

2.1.4.2.4 The Principle of Self-determination

It is the principle that should apply during the court- annexed mediation. In which only the parties have a choice to settle their dispute amicably or go through litigation. No third party may induce them to settle out of their willingness[31]. when the advocates or ay recognized agent are involved[32], their main task is to advice their client to settle the matter peaceful by pointing out the advantages of doing so and not forcing them to reach into the settlement which there are unwilling to reach. Hence, in court- annexed mediation the outcome of it are solely in the hands of parties themselves. Without consent in mediation, it promises of autonomy and self -determination are empty[33].

2.1.5 The main characteristics of the mediation process

Assisted Negotiation: The main role of a mediator is to facilitate communication between the parties, helping them to find the best possible solution to their own case. Different techniques are used to reach this goal, mainly communicative ones.

Mediators have different styles: some more facilitative, others more evaluative. They can use a narrow or a broad approach regarding defining the problem. However, in all cases mediators have no authority to impose an outcome; they are not decision makers.

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[30]Ibid

[31] M. C. Magiri, *An analysis of Alternative Dispute Resolution as a communication strategy in conflict resolution: A case study in court annexed mediation*, 2019

[32] Section 43 of the Arbitration Act [Cp.15 R.E 2020]

[33]Lewis v Barnett [2004] EWCA Civ 807

That's why "mediation, broadly speaking a process of assisting the negotiations of others."

Consensual Process: The parties completely control the outcome of the process. In adjudication, a judge, a jury, or an arbitrator will issue a ruling, stating who was right and who was wrong, imposing damages or proper relief for the winner. In mediation, the neutral party will not rule on the case or compel the parties to settle. Even when the mediation is mandated by the court, the parties must always have the option of dropping the process at any time, and can refuse any proposed agreement with no reasons.

Informal Process: Even though mediation is a structured process, parties may bring up and discuss whatever issue they wish. In a lawsuit, the parties are constrained by their legal rights and the elements of their claims. As an example, in a tort suit the discussion will be about the existence of duty, breach, causation, and damages. The case or compel the parties to settle. Even when the mediation is mandated by the court, the parties must always have the option of dropping the process at any time, and can refuse any proposed agreement with no reasons.

Informal Process: Even though mediation is a structured process, parties may bring up and discuss whatever issue they wish. In a lawsuit, the parties are constrained by their legal rights and the elements of their claims. As an example, in a tort suit the discussion will be about the existence of duty, breach, causation, and damages.

The discussion of other questions is unnecessary. In mediation, one may bring to the table other considerations that may affect the parties' behavior, regardless of the legal elements of the claim.

In that sense, the questions discussed are not delimited by the pleas. Moreover, in mediation the rules of evidence and procedural rules do not applies informality is genuinely good for the production of creative outcomes where parties can expand the pie so that each one can get as much as possible. The zero-sum of adjudication is replaced by win-win situations.

Producing Binding Agreements: If the parties reach an agreement, it can be enforced through the court system.

In other words, the solution found by the litigants is bind Private Process: Even though there may be some exceptions, court proceedings are public. The court's opinion circulates not just between the

2.1.6 Dialogue

Dialogue is a form of mediation conducted under the auspices of the court in the pre-trial stage of a case, giving the parties an opportunity to explore whether the dispute can be settled amicably before going to court. This is a new dispute resolution mechanism in Viet Nam, introduced through a pilot program launched in 16 localities throughout the country since 2018 . Cases submitted to court will be first transferred to Mediation and Dialogue Centres at the Court, which are established under the pilot program, except cases not under the court's jurisdiction, cases not subject to mediation or dialogue, and cases where the parties don't wish for mediation or dialogue at the court. The majority

of mediators are retired judges, procurators, lawyers, legal experts who have experience and capability in resolving disputes. Court-annexed mediation and dialogue is recognized as an important initiative to help reduce the number of cases submitted to court and to enhance the quality of court process for complicated cases.

CHAPTER THREE

LEGAL FRAME WORK ON ROLE OF THE COURT IN RELATION TO COURT ANNEXED MEDIATION

3.0 Introduction

This chapter of the research covers the legal frame work of the role of court in relation to court annexed and explain the roles which relating the court annexed mediation. the role towards the issue of court annexed mediation covered in national, regional and International level. The roles of court in issue of court annexed mediation are in handle of magistrates and judges where parties to the matter must be protected in all level without any kind of proving justice many laws where enacted in national, regional, and international level.

