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UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

AN ASSESSMENT OF MEDIATION AS AN EFFECTIVE AID FOR RESOLVING CONFLICT: LAND
DISPUTES

By

Mmakgoedi Sylvia Rakgwale

Student No.U23974827

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Resolution

Prepared under the supervision of

Prof R Baboolal-Frank

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Declaration

I, Mmakgoedi Sylvia Rakgwale declare that this dissertation is my own original work. Where other people's work has been used (either from a printed source, internet or any other source), this has been properly acknowledged and referenced in accordance with the requirements as stated in the University's plagiarism prevention policy. I have not used another student's past written work to hand in as my own. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.

Supervisor: Prof R Baboolal-Frank

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MSRakgwale

TABLE OF CONTENTS

CHAPTER 1 INTRODUCTION

i. Abstract.....	6
1.1 Introduction.....	7
1.2. Background.....	9
1.3 Thesis Statement and Research Questions.....	10
1.4. Study objectives.....	11
.1.5 Preliminary Literature Overview.....	11
1.6. Methodology.....	16
1.7. Limitations.....	16
1.8. Structure of Dissertation.....	16

CHAPTER 2 Theoretical Framework

2.1 Introduction.....	18
2.2 Overview of Mediation.....	18
2.3 Mediator's role.....	19
2.4 Principles of mediation.....	19
2.5 Key concepts of mediation process.....	20
2.6 Relevance of mediation to land disputes.....	20
2.7 Cultural factors influencing mediation in land disputes.....	21
2.8 Contextual factors influencing mediation in land disputes.....	22
2.9 Comparative analysis of mediation processes and practices used in South Africa, Kenya and Rwanda.....	24
2.9.1 South Africa.....	24
2.9.2Kenya.....	25
2.9.3. Rwanda.....	26

2.10 Roles and qualifications for mediators in each country.....	27
2.11 Conclusion.....	28

CHAPTER 3 Legal and institutional frameworks for mediation

3.1 Introduction.....	29
3.1.1 South Africa.....	29
3.1.2 Kenya.....	31
3.1.3 Rwanda.....	31
3.2 Institutional and support systems for mediation.....	32
3.2.1 South Africa.....	32
3.2.2 Kenya.....	33
3.2.3 Rwanda.....	35
3.3 Institutional frameworks effectiveness and limitations.....	35
3.3.1 South Africa.....	36
3.3.2 Kenya.....	36
3.3.3 Rwanda.....	36
3.4 Conclusion.....	37

CHAPTER 4 Outcomes and impacts of Mediation

4.1 Introduction.....	38
4.2 Mediation of land disputes in South Africa, Kenya and Rwanda has had different outcomes and impacts in these countries.....	38
4.2.1 South Africa.....	38
4.2.2 Kenya.....	38
4.3.3 Rwanda.....	39
4.3 The sustainability of mediated agreements in these countries.....	39
4.3.1 South Africa.....	39

4.3.2 Kenya.....	39
4.3.3 Rwanda.....	40
4.4. The social, economic and environmental impacts of mediated resolutions.....	40
4.4.1 Social impact.....	40
4.4.2 Economic impact.....	41
4.4.3 Environmental impact.....	41
4.5 Common challenges faced in the mediation of land disputes in countries.....	42
4.6 The lessons learned from the experiences of South Africa, Kenya and Rwanda.....	42
4.6.1 South Africa.....	43
4.6.2 Kenya.....	43
4.6.3 Rwanda.....	44
4.7 Land mark cases that promoted mediation of land disputes in all three countries.....	44
4.8 Unique aspects which were learned from case law.....	48
4.9 Conclusion.....	49

CHAPTER 5 Research findings, Conclusion and Recommendations

5.1 Introduction.....	49
5.2 The research findings and a conclusion based on the findings.....	50
5.3 Synthesis of the key similarities, differences and trends based on the 3 countries.....	51
5.3.1 Similarities.....	51
5.3.2 Differences.....	52
5.3.3 Common trends.....	52
5.4 Recommendations to enhance use of mediation in land disputes.....	53
5.5 Recommendations for addressing challenges in land disputes.....	54
<u>Bibliography</u>	56

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DEDICATION

This work is dedicated to my son, Temosho, thank you for walking this journey with me. I hope this inspires you to want to achieve great things in life. To my mother, thank you for your countless support. To the Road accident Fund, thank you for believing in me enough to fund my studies.

i. ABSTRACT

The use of mediation to resolve land disputes has become a popular phenomenon. There is a link between historical injustices, politics and economic factors with the usage of mediation for land disputes. Colonisation and other land related injustices coupled with political instability and economic pressures also contribute to the complications of land disputes. Mediation provides a vital and versatile tool which consists of an approach that is community –centred that addresses the multiple challenges associated with land disputes. The success of mediation is reliant on its ability to not only navigate immediate issues but also tackle deep historical and systematic factors that contribute to land conflicts. Different countries have included mediation in their legislation to reduce the pressure off the courts litigation system. The research will provide a comparative analysis of South Africa, Kenya and Rwanda to determine how mediation is used in all the countries to resolve land dispute. Similarities and trends in the three counties will show that mediation is an effective aid to resolve land disputes.

1.1 INTRODUCTION

Land disputes are common across various parts of Africa.¹ Disputes can sometimes result in prolonged conflicts, legal battles, and economic instability and can also have an impact on the community and relationships between individuals and community members.² Land disputes have been complex and are rooted with a combination of historical, economic, political and social factors.³ They often involve indigenous communities, ethnic groups, government and private interests.⁴

Disputes can range from issues of land ownership, access to natural resources, boundaries and evictions.⁵ Land reform and redistribution of previously disadvantaged groups has been a contentious topic across Africa⁶ Resolving land disputes in a fair and peaceful manner is important in order to be able to maintain social harmony and sustainable development⁷. Mediation has emerged as promising and has played a huge role in resolution of land disputes in a non-adversarial manner that encourages dialogue and cooperation.⁸ Mediation is an alternative dispute resolution mechanism that offers constructive and collaborative approaches

¹ N Kansiime and G Harris “Strengthening traditional approaches to community-level land disputes: An action research project in western Uganda” (2020) vol 2 no 1.

² C Price “Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution?” (2018) *Perpperdine Dispute Resolution Law Journal* vol 18 no 3 393-397.

³ R Home “Land dispute resolution and the development in Africa” (2020) *Journal for Juridical Science* vol 45 no 1 72-92.

⁴ C Lund et al “Land Rights and Land Conflicts in Africa: A review of issues and experiences “(2006) Copenhagen: DIIS.

⁵ Home (n3 above)72-92.

⁶ PE Peters “Challenges in land tenure and reform in Africa: Anthropological contributions.” (2009) *World development* vol 37 no 8 1317-1325.

⁷ Kansiime (n1 above).

⁸ Price (n2 above)393-397.

to resolving land disputes.⁹ It has its main goal on finding mutually acceptable solutions that meet the interests and needs of all parties involved.¹⁰

Authors such as Berg discusses mediation as a tool for resolving disputes; the focus of the author is on reasons why mediation is important and the advantages of mediation in commercial and residential real estate disputes.¹¹ The conducted research is primarily focused on mediation but has not focused on mediation of land disputes, therefore leaving this crucial topic underexplored.

In most of the research, for example research by Bob analyses different land conflicts, what constitutes them and recommendation on how to handle land disputes.¹² Kakooza focuses on land disputes in Uganda and the use of mediation to resolve the conflicts, the most effective way to use mediation to resolve disputes and highlighting current mediation laws and practices.¹³ The topic in both articles is limited to individual countries therefore leading to geographic specific information.

This study seeks to assess the effectiveness of mediation as an aid for resolving land disputes across South Africa, Kenya and Rwanda, also identifying the factors that influence its use. The study is necessary as it seeks to address the gap in the existing knowledge; even though research has been done there is still insufficient exploration of the topic of mediation of land disputes. This research will assist societal awareness and shed light on mediation of land disputes.

These three countries were chosen to conduct a comparative study on because they all have been colonised which has had a significant impact on land ownership, they are all characterised by a broad ethnic and cultural diversity where different

⁹ A Duursma “Making disorder more manageable: The short –term effectiveness of local mediation in Darfur” (2020) *Journal of Peace Research* vol 1-14.

¹⁰ FT Kalabamu “Land conflicts and alternative dispute resolution in Sub-Saharan Africa: The Case of Botswana. (2021) *Land issues for Urban Governance in Sub-Saharan Africa* 171-175.

¹¹ C Berg in “Real estate mediation-stop the costs before they get to court” (2017) *De Rebus- Sa Attorneys’ Journal*

¹² U Bob “Land-related conflicts in sub-Saharan Africa” (2010) *African Journal on conflict resolution* vol 10 no 2

¹³ AC Kakooza” Land dispute settlement in Uganda: Exploring the efficacy of the mediation option” (2007) *The Uganda Living Law journal* vol 5

communities have different connections to certain land.¹⁴ They have also all had rapid urbanization and population growth which has increased pressure on land resources. The unequal distribution of natural resources such as fertile land has been the source of land disputes in all the three countries.¹⁵ These countries also have legal and institutional challenges, and they all have on-going efforts for land redistribution and restitution.¹⁶

1.2. BACKGROUND

Disputes related to land arise due to so many reasons such as competing claims on property rights, land tenure systems, historical grievances and or land use policies which conflict with each other.¹⁷ Traditional legal methods such as litigation has proven to be more lengthy, costly and too adversarial.¹⁸ This adds more tensions between disputing parties resulting in protracted resolution processes. Mediation on the other hand provides an approach that prioritises communication, negotiation and consensus-building.¹⁹ It involves appointment of a neutral third party who is responsible for facilitating communication and negotiation between the disputing parties.²⁰ The approach does not involve imposing decisions but instead focuses on guiding parties towards reaching mutual agreement²¹. Mediation has the potential to address underlying interest and concerns and it fosters creative solutions and restores relationships.²²

¹⁴ R Palmer "Educating out of poverty? A synthesis report on Ghana, India, Kenya, Rwanda, Tanzania and South Africa." (2007) London: DFID.

¹⁵ JM Klopp "The politics of violence in democratization: Lessons from Kenya and South Africa" (2007) Comparative Politics 127-146.

¹⁶ PG Roessler "Donor-induced democratization and the privatization of state violence in Kenya and Rwanda" (2005) comparative Politics 207-227.

¹⁷ J David et al "Multiple methods in the Study of Driving Forces of Land Use and Land Cover Change: A Case Study of SE Kajiado, Kenya "(2005) Human Ecology vol 33 no 6

¹⁸ Price (n2 above) 393-397.

¹⁹ M Kleiboer" Understanding Success and Failure of International Mediation" (1996) Journal of Conflict Resolution vol 40 no 2 360-389.

²⁰ Kleiboer (n19 above) 360-389.

²¹ Kleiboer (n19 above) 360-389.

²² B Mutuku et al "Formal justice and the alternative dispute resolution on land-based conflicts in Kenya" (2022) International Journal of Gender Studies vol 1 no 1 1-19.

Even though mediation is popular in various fields such as family disputes, commercial conflicts and international diplomacy, its application to land disputes is still relatively underexplored.²³ There are existing studies which show some evidence of successful outcomes in certain contexts but there is a need for a comprehensive and systematic analysis of mediation's effectiveness in resolving land disputes. This research will address the research questions below in order to provide insights into the potential benefits and challenges of using mediation for resolving land disputes.

1. 3. THESIS STATEMENT AND RESEARCH QUESTIONS

The research statement is that mediation is an effective aid for resolving land disputes. This paper will look at the following research questions in support of the research statement:

1. How is mediation used and is it effective in resolving land disputes?
2. What are the similarities and differences in cultural and social contexts that influence community participation and outcomes of mediation in land disputes?
3. What are the skills, training and other factors that contribute to successful mediation outcomes?
4. What is the impact of history, politics and economy on the widespread presence of mediation in land disputes?
5. What institutions have been established to support resolution of land dispute through mediation?
6. What are the legal and policy frameworks that foster mediation as a method for resolving land disputes?

²³ Mutuku (n22 above)1-19.

1. 4. STUDY OBJECTIVES

The research will address the following:

1. To compare the use and effectiveness of mediation as a conflict resolution method in land disputes
2. To identify the similarities and differences in cultural and social contexts that influence community participation and outcomes of mediation in land disputes
3. To assess the skills, training and other factors that contributes to successful mediation outcomes in land disputes
4. To analyse the impact of historical, political and economic factors on the widespread use and effectiveness of mediation in land disputes
5. To evaluate the institutions established to support land dispute resolution through mediation
6. To assess the legal and policy frameworks that foster mediation as a method of resolving land disputes.

1.5. PRELIMINARY LITERATURE OVERVIEW

The South African land dispute resolution through mediation will be compared to that of other countries such as Rwanda and Kenya. The following author's work will be considered:

Scholars such as Meyer advocates for mediation, according to him mediation and successful conflict outcomes is closely related.²⁴ Another scholar who supports Meyer's view is Simkin and adds that mediation involves a team of social or behavioural scientists and embarks on a facilitative, communication strategies that involve non-evaluative consultations which can bring about change and successful

²⁴ J Bercovitch "Some conceptual Issues and Empirical Trends in the Study of Successful Mediation in International Relations" (1991) Journal of Peace Research vol 28 no 1 7-17.

outcomes in most disputes.²⁵ Andrew conducted a study of mediation of land conflicts in the small-scale mining industry according to him mediation has the potential to resolve conflicts in the small-scale mining and therefore warrants its use.²⁶ His conclusion is based on the data he collected. Another study conducted by Shalom and Munene where they looked at the use of mediation to address conflicts in Kenya. In their article they argue that mediation has the potential to promote sustainable development in Kenya by bridging the gap between conflicting parties and creating an opportunity for constructive dialogue and cooperation.²⁷ Mukubi also conducted a case study on the effectiveness of legal and non-legal processes in managing land conflict, according to her conclusions mediation-based solutions to land disputes contribute to durable individual solutions.²⁸ She also adds that mediation has an important social, emotional and institutional impact that contributes directly to local conflict management capacity and mediation culture²⁹.

All these Scholars and authors contribute to the notion that mediation has the potential to resolve land conflicts but none of the authors have conducted a comparative study on South Africa, Kenya and Rwanda. My research aims to provide a comparative analysis of those countries' use of mediation to resolve land disputes in order to show that mediation can be used effectively as a land dispute resolution mechanism.

The literature is reviewed according to the following broad themes: Literature on legislative framework, institutional support, skills and training and community participation in land dispute mediation.

Legal frameworks provide steps and guidance with regards to mediation procedures in order to ensure successful resolution of land disputes through mediation.

²⁵ Bercovitch (n24 above)7-17.

²⁶ JS Andrew "Potential application of mediation to land use conflicts in small-scale mining" (2003) Journal of cleaner Production vol 11 no 2 117-130.

²⁷ B Shalom and C Munene "Bridging the Gap to Sustainable Development through Mediation in Kenya" (2023).

²⁸ NJ Mukubi "Effectiveness of Legal and Non-legal Processes in Managing land Conflict: A Case study of Narok Country, 1992-2012" unpublished dissertation University of Nairobi.

²⁹ Mukubi (n28 above).