3.1 Legal framework

3.1.1 Domestic Legal framework

3.1.1.1 The Constitution of United Republic of Tanzania of 1977 as amended time to ti me

The Constitution of United republic of Tanzania CAP. 2 of 1977 as amended time to time is the supreme law of the state, it governs all activities in Tanzania, it provides judiciary functions. Under **Article 4** of the Constitution recognizes judiciary as among of three organs of the state which are Executive, Legislature and Judiciary[34]. The study focuses on the role of the court (judiciary) specific on the issue of Court annexed mediation concerning the provision of justice to the parties in civil matters. This is

[34] Article 4 of the Constitution of the United Republic of Tanzania CAP. 2 of 1977 as amended time to time

according to Article 107A (1) that "The judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania".[35]

Also, under Article 107 (2) (d) that "In delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say- (d) to promote and enhance dispute resolution among persons involved in the disputes"[36].

Therefore, the principle of civil justice in Tanzania are essentially derived from provision of Article 107A of the constitution of the united republic of Tanzania[37]. These include first delivery of justice without regard to the litigant social or economic status, second delivery of justice on timely manner or without undue delay, third provision of adequate compensation in case of injuries caused by others, fourth facilitating and encourages amicable settlement and dispute resolution and lastly delivery of justices without undue technicalities.

3.1.1.2 The Civil Procedure Code (CPC) [CAP. 33 R. E 2019]

The Act provides for court's procedures relating to civil matters. It stipulates all necessary procedures to the court of law on the issue of dispensing justice under court annexed mediation. Under **Section 64** of the Act provides for Arbitration that[38]"Save in so far as is otherwise provided by the Arbitration Act, or by any other law for the time being in force, all references to arbitration, whether by an order in a suit or otherwise, all

[35] Article 107A of the Constitution of the United Republic of Tanzania CAP. 2 of 1977 as amended time to time

[36] Article 107 (2) (d)of the Constitution of the United Republic of Tanzania CAP. 2 of 1977 as amended time to time

[37] C. A. McEwen & R. L. Wissler, *finding out if it is True: Comparing Mediation and Negotiation through Research*, 2002

[38] Order V11C Rule 24 of The Civil Procedure Code (CPC) [CAP. 33 R. E 2019]

proceedings thereunder shall be governed by the provisions contained in the second schedule". Also, specifically the mediation under the control of the court provided under Order V11C, Rule 24 of the same Act that "Subject to the provisions of any written law, the court shall refer every civil action for negotiation, conciliation, mediation or arbitration or similar alternative procedure, before proceeding for trial"[39]. These procedures also provided in the second schedule of the civil procedure (Arbitration) Rules[40]. The requirement for court annexed mediation is imposed for civil suits except for few like election petition, human right petition, judicial and maintain causal relationship between the parties[41]. Despite of such tremendous advantage still in Tanzania court annexed mediation has been relatively unsuccessfully which make the good intention for its introduction to be less attained or rather remaining a mere compulsory legal requirement with or less practical manifestation.

3.1.1.3 The arbitration (rules of procedure) regulations of 2021

The rules relating to the accreditation regulation and conduct of mediators (the ADR rules) defines mediation as a process a mediator uses to help parties in a dispute to identify their disputed issue develop their own decision about how to forward and or enhance their communicating in a way that addresses their mutual needs with respect to their individual interest[42] with future action and outcome and enable them to reach their own agreement or make decision based on principle of self-determination and include

[39] Section 64 of The Civil Procedure Code (CPC) [CAP. 33 R. E 2019]
[40] Second Schedule of the Civil Procedure (Arbitration) Rules of 2021
[41] G. Hazel, *Civil Mediation: A Measured Approach?* June 2010
[42] Ibid

blended processes and customary form of mediation[43]. In accordance to national court Act (chapter no. 38) and the ADR rules, all court annexed mediation are conducted by mediators who have been accredited under the ADR Rules.[44] These mediators including judges, lawyers, and other experts that have undergone specialized mediation training and experience in c1981ourt annexed mediation processes.

3.1.2 Regional Legal framework: Africa

3.1.2.1 African Charter on Human and People Right 1981

This adoption of African charter on human and people right and its entry into force could represent a turning point in Africa effort to fully ensure justice in terms of equality[45], rule of law, and development. **Article 7** of the charter relates directly to the right to fair trial. It stipulated that ''every individual shall have the right to have his cause heard''[46]. So that it seems that court annexed mediation it facilitates delivery justice through promotion of this article

3.1.3 International Legal framework

3.1.3.1 UNCITRAL Model on Conciliation and Mediation.

Article 5 provide for commencement of mediation proceedings[47] that mediation proceeding in respect of a dispute that has arisen commence on the day which the parties to that dispute agree to engage in mediation proceeding[48]. If a party that invited another party to mediate does not receive an acceptance of the invitation within 30 days from

[43] The arbitration (rules of procedure) regulations of 2021
[44]Ibid
[45] O. Rundle, *Mediation for Lawyers*, 2010 Pp. 522
[46] Article 7 of the African Charter on Human and People's Right of 1981
[47] G. Hazel, *Civil Mediation: A Measured Approach?* June 2010
[48] Article 5 of UNCITRAL Model on Conciliation and Mediation

the day on invitation was sent or within such other period of time as specified in the invitation the party may elect to treat this as a rejection of the invitation to mediate. The method of conducting mediation process id determined by disputant in the event they fail to agree the mediator proceeds in a way he deems desirable information relating to mediation proceeding is confidential and inadmissible in judicial proceeding[49].

3.1.3.2 The United Nation Convention on International Settlement Agreement Resulting from Mediation (Singapore Convention)

This convention was enacted by the general assembly of the united nation.it recognize the value of international trade of mediation as the way of resolving disputes where disputants request for a third party to assist in reaching an amicable settlement.[50] It applies to international settlement agreement, dispute relating to employment and family fall outside the scope of the convention. The Singapore convention also lays down a certain requirement for reliance for settlement agreement, for instance a party relying on settlement agreement must demonstrate that the settlement agreement signed by disputant proof that the settlement agreement resulted from mediation like mediator signature on settlement agreement a document signed by mediator conforming the occurrence of mediation attestation by the institution that administered the mediation in the absence of the above any other evidence acceptable to the competent authority should be availed. Grounds upon which the relief sought concerning enforcement of agreement are set

[49] Article 5 of the uncitral model on conciliation and mediation
[50] The United Nation Convention on International Settlement Agreement Resulting from Mediation (Singapore Convention)

down in the convention. They include where the party to settlement agreement was incapacity; the agreement being relied upon is null and void, not binding or not final according to its terms or has been subsequently modified, obligation in the settlement agreement have not been performed or unclear granting relief will contradict the settlement agreement the presence of serious breach by mediator of applicable standard like impartiality, independence among others.[51]

3.1.3.3 The Universal Declaration of Human Resolution of 10 December 1948

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article Everyone is entitled in full equality to a fair and public hearing by an independent and impartial l tribunal, in the determination of his rights and obligations and of any criminal charge against him. Access justice now consider a critical part of international human right.[52]

3.1.4 Conclusion

Generally, most of the international instrument, regional instrument and national instrument those instruments governed role of court in court annexed mediation. So that our laws it seems to have some weakness to facilitate civil justice. According to that views on the national laws, regional and international laws it seems that role of court in court annexed mediation it difficult to facilitate delivery justice to the court. So due to that different laws governed role in worldwide is time to our country to improve and reform

[51] The United Nation Convention on International Settlement Agreement Resulting from Mediation (Singapore Convention)

[52] Article 8 and articles 10 of universal Declaration of Human right Resolution of 10 December 1948

our laws because due to that different views of foreign laws and different author it seems that ours laws have many weakness which the government should solution of changing our laws in order to facilitate the justice to the court and protect human right

CHAPTER FOUR

CRITICAL ANALYSIS ON THE ROLE OF COURT IN COURT ANNEXED MEDIATION IN TANZANIA

4.0 Introduction

This chapter presents research findings of the study and data analysis. The data collected under this chapter help in proving the hypothesis of the study and recommend proper solutions to the problem outlined. For the purpose of clarity, the data collected under this chapter have been classified basing on the assessment and analysis of books, reports, Journals, and field reports after conducting an interview and questionnaire in this study was carefully analyzed to ensure the data gathered and presented clearly. In general, the information has been collected to individuals of different knowledge and skills and authorities deals with the study.