Nonyana highlights the communal land rights acts (CLRA).³⁰ She discusses the Land Rights Board; mentions what constitutes its functions and also how it was not expressed in legislation governing communal tenure.³¹ The author concludes by making recommendations one of which is to involve communities, stakeholders and to support and monitor through formation of Land Rights board and reporting to the department of land rights act.³² She highlights challenges such as how institutions can be made accessible and how equity can be practically achieved in rural communities where men are still dominant over women and children.³³

Another author who brings into light the legal framework for resolution of land disputes is Coertse.³⁴ He discusses restitution of Land rights act which brought about the formation of the Land Claims court (LCC).³⁵ In his article he highlights what features constitute the LCC. Home speaks about the importance of resolving land disputes in order to achieve development.³⁶ Author examines legal frameworks for resolving land disputes in Africa and highlights the challenges faced.

In order to compare Rwanda with the other two countries, I will be looking at articles such as Abbott et al which discusses land disputes in Rwanda, and policies implemented to address land inequality with regards to women.³⁷ This is relevant to my study as lessons can be drawn from this article with regards to how Rwanda deals with land disputes and the legal.

Institutional support systems provide a platform for communication and negotiation to ensure satisfaction level for parties involved is reached. Cohen expresses how mediation is taken serious by discussing legislation which mirrors provision for

³⁰ MR Nonyana "The Land Rights Board" (2004) Property Law Digest.

³¹ Nonyana (n30 above).

³² Nonyana (n30 above).

³³ Nonyana (n30 above).

³⁴ CJ Coertse "The Restitution of Land Rights and Land Claims Court" (1999) *De Rebus* no 374 33-35.

³⁵ Land rights act 22 of 1994.

³⁶ Home (n3 above)72-92.

³⁷ P Abbott et al "Women, land and empowerment in Rwanda" (2018) *Journal of International Development* vol 30 no 6 1006-1022.

mediation.³⁸ Mutisi shows the role traditional institutions have in place for resolving land disputes.³⁹ Botha speaks about expropriation of land in South Africa, its purpose, compensation and the process followed.⁴⁰

Mediators' skills and training play a role in ensuring satisfaction level is reached between parties during land disputes. In LSSA submissions on court-annexed mediation the author highlights the importance of training mediators, the qualifications required and the standards to be upheld in legal profession when conducting mediation.⁴¹ To support the concept of training mediators another article considered is an article by De Jong.⁴²

In order to look at the role mediators' play in resolving land disputes I will consider the article by Crystal and Mackay-Davison where they discuss the role mediator's play.⁴³ They conclude by making submission that mediators should have the ability to exercise some powers in certain situations.⁴⁴ They also highlight power balance between parties as a mediation challenge and recommend mediators are cautious during process to ensure they assume enough control to balance power but also ensure the core purpose of mediation process is not lost.⁴⁵

Community participation ensures there is adherence to cultural consideration and recognition of cultural norms during mediation while maintaining compliance to mediated agreements. An article by Nonyana will be considered as it speaks about

³⁸ C Cohen "Mediation and the attorney's profession" (2011) *De Rebus- SA Attorneys' Journal*

³⁹ M Mutisi "The abunzi mediation in Rwanda: Opportunities for engaging with traditional institutions of conflict resolution" (2011).

⁴⁰ M Botha "Current Expropriation Laws and Talks" (2021) *Property Law Digest*.

⁴¹ "LSSA submissions on court-annexed mediation: Qualifications, standards and mediator levels" (2014) *De Rebus- SA Attorneys' Journal*.

⁴² M De Jong "The newly introduced public mediation service in the maintenance court environment: Does it make a difference in the short term?" (2009) THRHR no 72 274-293.

⁴³ M Crystal and S Mackay-Davison "The role of the mediator: Umpire or interrogator?" (2015) *De Rebus- SA Attorneys' Journal*.

⁴⁴ Crystal and Mackay-Davison (n43 above).

⁴⁵ Crystal and Mackay-Davison (n43 above).

land reform in South Africa and the shortcomings that have been experienced in delivery of the land reform in South Africa.⁴⁶

In order to highlight the impact of historical, political and economic factors, an article by Singh will be looked at which speaks about the history of land disputes and how ADR can be used as a method to assist in resolving disputes.⁴⁷ Howard also speaks about the past injustices and attempts to correct them through land restitution programme, he highlights the challenges and gives examples of case law which are related to land claims in respect of land restitution⁴⁸. He concludes by making recommendations for the way forward for resolving land claim disputes. Wehrmann on the other hand discusses types of land conflicts; causes of land conflicts, institutional changes and their impact on land conflicts, how to resolve land conflicts and the challenges faced.⁴⁹

To look at land disputes in Kenya I will consider an article by Mutuku which speaks about ADR in Kenya and its role in resolving land disputes in Kenya, the acts that support resolution of land conflicts through ADR.⁵⁰ I will also look at Muigua's work, which speaks about the use of mediation to resolve environmental conflicts and the unresponsive polices that have emerged due to increasing environmental conflicts and resource struggles.⁵¹

In order to study mediation of land disputes in the Rwanda perspective the work of Doughty, this speaks about the use of mediation in legal reforms to resolve a range of disputes across Rwanda post genocide.⁵²

⁴⁶ R Nonyana "The shortcomings in the delivery of land reform South Africa" (2004) Property Law Digest.

⁴⁷ JA Singh "Preventative Diplomacy as a Mechanism for resolving Property Rates Disputes" (2000) Property Law Digest.

⁴⁸ G Howard "Righting the wrongs of the past: A review of the Land Restitution Programme" (1999) Property Law Digest.

⁴⁹ B Wehrmann *A practical guide to dealing with land disputes* (2008) 110.

⁵⁰ B Mutuku et al (n 22 above)1-19

⁵¹ Unpublished: DK Muigua "Resolving Environmental Conflicts through Mediation in Kenya" unpublished PhD dissertation, University of Nairobi 2011.

⁵² KC Doughty "Our Goal is not to Punish but Reconcile: Mediation in Postgenocide Rwanda" (2014) *America Anthropologist* vol 116 no 4 780-794.

Overall, the themes should jointly result in peaceful relations, prevention of future conflicts and empowerment of community and development through mediation of land disputes.

1.6. METHODOLOGY

This research will be compiled using a range of open-source information from different authors which speak about mediation, its effectiveness and the role it plays in resolving land disputes. Views expressed in books, Legal journals and views of authors and will be discussed and analysed. This research will be done using desktop legal research with the focus on article journals, books and case law. It will also use comparative law to compare usage of mediation to resolve land disputes in South Africa, Kenya and Rwanda. The aim of the comparative study will be to draw lessons from the above-mentioned countries

1.7. LIMITATIONS

This research will not be able to cover mediation of land disputes across all African countries but will be limited to South Africa, Kenya and Rwanda. The sources will also be limited to article journal, books and case law.

1.8. STRUCTURE

Chapter 1-Introduction and Background

This chapter will introduce the framework used to do this research. It will also provide the background of the research study. It will provide the problem statement, the objectives. It will contain the literature review. It will provide the scope and significance of the comparative study. It will provide the methodology and the overview of the research structure.

Chapter 2-Theoretical Framework

This chapter will provide overview of mediation as a dispute resolution mechanism. It will outline the key concepts and principles of mediation. It will look at the relevance of mediation in land dispute resolution. It will outline the cultural and contextual

factors influencing mediation in land disputes. This chapter will provide a comparative analysis of mediation processes and practices used in South Africa, Kenya and Rwanda. There will be an examination of the roles and qualifications for mediators in each country.

Chapter 3-Legal and institutional frameworks for mediation

This chapter will examine legal frameworks related to mediation of land disputes in South Africa, Kenya and Rwanda. It will have a comparative analysis of institutional structures and support systems for mediation in each country. There will be an evaluation of the effectiveness and limitations of the legal and institutional frameworks.

Chapter 4-Outcomes and impacts of Mediation

This chapter will assess and compare the outcomes and impacts of mediation in land dispute resolution in South Africa, Kenya and Rwanda. It will analyse the sustainability of mediated agreements in each country. It will evaluate the social, economic and environmental impacts of mediated resolutions. This chapter will identify common challenges faced in mediation of land disputes in the three countries. It will evaluate and compare the lessons learned from the experiences of South Africa, Kenya and Rwanda. This chapter will provide an analysis of case law from South Africa, Kenya and Rwanda. It will also look at unique aspects which were learned from each case.

Chapter 5-Research findings, Conclusion and Recommendations

This chapter will discuss the research findings and a conclusion will be generated based on the findings. It will show synthesis of the key similarities, differences and trends based on the three countries. It will contain recommendations to enhance use of mediation in land disputes. It will also provide recommendations for addressing challenges in land disputes.

Chapter 2 Dissertation

Chapter 2-Theoretical Framework

2.1 Introduction

Land is a natural resource valued by humans. The scarcity of land leads to disputes. In order to address the apartheid legacy of land dispossession the South African Constitution⁵³ provides for restitution and land tenure.⁵⁴ This chapter will provide an overview of mediation as a dispute resolution mechanism. The key concepts and principles of mediation are discussed. The relevance of mediation in land dispute is important in the resolution of disputes. Factors that play a pivotal role are cultural and contextual factors influencing mediation in land disputes. This chapter will provide a comparative analysis of mediation processes and practices used in South Africa, Kenya and Rwanda. There will be an examination of the roles and qualifications for mediators in each country.

2.2 Overview of Mediation

Mediation can be said to be a voluntary yet confidential dispute resolution process.⁵⁵ It involves a third party referred to as a mediator who aids parties in conflict to reach a mutually acceptable resolution.⁵⁶ Mediation is quite different from litigation as it encourages parties to have open communication and collaboration.⁵⁷ This process involves the mediator facilitating discussions in order to identify issues that help get to resolution options.⁵⁸ Mediation has been used in a lot of contexts, from family disputes to business disagreements and now also used for land disputes.⁵⁹ Mediation has brought benefits some of which include cost-effectiveness, preservation of relationships and quicker resolution, making it gain more traction as opposed to litigation.⁶⁰

⁵³ The Constitution of the Republic of South Africa, 1996.

⁵⁴ Final Report of the Presidential Advisory Panel on Land Reform and Agriculture 2019

⁵⁵ Andrew (n 26 above)117-130.

⁵⁶ Andrew (n 26 above) 117-130.

⁵⁷ LJ MacDonnell "Natural resources dispute resolution: An overview"(1988) Nat. Resources J vol 28 no 5.

⁵⁸ MacDonnel (n57 above).

⁵⁹ Andrew (n 26 above)117-130

⁶⁰ Andrew (n 26 above)117-130

2.3 Mediator's role

Mediator's role is to guide the whole process in order to ensure fairness and respect. His/her duty is not to impose decisions but rather assist parties in exploring options and finding a common ground.⁶¹ Mediation can therefore be said to be important as it encourages collaborative problem-solving while preserving relationships.⁶² At most times it results in agreements that all parties find acceptable ensuring sustainable resolution.

2.4 Principles of mediation

There are core principles of mediation that ensure a dispute is successfully resolved. Mediation requires that parties engage freely, ensuring their active involvement and commitment to resolutions.⁶³ It provides for informed consent which involves understanding the mediation process and its implications.⁶⁴ Impartiality and neutrality is also important. This means mediators should remain unbiased and neutral in order to ensure a balanced approach that involves all parties.⁶⁵ The avoidance of favouritism ensures trust and confidence from disputing parties.⁶⁶ Confidentiality is another principle; mediation discussions are private and confidential to ensure open communication.⁶⁷ There may be exceptions in instances where threats of harm are clearly stated to maintain trust while ensuring safety.⁶⁸ Parties Self-determination means they have the autonomy to make decisions about the resolution empowering

⁶¹ L Boule and A Rycrof "Mediation: principles, process, practice"(1998) JS Afr.L p167

⁶² Boule and Rycrof (n 61 above) 167.

⁶³ E Octaleny et al "Mediation of Land Disputes in South Sumatera Province"(2020)Annual Conference of Indonesian Association for Public Administration(IAPA 2019) p21-39.

⁶⁴ E Octaleny et al (n63 above) 21-39.

⁶⁵ B Derevyanko et al "Legal foundations for resolving land disputes through mediation as an alternative dispute resolution method"(2023)European Energy and Environmental Law Review vol 32 no 5 248-256

⁶⁶ Derevyanko et al (n65 above)248-256.

⁶⁷ U Caser et al "Environmental mediation: an instrument for collaborative decision making in territorial planning"(2017) Finisterra vol 52 no 104 p109120.

⁶⁸ U Caser et al (n67)109120.

them in the process, this is another principle⁶⁹. Mediators aid this self-discovery and decision-making without imposing their opinions.⁷⁰

2.5 Key concepts of mediation process

The key concepts of the mediation process involve four phases. Firstly there is an opening session, this is where mediators set the tone by explaining the process and ground rules.⁷¹ Parties have the opportunity to discuss the issues at hand, express their concerns and reach an agreement with regards to which topics will be addressed. Then we have the second phase which is the exploration phase. At this point underlying issues are identified in order to understand the root cause of the dispute.⁷² It involves clarifying interests, needs and goals for effective communication. The third phase is the negotiation phase. Here there is generation of options and brainstorming creative solution.⁷³ The mediator facilitates communication between parties so they express their views and explore compromises where necessary.⁷⁴ Lastly is the agreement phase, it involves drafting a clear and comprehensive agreement that is a reflection of the parties' decisions.⁷⁵ This ensures parties understand the terms fully and are willing to abide by them.⁷⁶

2.6 Relevance of mediation to land disputes

Mediation plays a crucial role in resolving disputes and this has made it relevant to land disputes for several reasons. For starters mediators that are experienced in land disputes bring valuable expertise to the table.⁷⁷ They do this by helping parties understand zoning regulations, property laws and all the relevant information to

⁶⁹ W Betts "Third party mediation: an obstacle to peace in Nagorno Karabakh"(1999)SAIS Review(1989-2003) p161-183

⁷⁰ Betts (n69 above)161-183

⁷¹ RB Mckersie et al "Kaiser Permanente: Using interest-based negotiations to craft a new collective bargaining agreement"(2004)Negotiation Journal vol 20 no 1 p13-35.

⁷² Mckersie et al (n71 above)13-35.

⁷³ Mckersie et al (n71 above)13-35.

⁷⁴ Mckersie et al (n71 above)13-35.

⁷⁵ Mckersie et al (n71 above)13-35.

⁷⁶ Mckersie et al (n71 above)13-35.

⁷⁷ Y Shamir "Alternative dispute resolution approaches and their application"(2016)p1-43.

make informed decisions.⁷⁸ There are often deep emotional ties to land and property and mediation provides a supportive platform which enables parties to express their emotions and concerns.⁷⁹ The agreements reached through land dispute mediation are most likely to be adhered to because they are mutual.⁸⁰ Mediation has also assisted in ensuring parties consider long-term solutions and sustainable land use practices.⁸¹ This is important in disputes related to land development, property boundaries or environmental concerns.⁸² Where land disputes involve communities, mediation helps keep harmony and cohesion within the community for a shared resolution.⁸³ The relevance of mediation to land disputes can therefore be said to be in its ability to offer efficient and cost effective solutions that are customized, preserve relationships and maintain privacy.⁸⁴ Mediation is a valuable alternative to litigation and ensures land-related conflicts are resolved in a satisfactory manner.