4.1 Research Findings

4.1.1 The pre-mediation stage as foreseen in formal frameworks

The pre-mediation stage is the period between when the conflict arises and the commencement of the mediation procedure[53]. Before the parties eventually meet for mediation, they need to be informed about the possibility to resolve their dispute out of court. Ideally, the parties should be aware of the possibility of resolving the dispute through mediation, or at least be informed of this by their legal representatives, before filing a lawsuit[54]. However, especially in states in which mediation does not have a long

[53] G. Hazel, *Civil Mediation: A Measured Approach?* June 2010
[54] O. Rundle, *Mediation for Lawyers*, 2010 Pp. 522

tradition, the Tanzania being an example, the courts can also potentially be very helpful. If such mediation develops in the frame of or in connection with a judicial procedure, we can talk about court-annexed mediation[55].

There are basically two methods of commencing court-annexed mediation: **First**, following recommendation to attend mediation, or **Second**, through court-referral order. In the former instance the judge may informally advise the parties to try mediation, and the parties agree to this, as described in Order VIII B[56]. In such a case, the judge shall suspend the proceedings and wait for the result of mediation. In the latter instance, the judge may order the parties to the dispute to attend a first meeting with a registered mediator[57]. Mandatory mediation is applying in the Common legal system states such as Tanzania, where there is obligation to initiate mediation before filing a lawsuit[58], or can the court order mediation in contentious civil proceedings[59].

4.1.2 Judicial Settlement Conference

Conflict settlement is the goal of both mediation and judicial settlement conferences. The techniques used are mostly the same. The salient distinction lays in the fact that the third party who will help the parties reach an agreement is a judge or a magistrate. This slight difference seems to be irrelevant for the process or for the solution because the parties control outcome in theory, and they are still not obligated to settle the dispute.

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[55] The Civil Procedure Code (CPC) [Cap. 33 R. E 2019]
[56] Ibid
[57] Grosu, M. R., *'Hungary' in Alexander, N., Walsh, S., and Svatoš, M. (eds), EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes (Kluwer Law International 2017)* 403–434.
[58] Order VIII C of the Civil Procedures Code (CPC) [Cap. 33 R. E 2019]
[59] Holá, L., Fiedor, D. and Urbanová, M., '*First meeting with a registered mediator based on a spatial analysis of the rate of its use in the Czech Republic*', (2019) 158 Právník 876–886.

However, there are still theoretical and practical aspects that set mediation apart from judicial settlement conferences. There are two main models of the judicial settlement conferences: the "traditional" and the "modern." In the former, the trial judge is in charge of the settlement conference; in other words, the judge tries to settle cases. If the case is not settled, the judge continues to sit in court for further proceedings and trial. In the latter, a different judge is assigned to the case solely to conduct the conference. Afterwards, if the parties did not reach. an agreement, the trial judge resumes trying the case. In the United States, courts vary in the way they hold judicial settlement conferences. Some use one model, some the other, and some both. However, from a theoretical point of view, the modern approach is preferable. Few studies highlight any benefit in the traditional approach

The modern approach is used in India. Judicial settlement is one of the techniques for solving disputes according to section 89 of the CCP. Interpreting the Code, the Afcons court stated that "judicial settlement" refers to "a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute." Therefore, in a pending case, "[i]f the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution." The traditional model is the rule for civil law countries, where "the settlement function takes place within the courtroom and is conducted by the same judge who will hear the matter if no settlement is reached." This is true for the Brazilian's style of mediation, where the judge is the person in charge of any attempt to settle the disputes, and may even be assisted by an appointed staff member in some cases. Regardless of the model, even though it is possible, it is not

desirable for a judge to sit as a mediator and, worse still, when he is the one assigned to adjudicate the case if it is not settled. The modern approach is less controversial because the final decision maker does not participate in the conversations and negotiation process. However, in order to compare and analyze the main concerns and differences between mediation and judicial settlement conferences, this article will use the traditional model, commenting on some useful issues concerning the modern approach.

4.1.3 The Benefits of the Mediation

There are controversies as to whether mediation is as beneficial as its supporters argue. They suggest that the process is highly advantageous for parties, enumerating the following positive aspects when compared to litigation:

Cost: Mediation is generally less expensive. One study concludes that the cost in federal government litigation is reduced significantly.

Time: A lawsuit can take a long time to come to trial, and afterwards years if the case is appealed. Mediation saves time because once litigants reach an agreement, they do not need to wait for a court date and trial proceedings. Even though empirical data is not unanimous, most recent research shows that ADR programs in general reduced disposition time by 10% to 45%. Particularly for federal government litigation, ADR saved 88 hours of staff work and 6 months of time to disposition.