2.7 Cultural factors influencing mediation in land disputes

It's important that we recognise the cultural norms that are crucial for mediation. This allows outcomes that are sensitive to specific needs and values of parties. Cultural norms and values related to land ownership for example, there are different traditional beliefs and customs, and some may regard land as a sacred entity or ancestral heritage.⁸⁵ There are also rituals and ceremonies associated with land use that can affect negotiations.⁸⁶ Indigenous communities usually have different communal land ownership structures; this means mediators must respect indigenous

⁷⁸ Shamir (n77 above)1-43.

⁷⁹ TS Jones "Mediating with heart in mind: Addressing emotion in mediation practice"(2001) Negotiation Journal vol 17 no 3 p217-244.

⁸⁰ A Dhialulhaq et al "The use and effectiveness of mediation in forest and land conflict transformation in Southeast Asia: Case studies from Cambodia, Indonesia and Thailand (2015) Environmental Science & Policy vol 45 p132-145.

⁸¹ Dhialulhaq et al (n80 above)132-145.

⁸² Dhialulhaq et al(n80 above)132-145.

⁸³ B Wehrmann"Land conflicts: A practical guide to dealing with land disputes"(2008)Eschborn:GTZI

⁸⁴ Andrew (n 26 above)117-130.

⁸⁵ Di X "The developing trend of the people's mediation in China" (2009) Sociological Focus vol 42 no 3 p288-245.

⁸⁶ G Basita "Cross-cultural approach to resolving conflicts: Traditional mediation in Burundi compared to Western techniques "PhD dissertation University of Duquesne 2001.

knowledge and governing systems.⁸⁷ Non-verbal cues and communication styles is another example. Gestures and symbols are important as they convey emotions and intentions.⁸⁸ Should there be misinterpretation of gestures during mediation, it can lead to misunderstandings.⁸⁹ There is also the issue of language barrier and translation issues, this often results in miscommunication and misrepresentation of intentions it's therefore required that there are skilled interpreters during mediation to breach the language and communication gaps.⁹⁰ Lastly social hierarchies and power dynamics have influence on land mediation.⁹¹ The influence of community leaders and elders often has a great influence on how disputes are resolved.⁹² It's important those mediators are able to navigate through the power dynamics with respect and maintain impartiality.⁹³ Gender roles can also affect participation of women in mediation therefore mediators must ensure gender-inclusive mediation process that addresses the power imbalance.⁹⁴

2.8 Contextual factors influencing mediation in land disputes

Contextual factors also play a role in the influence of mediation. Legal frameworks and property rights is one of the factors. The variety of legal systems has an impact on ownership of land because of how it is defined and contested for.⁹⁵ Mediators need to be exposed to all the relevant laws in order to provide a platform for informed discussions.⁹⁶ The historical injustices and land dispossession have an

⁸⁷ G Basita (n86 above).

⁸⁸ G Oleksik et al "Touch and gesture; mediating content display, inscriptions, and gestures across multiple devices"(2014) Personal and Ubiquitous Computing vol 18 p1243-1257.

⁸⁹ G Oleksik et al(n88 above)1243-1257.

⁹⁰ YL Hertig 'Cross –cultural mediation: from exclusion to inclusion'2004 Mission in acts: ancient narrative in contemporary context p59-72.

⁹¹ V Narain "Bonds, battles and social capital: Power and the mediation of water insecurity in peri-urban Gurgaon, India' (2019)Water vol 11 no 8 p1607.

⁹² R Blench et al "The role of traditional rulers in conflict prevention and mediation in Nigeria"(2006)Study prepared for the United kingdom's Department for international Development(DFID),Nigeria p1-107.

⁹³ Blench et al (n92 above)1-107.

⁹⁴ M Allen "Land and conflict in Papua New Guinea;the role of land mediation"(2014)Security Challenges vol 10 no 2 p1-14.

⁹⁵ M Al-Amin and R Akter "Land and Conflict in Balovpur Village: The Role of Land Mediation".

⁹⁶ Al-Amin and Akter(n95 above)

influence on current disputes.⁹⁷ Mediators acknowledging historical context is important for reconciliation-based solutions.⁹⁸ The link between economic factors and land value is another context to be considered.⁹⁹ Economic disparities can make land conflicts more serious especially in land that is full of resources.¹⁰⁰ Mediators are therefore tasked with finding sustainable solutions that address underlying economic issues.¹⁰¹ Where there are corporate interest and development projects, there can be displacement and conflict.¹⁰² The need to balance economic development with community rights becomes a challenge for mediators.¹⁰³ Political stability and government involvement is another underlying factor that influences mediation of land disputes.¹⁰⁴ There are government policies and interventions that influence land disputes.¹⁰⁵ Mediators are required to understand political dynamics in order to control how the government gets involved effectively.¹⁰⁶ Political tensions may also intensify land disputes which then complicates resolution process.¹⁰⁷ It is therefore a requirement that mediators encourage dialogue to minimise political challenges.¹⁰⁸

⁹⁷ JL Gibson 'Overcoming historical injustices; Land reconciliation in South Africa' in Cambridge University Press (2009) p1-218.

⁹⁸ Gibson (97 above)1-218.

⁹⁹ U Bob "Land –related conflicts in sub-Saharan Africa" (2010) African Journal on conflict resolution vol 10 no 2 p49-63.

¹⁰⁰ Bob (n 99 above)49-63.

¹⁰¹ Bob (n 99 above)49-63.

¹⁰² NC Girke "A Matter of balance: the European Union as a mediator in Yemen"(2015)European security vol 24 no 4 p509-524.

¹⁰³ L Viscidi and J Fargo "Local conflicts and natural resources."(2015)A Balancing Act FOR Latin American Governmants.Inter-American Dialogue p1-11.

¹⁰⁴ A Dhialulhaq et al "Resolving industrial plantation conflicts in Indonesia: Can mediation deliver?"(2018)Forest policy and Economics vol 91 p64-72.

¹⁰⁵ Dhialulhaq et al (n 104 above) 64-72.

¹⁰⁶ Dhialulhaq et al (n 104 above) 64-72.

¹⁰⁷ Dhialulhaq et al (n 104 above) 64-72.

¹⁰⁸ Dhialulhaq et al (n 104 above) 64-72.

2.9 Comparative analysis of mediation processes and practices used in South Africa, Kenya and Rwanda.

Each country's approach to land dispute mediation is a reflection of its historical, cultural and legal context. South Africa, Kenya and Rwanda provide a diverse context for land dispute mediation.

2.9.1 South Africa

South Africa consists of mediation process that provides for court-annexed mediation¹⁰⁹. Trained mediators facilitate negotiations between disputing parties. This is often used in urban areas¹¹⁰. There is also community-based and traditional leader's mediation.¹¹¹ This is often used in rural areas where involvement of community and traditional leaders are important.¹¹² These leaders play a crucial role in resolving land related disputes. The legal framework for land disputes is the land reform laws. The Land Reform Act provides guidelines for land disputes.¹¹³ There are also specialised land claims courts to handle disputes related to restitution and land rights that encourage mediated settlements.¹¹⁴ South African approach is focused on addressing historical injustices such as the land dispossession that occurred during apartheid era which makes it unique from other countries due to its emphasis on transformation and restitution.¹¹⁵ The challenges faced by South Africa include its complex historical context. The history of apartheid-era land dispossession makes land disputes more complicated and requires sensitive, subtle mediation approaches.¹¹⁶ Communication between formal and traditional systems is another

¹⁰⁹ M Olivier 'the role of court-annexed mediation in providing access to justice in the resolution of commercial disputes' PhD dissertation University of North West (2018).

¹¹⁰ Olivier (n 109 above).

¹¹¹ B Cousins and T Kepe "Decentralisation when land and resource rights are deeply contested: A case study of the Mkambati eco-tourism project on the Wild Coast of South Africa"(2004)The European Journal of Coast of South Africa vol 16 no 1 p41-54.

¹¹² Cousin and Kepe (n111 above) 41-54.

¹¹³ The Land Reform Act of 1996.

¹¹⁴ K Geldenhuys "Specialised courts: a court for almost every occasion"(2017)Servamus community-based Safety and Security Magazine vol 110 no 3 p20-24.

¹¹⁵ L Ntsebeza 'The land question in South Africa: The challenge of transformation and redistribution' in HSRC press, 2007 p1-220.

¹¹⁶ Ntsebeza (n 115 above) p1-220.

challenge as it is necessary for successful mediation outcomes especially in areas where traditional practices have a huge influence.¹¹⁷

2.9.2 Kenya

Kenya consists of a mediation process that is formal and informal.¹¹⁸ There is court based and community based mediation.¹¹⁹ Informally disputes are resolved by local elders or community leaders governed by traditional customs and practices.¹²⁰ The Kenyan judiciary actively promotes alternative dispute resolution mechanisms such as mediation of land disputes.¹²¹ The Kenyan legal framework consist of land acts thus The Land Act¹²² and Land Registration Act¹²³ provides the legal framework for land mediation in Kenya. These laws establish the rights of individual and communities regarding land use and ownership.¹²⁴ Kenya also has a small claims court that allows parties to resolve land disputes inexpensively through mediation.¹²⁵ The challenge faced by Kenya is the limited access to legal representation for disadvantaged communities which ultimately affects the fairness of mediation process.¹²⁶ Mediated agreements may also face challenges related enforcement due to corruption.¹²⁷

¹¹⁷ S Puri et al 'Contextuality of participation in IS design: a developing country perspective'(2004) In Proceedings of the eighth conference on Participatory design: Artful integration: interweaving media, materials and practices vol 1 p42-52.

¹¹⁸ Mtuku et al (n 22 above)1-19.

¹¹⁹ Mtuku et al (n 22 above)1-19.

¹²⁰ Mtuku et al(n 22 above)1-19.

¹²¹ Mtuku et al(n 22 above)1-19.

¹²² The Land Act of 2012.

¹²³ Land Registration act of 2012.

¹²⁴ L Alden Wily "The community land act in Kenya opportunities and challenges for communities"(2018)Land vol 7 no 1 p12.

¹²⁵ RM Mwaura "An analysis of the viability of implementing the proposed small claims courts in the Kenyan judiciary"(2016).

¹²⁶ AA Djurfeldt "Gendered land rights, legal reform and social norms in the context of land fragmentation-A review of the literature for Kenya, Rwanda and Uganda"(2020)Land use Policy vol 90 p104305.

¹²⁷ Djurfeldt (n 126 above) 104305.

2.9.3 Rwanda

Rwanda consists of community –based mediation through the “Abunzi” system.¹²⁸ Trained mediators at villages handle disputes such as land disputes.¹²⁹ This ensures accessibility and cultural relevance.¹³⁰ There are also mediation committees established at grassroots level, this promotes local participation and ownership in dispute resolution process.¹³¹ The Rwanda legal framework consists of land law. Rwanda’s 2013 Land Law governs land ownership, promotes mediation and reconciliation in resolving land disputes¹³². It provides a legal basis for mediation efforts and promotes consistency in outcomes.¹³³ Rwanda also integrates traditional Gacaca courts with modern legal structures that acknowledge and incorporate indigenous methods of conflict resolution.¹³⁴ The challenges faced by Rwanda include balancing traditional practices with modern legal frameworks to ensure that both are respected and integrated effectively.¹³⁵ Ensuring consistency and fairness in decisions made by community mediators from different areas is another challenge.¹³⁶

Similarities

All three countries employ a mix of formal legal frameworks and traditional community-based mediation methods¹³⁷. They therefore recognise the importance of involving local customs into dispute resolution.¹³⁸ Limited access to legal

¹²⁸ M Mutisi “The abunzi mediation in Rwanda: Opportunities for engaging with traditional institutions of conflict resolution (2011) African Centre for the Constructive Resolution of Disputes(ACCORD) no012 p1-4.

¹²⁹ Mutisi (n 128 above) 1-4.

¹³⁰ Mutisi (n 128 above)1-4.

¹³¹ Mutisi (n 128 above) 1-4.

¹³² Rwanda’s 2013 Land Law.

¹³³ Rwanda’s 2013 Land Law (n80 above).

¹³⁴ LL Rose “Women’s land access in post-conflict Rwanda: bridging the gap between customary land law and pending land legislation”(2003)Tex.J.Women & L vol 13 p197.

¹³⁵ Rose (n134 above)197.

¹³⁶ Rose n134 above)197.

¹³⁷ Djurfeldt (n 126 above) 104305.

¹³⁸ Djurfeldt (n 126 above) 104305.

representation for disadvantaged communities is a shared challenge that has impact on fairness and inclusivity of mediation process.¹³⁹

Differences

Rwanda's emphasis on community-driven Abunzi mediation is a highlighting feature that ensures localised and culturally sensitive dispute resolution.¹⁴⁰ South Africa's focus on addressing historical injustices such as land restitution makes it different as it emphasises the need for transformative and designed solutions.¹⁴¹

2.10 Roles and qualifications for mediators in each country.

Mediators play different roles in all three countries which are a reflection of the diverse approaches to mediation in different cultural, legal and social context. It is therefore necessary that we look at the roles played by mediators in each country and the qualifications they possess.

In South Africa mediators play an important role in court-annexed mediation by guiding parties through the mediation process in a formal legal system.¹⁴² They also engage with community addressing land disputes combining formal and traditional approaches.¹⁴³ Mediators bridge the communication gap and ensure informed decisions are made¹⁴⁴. Qualifications for mediators in South Africa often include a legal background for example qualified lawyers or retired judges.¹⁴⁵ Possession of legal knowledge is important in order to understand land laws and drafting legal agreements.¹⁴⁶ Mediators undergo accredited training involving mediation techniques, legal aspects of disputes and cultural sensitivity training.¹⁴⁷ Upon successful completion of training programs and examinations, mediator receives

¹³⁹ Djurfeldt (n 126 above) 104305.

¹⁴⁰ Mutisi (n 128 above)1-4.

¹⁴¹ Ntsebeza (n115 above)1-220.

¹⁴² Olivier (n 109 above).

¹⁴³ Olivier (n 109 above).

¹⁴⁴ Olivier (n 109 above).

¹⁴⁵ L Greyvenstein "Mediation & the law:Accerditation and training of family mediators"(2022)

Servamus community-based Safety and Security Magazine vol 115 no 8 p70-71

¹⁴⁶ Greyvenstein (n 145 above) 70-71.

¹⁴⁷ Greyvenstein (n 145 above) 70-71.

certification by recognized mediation bodies that ensure they meet professional standards.¹⁴⁸

Mediators in Kenya work to identify common ground between parties.¹⁴⁹ Their role is to encourage disputing parties to reach mutually acceptable agreement by emphasising cooperation and compromise.¹⁵⁰ They also undergo training programs which lead to certification upon completion.¹⁵¹ Kenyan mediators possess legal knowledge to navigate legal complexities related to land dispute.¹⁵²

Mediators in Rwanda promote reconciliation and are expected to be culturally sensitive by understanding local customs and traditions.¹⁵³ Mediators receive training from local authorities and government bodies that focus on conflict resolution techniques¹⁵⁴. Recognition by the community is also important. The Rwandan government is responsible for supporting and overseeing the training and appointment of community mediators to ensure a standardised approach.¹⁵⁵

2.11 Conclusion

In conclusion Rwanda's community-based approach shows effectiveness of involving local communities directly in mediation process, providing a sense of ownership and cultural relevance.¹⁵⁶ Kenya's integration of traditional and formal methods provides a comprehensive approach that ensures flexibility and adaptability for all contexts.¹⁵⁷ South Africa's focus on transformation gives a valuable lesson in addressing deep rooted historical injustices emphasising restitution and

¹⁴⁸ Greyvenstein (n 145 above) 70-71.