Even when the case is not settled, parties tend to prefer mediation over judicial settlement conferences or trials. Also, if the first two benefits are true, satisfaction increases when people get their cases resolved in a faster and cheaper way.

Compliance: People are more likely to comply with solutions they reached themselves with obligations they agreed on rather than comply with an imposed decision. An empirical study mentions that the compliance rate for mediated agreements is almost twice that of decisions imposed in litigation.

Customized Solutions: Through mediation, parties can discuss both legal and extralegal matters and reach outcomes more compatible with their particular interests. It allows "people to deal with the emotional as well as financial features of disputes."

Party Control: The parties are in control of the outcome of their case. They are able to predict the gains and losses in negotiating the best alternative to a negotiated agreement (BATNA).

Satisfaction: Though in adjudication there is a third party who imposes a decision to the dispute, in mediation parties may be more satisfied with the outcome because solutions are mutually agreed upon. Empirical studies conclude that mediation brings more satisfaction to parties than

Empowerment and Self-Determination: When people are facing their own problems and are able to solve the dispute through their own efforts, there is a self-empowerment that is important for personal development. They notice that they are able to make their own choices to preserve whatever interest is at risk.

Preservation of Relationships: In some matters (such as child custody, for instance), the relationship between parties will continue after the decision on the case. In these cases, an agreed settlement that addresses both parties' interests can preserve or even heal the

relationship because both parties are working together with their eyes on the interests of both. In mediation, litigants and the mediator can focus on both the problem and on the relationship, something that is not likely to happen in court, where the focus will be mainly, if not exclusively, on legal issues.

Workable and Implementable Decisions: In an agreed settlement, parties can refine the details of its implementation, unlike judicial decisions, which are usually not tailored in terms of how their contents will be carried out. This also helps to increase the likelihood of compliance with the solution.

Decisions That Hold up Over Time: Mediated agreements tend to hold up over time. If a future case results, litigants are more likely to utilize a negotiation process to solve their dispute rather than use an adversarial approach.

4.1.2 Research questions

4.1.2.1 What are the dilemmas of court-annexed mediation?

The discussion under this question will cover the criticisms of court-annexed mediation. Where the researcher conducted this through interviewing different judicial officers, law students, and other normal peoples concerning the challenges of the court annexed mediation over the process of dispensing justice. Where each one replied accordance to his/her knowledge and according to what continue to occur around our society, as follows;

McEwen & Wissler 2002[60], in their literature argue that the aim of court-annexed mediation from the legal perspective is more towards institutional efficiency particularly in reducing case backlogs rather than parties' satisfaction and just outcomes through creative problem-solving.

Astor & Chinkin 2002[61], They argue in the issue of lack of procedural safeguard, the confidentiality of the process prevents the development of case law and the enforceability of the mediated settlement agreements. These concerns have led some to regard mediation as second class justice.

Advocate Japhet[62], he provided that the rules and guidelines used to run court annexed mediation are insufficient. Despite that there are procedures provided under Order VIIIA of the Civil Procedure Code yet there are no sufficient guidelines for court annexed mediation, this led injustice to the parties due to use learning manual which is not competent authority to be applies.

Horn. Asifiwe Jembe[63], he argues that one of the challenges facing our country is the absence of enough institutions using to solve conflict through mediation out of the court of law. Meaning that there is no enough of authorized bodies of running mediation system in Tanzania. So, due to luck of these institutions led poor determination of the justice as well as delaying for cases to be solved.

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[60]C. A. McEwen & R. L. Wissler, *finding out if it is True: Comparing Mediation and Negotiation through Research*, 2002

[61] H. Astor & C.M. Chinkin, *Dispute Resolution*, 2002, Pp.462

[62] Maleta and Ndumbaru Advocate Firm at Songea, Dated on 10th August,2023

[63] Resident magistrate of the resident magistrate of Songea dated at 23rd august,2024

Advocate, argued that the active role played by the judge to affect settlement can poses risks to justice in three circumstances: judicial overreaching, judicial overcommitment and procedural unfairness. By judicial overreaching, he means that although the judge in general cannot punish lawyers who are disinclined to promote a settlement, the danger remains that lawyers interpret judicial pronouncements and actions as thinly-veiled coercion.

Ramadhani January[64] argued that the disputants may experience coercion as they may lose control of their dispute through the judges asserting the position of decision-makers. This is due to judges might be too forceful in their dealings with parties and might rely too much on their judicial authority to bring the parties to an agreement.