¹⁴⁹ AK Mugo "The Applicability of mediation in the resolution of criminal disputes in Kenya: a case for restorative justice in the criminal justice system"(2017) Strathmore University.

¹⁵⁰ Mugo (n149 above).

¹⁵¹ Mugo (n149 above).

¹⁵² Mugo (n149 above).

¹⁵³ G Payne "Land Issues in the Rwanda's Post Conflict Law Reform"(2011)Local case studies in African land law vol 21 p21-38.

¹⁵⁴ Payne). (n153 above)21-38.

¹⁵⁵ Payne (n153 above) 21-38.

¹⁵⁶ Mutisi (n 128 above)1-4.

¹⁵⁷ Mtuku et al (n 22 above).1-19

acknowledging mediation of land disputes.¹⁵⁸ Effective communication between formal and traditional systems is in this context important. While there are common challenges, each nation's unique emphasis on community involvement, a hybrid of traditional and formal methods or historical justice provides valuable insights for shaping land dispute resolution strategies on a global scale. While legal expertise is important, cultural sensitivity of mediators and government support for a standardized training play a huge role in ensuring effective mediation processes.¹⁵⁹

CHAPTER 3 –LEGAL AND INSTITUTIONAL FRAMEWORK

3.1 Introduction

Each country has unique legal frameworks, institutional structures and support systems with the common goal of ensuring fair and efficient resolution of land disputes through the use of mediation techniques. This chapter will examine legal frameworks related to mediation of land disputes in South Africa, Kenya and Rwanda. It will have a comparative analysis of institutional structures and support systems for mediation in each country. There will be an evaluation of the effectiveness and limitations of the legal and institutional frameworks.

3.1.1 South Africa

South Africa has various laws and regulations that govern land dispute mediation. For starters we have The Constitution of the Republic of South Africa that contains section 25 which provides land related issues.¹⁶⁰ There is a Land Reform programme that consists of three key elements that is restitution, redistribution and tenure reform in order to provide for constitutional essentials.¹⁶¹

¹⁵⁸ Ntsebeza (n 115 above)1-220.

¹⁵⁹ Di (n 88 above) p288-245.

¹⁶⁰ The Constitution of the Republic of South Africa,1996 as set out in sec 25

¹⁶¹ E Lahiff “Land reform in South Africa: is it meeting the challenge?”(2001)Institute for Poverty, Land and Agrarian Studies, University of the Western Cape p1-6

The Government has also enacted legislation in order to comprehensively provide for land reform through redressing inequality when it comes to land ownership¹⁶². The first law passed in a democratic government is the Restitution of Land Rights Acts; it makes provision for restitution of land to people and communities disposed due to apartheid laws.¹⁶³ The Expropriation Act makes provision for the expropriation and property for public.¹⁶⁴ We also have applicable legislation such as Deeds Registries Act which provides for the administration of land registration system and land rights registration¹⁶⁵. The State Land Disposal Act makes provision for state land and prevents the acquisition of state land through prescription.¹⁶⁶ Land Reform: Provision of Land and Assistance Act provides for the designation of certain land, settlement of persons and subdivision regulation.¹⁶⁷ There is also the Land Reform (Labour Tenants) Act which provides for the security of tenure of labour tenants and those using land because of their association with labour tenants, making provision for the land and rights acquisition by labour tenants.¹⁶⁸ The upgrading and conversion of ownership of land rights and transfer of tribal land to community is provided for by the Upgrading of Land Tenure rights Act.¹⁶⁹ These are just some of the few legislations enacted by government that promote land dispute resolution through mediation.

In order to deal with land related disputes the government has put in place land redistribution.¹⁷⁰ It has made efforts to change and improve the distribution of land ownership. This is mostly applicable to agricultural land owned by state or large land owners and redistributing it to the landless.¹⁷¹ They also designed a programme aimed at modifying legal and institutional framework for land administration through

¹⁶² Lahiff(n 161 above)1-6

¹⁶³ Restitution of Land Rights Act 22 of 1994

¹⁶⁴ Expropriation Act 63 of 1975

¹⁶⁵ Deeds Registries Act 47 of 1937

¹⁶⁶ State Land Disposal Act 48 of 1961

¹⁶⁷ Land Reform: Provision of Land and Assistance Act 126 of 1993

¹⁶⁸ Land reform(labour tenants) Act 3 of 1996

¹⁶⁹ Upgrading of Land Tenure rights Act 112 of 1991

¹⁷⁰ T Jacobs et al "Evaluating land and agrarian reform in South Africa: Land redistribution"(2003)Institute for poverty, Land and Agrarian Studies (PLAAS) p1-42

¹⁷¹ Jacobs et al(n 170 above)1-42

decentralization of administration and management of land.¹⁷² There is also the Land Tenure Reform which is a programme to change legal and institutional framework for land administration.¹⁷³ Institutions established include the Commission on Restitution of Land Rights and Land Claims Court to address land-related issues and mediate disputes.¹⁷⁴

3.1.2 Kenya

In Kenya the land disputes fall under the jurisdiction of the National Land Commission which was established under the Land Act.¹⁷⁵ The Land Act, The Community Land Act¹⁷⁶ and the Land Registration Act¹⁷⁷ provide legal framework for land dispute resolution in Kenya. These legislations aim to streamline land administration, registration and ensure efficient dispute resolution mechanisms¹⁷⁸.

3.1.3 Rwanda

Rwanda land dispute mediation is governed by the Organic Land Law (OLL).¹⁷⁹ This legislation is responsible for regulating various aspects of land tenure, acquisition and use.¹⁸⁰ It forms structures such as Land Mediation Committees in villages which play an important role in mediating disputes that are land-related.¹⁸¹ There is also the

¹⁷² L Ntsebeza "Democratic decentralisation and traditional authority: Dilemmas of land administration in rural South Africa" (2004) *The European Journal of Development Research* vol 16 no 1 p71-89.

¹⁷³ L Cliffe "Land Reform in South Africa"(2000)*Review of African Political Economy* vol 27 no 84 p273-286.

¹⁷⁴ C Walker "Relocating restitution"(2000)*Transformation* p44

¹⁷⁵ A Manji "The politics of land reform in Kenya 2012"(2014) *African Studies Review* 57 no 1 p115-130

¹⁷⁶ Community Land Act ,2016

¹⁷⁷ Land Registration Act,2012

¹⁷⁸ Manji(n 175 above)115-130

¹⁷⁹ Organic Land Law of 2013

¹⁸⁰ E Uwayezu and T Mugiraneza "Land Policy Reform in Rwanda and Land Tenure Security for all Citizens: Provision and Recognition of Women's Rights over Land"(2011)*Gender Issues in Land Administration*, Paper 4914

¹⁸¹ Uwayezu and Mugiraneza(n 180 above)4914.

Rwanda Land Management and Use Authority (RLMUA) which was put in place to oversee the implementation of land policies and regulations in the country.¹⁸²

3.2 Institutional and support systems for mediation

In order to promote social stability, economic development and protection of individual land rights these three countries have established institutional structures and support systems for mediation. It is therefore important to outline the institutional structures and support systems of each country:

3.2.1 South Africa

The institutional structures in South Africa include the Land Claims Court and the Land Rights Management Facility. These bodies play an important role in mediating land disputes to ensure fair resolutions and protecting rights of parties.