4.1.2.2 What are the key reasons for the growth and development of court annexed mediation in Tanzania and other jurisdictions?

First, five key factors were identified as reasons for the growth and development of court-annexed mediation as follows:

Spencer & Brogan 2006[65], in their literature argue the realization of the benefits of mediation; contributed to issue of the prevailing court backlogs, that the increasing backlogs resulting in long delays in cases being heard has been a motivating factor for these countries in turning to mediation as a means of settling disputes.

[64] LLB Student at Ruaha Catholic University (RUCU) dated on 28th July,2023 at 10:36Am
[65] D. Spencer & M. Brogan, *Mediation Law and Practice*, Cambridge University Press & Assessment, 2006

Villareal 2006[66], in his literature argues that the spiraling cost of litigation in US, UK, Australia, and other jurisdiction has also led to a search for cheaper and quicker dispute resolution mechanisms. The increasing costs of discovery and associated lawyers' fees led to substantial increases in litigation costs. The high costs of litigation and long delays caused dissatisfaction with litigation.

Woolf 1996[67], government involvement in promoting the use of mediation is a significant contribution to its further development. Argues that, the support and encouragement from the senior members of the judiciary, the exposure to, and training of mediation, and the cultural use of mediation in the traditional Tanzanian society.

Advocate Said[68], argues that judges generally believe that mediation can be very effective as an alternative to litigation in Tanzania if it is mandated following the system adopted in other jurisdictions.

4.1.2.3 What are the general benefits of mediation?

The survey found that the lawyers in Tanzania have reacted positively to the typical benefits of mediation as revealed in the interview, where about 84% describing their knowledge of mediation. Most of them they demonstrated a strong understanding of the three key benefits of mediation; it saves time and produces quick resolutions for 78.8% this is done by reduce the issues for trial which in turn reduces the time taken to resolve the disputes, is cheaper and more economical for 68.7%, and is informal for 76.8%, the

[66] Villareal Attorneys and Mediators, The Model Standards of conduct for Mediators, 2006
[67] Lord Woolf, *Mediation and Judicial Review: An empirical research study*, 1996
[68] On 44th December 2023 at 12: 54 pm

mediation procedure, on the other hand, is informal in nature for 76.8%. The parties are free to express themselves[69]

Also, the analysis of the interviews also suggests that the interviewees had strong understandings of the benefits of mediation including its promotion of better relationships as mediation generally resulted in a mutual outcome unlike a win-lose in litigation. Mediation certainly benefits the parties if it is successful, but it can also be beneficial when it fails. For instance, in some cases, the parties may have reached a settlement after a cooling off period following the failed mediation. This is because the parties are in a better position to appreciate each other's cases and can see the potential outcome if they go for trial.

4.1.2.4 There is any reason for disputants to be presented in mediation?

An interesting finding is that some lawyers indicate that the terms of settlement in mediation are not always designed by the disputants but their lawyers[70]. This finding may indicate that the presence of lawyers in mediation impacts on the disputants' participation in shaping their own settlements as lawyers are likely to play a dominant role[71]. This may be because lawyers have knowledge of the case and they know what is in the best interests of their clients[72]. It relates to the issue of whether or not disputants should be represented in mediation which is one of the disputed issues in mediation.

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[69] J. Gutman, *The reality of non-Adversarial Justice: Principles and Practice*, 21st October 2009
[70] C. A. McEwen & R. L. Wissler, *finding out if it is True: Comparing Mediation and Negotiation through Research*, 2002
[71] O. Rundle, *Mediation for Lawyers*, 2010 Pp. 522
[72] Ibid

Whilst the research found that most lawyer respondents (64%) they need for disputants to be represented to provide justice in the process of court annexed mediation, particularly to overcome power imbalances, the majority of judges believe that having lawyers present is not helpful.

Gutman 2009[73], in his literature suggested that the role of lawyers in mediation is completely different from their role in litigation. Mediation has been said to require lawyers to be problem solvers, working collaboratively with the disputants, assisting them to understand the issues in the case, thereby enabling them to exercise their self-determination and ensuring that the agreement reached by them is based on informed consent.

Frey 2001[74], in his literature argues that the presence of lawyers in the mediation processes may make it more just and fair to the disputants especially those who have less bargaining power or experience.

4.1.2.5 Judges sitting as mediator in a court setting is preferred?

The respondents were asked their opinions on judges sitting as mediators in a court setting. As this is an open-ended question, the lawyers' answers categorized into two comprising of 'Agree', and 'Disagree' based on their reasons given to support their answers. There was about 9 respondents who responded to this question, 3 agreed with the notion of judges as mediators, and 6 were disagreed.

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[73] S. Gutman, *why haven't we generated sufficient evidence? Part II: building our evidence*, July-August 2009

[74] B. Frey, *Motivation Crowding theory*,1 December 2001

4.1.2.5.1 For those who Agree

The first category was a group of 3 respondents who agreed with judges being mediators. Their reasons are discussed in the following reasons;

1st respondent argues that, Judges are mostly experience and knowledgeable on various areas of law due to their exposure in different cases. They would be very helpful in getting matter solved and give useful or effective suggestions. Judge is a well-respected person with highly experienced in law and can give a fair and good judgment[75].

2nd respondent[76] argues that, I think the judges can give some options and ideas to the parties in settling the matter and it would encourage parties to speak out and to take the advice of the judge as they feel that they are given an opportunity to be heard on their side of story

3rd respondent believed that, the process of judges sitting as mediators in the court setting will give a feeling of legitimacy and seriousness, by Give the sense of seriousness to the proceedings.

4.1.2.5.2 For those who Disagree

The second category were 4 respondents who felt that it was inappropriate for judges to conduct mediation. They provided their comments which were themed and arranged as follows;

[75] M. C. Magiri, An analysis of Alternative Dispute Resolution as a communication strategy in conflict resolution: A case study in court annexed mediation, 2019
[76] Advocate, on 24th October, 2023 at 04:54pm

1st respondent[77] argues that, "unfortunately some forgot to leave their robe and wig, hence behave as if they are conducting trial, he proceeds that not really effective as their mindset is different and not trained to resolve matter in a compromise manner".

2nd respondent said that, it is my view that judges sitting as mediators in a court setting would create undue pressure on disputants to settle their dispute, this could harm a real mediation as parties may not want to show their real strengths and weaknesses' and, not advisable as it is too formal[78]. Parties may feel uncomfortable and discussion may be treated like court proceeding. Lack of frank and candid disclosure of information.

3rd respondent stated that, "prefer court-annexed mediation as judges may be biased in forcing a forced resolution rather than mutual in order to clear backlogs and Judges might not be experienced in certain areas as compared to private mediator for instance matters involving accounting or international laws"[79].

4th respondent commented that, "The court setting might impede the mediation process, and it would appear intimidating. The environment is very important so that parties can be at ease"[80]

4.1.3 CONCLUSION

In recent years, the importance of using mediation in resolving civil disputes has been emphasized. One way to promote a higher level of mediation is through court-annexed mediation. In case of the civil matters, the district court judge recommends or refers

[77] Resident of Ilala on 23rd August 2023 at 11: 21 am
[78] Advocate, on 24th October, 2023 at 04:54pm
[79] The Excutive Council of Gagilonga on 15th January 2024, at 10: 23am
[80] Resident of Wilolesi in Iringa on 34th October 2023 at 12: 30

disputants to the first meeting with a mediator during civil proceedings[81]. The empirical qualitative research described here responds to the compelling need to fill the gap in the knowledge through focusing on creating a deeper understanding of the role and experience of judges[82], the actors uniquely positioned to comment on the studied phenomena from an emic perspective.

[81] C. A. McEwen & R. L. Wissler, *finding out if it is True: Comparing Mediation and Negotiation through Research*, 2002

[82]M. C. Magiri, *An analysis of Alternative Dispute Resolution as a communication strategy in conflict resolution: A case study in court annexed mediation*, 2019

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This is the last chapter which provides for the recommendation and general conclusion basing on findings of the research. The recommendation a conclusion revolves main objectives of the study for the Critical analysis on the role of court in court annexed mediation in Tanzania. Also, this chapter introduces the general concepts from the study and provides possible solutions to overcome the problem reveled under this study.

5.1 Conclusion

The main objective of the research in this is to find solution that will make the system of court annexed mediation to be applicable with the compliance to the party's wishes[83]. After the critical analysis from the data collected and analyzed the researcher came with the conclusion that, the court annexed mediation to be conducted by the judges or magistrates does not comply with the context of mediation[84], so the court annexed mediation should be conducted by the trained legal officers who have skills and knowledge of mediation.

In recent years, the importance of using mediation in resolving civil disputes has been emphasized[85]. In which one way to promote a higher level of mediation is through court-annexed mediation. In case of the civil litigation, the court recommends disputants

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[83] H. T. Hamis, *Court annexed mediation in Tanzania*: *Success, challenges and prospect* (2002)
[84] M. C. Magiri, *An analysis of Alternative Dispute Resolution as a communication strategy in conflict resolution: A case study in court annexed mediation*, 2019
[85] A. A. Wahab, *Court-Annexed and Judge-led Mediation in civil cases: The Malaysian Experience,* October 2013

to the first meeting with a mediator during civil proceedings[86]. The research described here responds to the compelling need to fill the gap in the knowledge and skills through focusing on creating a deeper understanding of the role and experience of judges, the actors uniquely positioned to comment on the studied phenomena from an emic perspective[87].

Also, researcher from those data collected in this research conclude that, since the court annexed mediation termed as the one of the mediation ways of solving conflict the judges should adapt all techniques of the mediation. One of the respondents claimed that judges doesn't have communication skill during the court annexed mediation through fail to provide chance to the disputants to compromise themselves as well as on the issue of changing terms.

Also, the researcher concluded that the basic object of conducting mediation is to settle the conflict amicably without leaving any doubt between the disputants, also is to reducing backlog of cases in the court of law but court annexed mediation used much by judges only to reducing the backlog of cases rather to settle the conflict in justice way. Training of judges noted above emerged as a key strategy from this thesis as mediation needs a different approach compared to litigation[88]. Their role as adjudicators in the adversarial court system has made them familiar with the skills and outlook related to litigation. This is one of the drawbacks perceived of judge-led mediation. The current

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[86] A. A. Wahab, *Court-Annexed and Judge-led Mediation in civil cases: The Malaysian Experience*, October 2013

[87] M. C. Magiri, *An analysis of Alternative Dispute Resolution as a communication strategy in conflict resolution: A case study in court annexed mediation*, 2019

[88] Ibid

shortage of judges means that even with training their numbers are insufficient to both participate in reducing case backlog as well as continue with their adjudicative role. The interviewees were concerned that the increase in judges' workloads and the time and mental energy required to handle mediation means that more judges need to be appointed and assigned to deal with mediation.

5.2 Recommendations

Supported on the field findings, literature reviews, comments, opinion of various respondents both scholars and non-scholars together result the conclusion of this research. Thereafter, the conclusion has subsequently invited the research to come up with the following recommendations.

1st recommendation, proposed by the lawyers and the interviewees was that the court must have a system in place to ensure the effectiveness of court-connected mediation. This includes having a special registry in the court for mediation cases, training of the registrars to evaluate cases for mediation before they go to judges for mediation, enlisting a panel of trained and qualified mediators for the parties' selection and, having an administrative process to monitor and supervise the cases referred to mediators and cases which return to court if mediation fails[89].

2nd recommendation, Judges / Magistrates as the mediators in the court annexed mediation should undergo training to accredit them as qualified mediators. As the structure of judge-led mediation is different from court-annexed mediation[90], the findings

[89] O. Rundle, *Mediation for Lawyers*, 2010 Pp. 522
[90] Ibid

from the questionnaire and interviews suggested special training is needed for judges in mediation[91]. Because if judges or magistrates used the appropriate techniques in mediation including being able to conduct the process more informally, the parties would feel more comfortable and responsive

3rd recommendation, dealt with a setting of an independent court annexed mediation Centre under the appointed judges or Magistrates referring their qualifications, this proposal for an independent mediation Centre was proposed by the interviewees who felt that the public's perception is that judges or magistrate to lead mediation in the court of law create fear to the disputants.

4th recommendation, is to Mobilize mediators who participated in the pilot program to continue their position as mediators when the new Law take effect. These are quality mediators that already have experience with the new mechanism and would be a great asset to the court.

5th recommendation, is to draft Law on Court Annexed Mediation which should include provisions stating the obligations of court annexed mediators to comply with the Code of Conduct. This restrict the Court from impose coercive measures in the court annexed mediation process, include specific provisions to resolve cases of inconsistencies in application of law identified throughout the pilot program[92].

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[91] A. A. Wahab, *Court-Annexed and Judge-led Mediation in civil cases: The Malaysian Experience*, October 2013

[92] C. A. McEwen & R. L. Wissler, *finding out if it is True: Comparing Mediation and Negotiation through Research,* 2002

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