- Land Claims Court(LCC)

Is a specialised legal institution formed to deal specifically with land restitution cases particularly those arising from past racial discrimination and land disposition during the apartheid era.¹⁸³ It has jurisdiction to hear cases across any part of South Africa with authority to hear disputes related to land rights, determine compensation and oversee the restitution process.¹⁸⁴ The judges who preside over the matters have experience in land and property law therefore ensuring cases are handled by experts who are familiar with the complexities of land restitution.¹⁸⁵ The court is designed to provide expedited legal process for resolving land claims.¹⁸⁶ The court often involves affected communities in legal processes by allowing them to present their case and provide evidence.¹⁸⁷

- Land Rights Management Facility.(LRMF)

¹⁸² AK Hughes “Harnessin Technology to Advance Citizen-Centric Land Administration in Rwanda”(2022) African Journal of Land policy and Geospatial Sciences vol 5 no 2 p344-354

¹⁸³ K Farmbry and R Harper “Institutional legitimacy building in a context of transition: The South African Land Claims Court”(2005)Public Administration Review vol 65 no 6 p678-686.

¹⁸⁴ K Farmbry and R Harper (n 183 above) 678-686.

¹⁸⁵ K Farmbry and R Harper (n 183 above) 678-686.

¹⁸⁶ K Farmbry and R Harper (n 183 above) 678-686.

¹⁸⁷ K Farmbry and R Harper (n 183 above) 678-686.

This is a government initiative aimed at supporting land rights and improving land tenure security especially in communal areas.¹⁸⁸ It works directly with communities offering legal advice; facilitating land tenure processes and helping communities understand their rights.¹⁸⁹ Additionally it engages in capacity-building activities that include training community leaders and members about their land rights, legal procedures, and sustainable land use practices.¹⁹⁰ It has also played a role in conflict resolution through mediating land-related conflicts within communities.¹⁹¹ LRMF is also involved in development of policies related to land tenure and communal rights.¹⁹² It has also been seen to collaborate with many stakeholders such as government agencies, NGOs and community –based organisations to strengthen the support network available to communities.¹⁹³

There are also support systems provided such as legal aid services to those who cannot afford legal representation in order to ensure access to justice. The Government also supports mediation efforts through various programs, facilitating communication and understanding between parties that are in dispute.

3.2.2Kenya

Kenya has the National Land Commission that oversees land dispute resolution. It works alongside institutions such as the Environment and Land court which has jurisdiction on land issues. The Kenyan judiciary plays an important role in the mediation of land disputes.

- National Land Commission(NLC)

Is a constitutional body that operates independently, established in Kenya and came into effect in 2010 with the primary mandate of managing and administering public

¹⁸⁸ S Dlamini and O Ogunnubi “Land reform in South Africa: contending issues”(2018)Journal of Public Administration vol 53 no 2-1 p339-360.

¹⁸⁹ Dlamini and Ogunnubi (n 188 above) 339-360.

¹⁹⁰ Dlamini and Ogunnubi (n 188 above) 339-360.

¹⁹¹ Dlamini and Ogunnubi (n 188 above) 339-360.

¹⁹² Dlamini and Ogunnubi (n 188 above) 339-360.

¹⁹³ Dlamini and Ogunnubi (n 188 above) 339-360.

land to ensure sustainable and equitable distribution of land.¹⁹⁴ It is responsible for the adjudication of all historical land injustices and giving redress to those displaced due to past policies¹⁹⁵. It also oversees administration and management of community land advising national government on matters related to land policy.¹⁹⁶ NCL has powers to hear and determine disputes related to land while operating in a transparent manner that is accountable to the public.¹⁹⁷

- Environment and Land court

This is a specialised court system established to handle cases related to environmental conservation, land disputes and natural resources.¹⁹⁸ It has jurisdiction across Kenya ensuring consistent application of environmental and land laws.¹⁹⁹ The judges are experts in environmental and land laws.²⁰⁰ The court is designed to provide speedy resolution and has a participatory approach through community engagement.²⁰¹ It also encourages alternative dispute resolution methods such as mediation and negotiation.²⁰² In order to support land mediation, Kenya has established community land registration support programs to assist communities secure land rights. There is also legal aid services provided for by the government enabling individuals from vulnerable populations to access mediation services effectively.

¹⁹⁴ SW Kabue “To assess the role of the national Land Commission to resolve the problem of historical land injustices in Kenya”(2018)Strahmore University.

¹⁹⁵ Kabue (n 194 above).

¹⁹⁶ Kabue (n 194 above).

¹⁹⁷ Kabue (n 194 above).

¹⁹⁸ C Odote “The role of the Environment and Land Court in governing natural resources in Kenya”(2019)Law/Environment/Africa p335-356.

¹⁹⁹ Odote (n 198 above) 335-356.

²⁰⁰ Odote (n 198 above) 335-356.

²⁰¹ Odote (n 198 above) 335-356.

²⁰² Odote (n 198 above) 335-356.

3.2.3 Rwanda

Rwanda consists of a decentralised approach when it comes to land dispute resolution. It involves institutions such as the Land Mediation Committees that are found at the village level.

- Land Mediation Committees

Committees' consist of community members trained in mediation techniques and play a fundamental role in resolving local land disputes.²⁰³ They provide accessible and informal avenues for disputing parties to resolve disputes.²⁰⁴ Committee members are familiar with local customs, traditions and social norms allowing cultural sensitivity.²⁰⁵ Committees promote resolution of conflicts maintain peace and harmony.²⁰⁶ They are legally recognised entities and their decisions may hold legal weight²⁰⁷. These committees' have received support from government, NGOs and international agencies that includes training, resources and legal guidance.

The land policies in Rwanda are supported by public awareness campaigns and education programmes. This ensures citizens are informed about their rights and available mediation mechanisms. The Rwanda Land Management and Use Authority (RLMUA) provide support and oversee these initiatives.

3.3 Institutional frameworks effectiveness and limitations

While countries make strides to develop legal and institutional frameworks there are challenges that remain as significant limitations. Addressing these challenges can enhance effectiveness of these frameworks in order to resolve land disputes. It's therefore necessary that we evaluate the effectiveness and limitations of the legal and institutional frameworks for each country.

²⁰³ M Mutisi 'Local conflict resolution in Rwanda: the case of abunzi mediators'(2012)Integrating Traditional and Modern Conflict Resolution Experiences from selected cases in Eastern and the Horn of Africa. Durban, South Africa: Accord p41-74.

²⁰⁴ Mutisi (n 203 above) 41-74.

²⁰⁵ Mutisi (n 203 above) 41-74.

²⁰⁶ Mutisi (n 203 above) 41-74.

²⁰⁷ Mutisi (n 203 above) 41-74.

3.3.1 South Africa

South Africa's legal frameworks and institutions such as the Land Claims Court and Land Rights Management Facility have been effective in addressing historical land injustices.²⁰⁸ These institutions have facilitated the restitution of land to dispossessed communities, promoting social justice.²⁰⁹ The government has settled approximately 80664 claims benefiting 2, 1 million beneficiaries and has restored 3, 5 million hectares of land that can be used for agricultural and economic development.²¹⁰ Despite progress there are challenges such as delays in legal process and inadequate resources for institutions have hindered the effectiveness.²¹¹ Additionally complications in communal land tenure systems pose challenges in resolving disputes comprehensively.²¹²

3.3.2 Kenya

Kenya's National Land Commission and specialised courts have improved access to justice.²¹³ Community land registration initiatives have empowered local communities fostering a sense of ownership and stability. Limited resources, corruption, and bureaucratic inefficiencies have impeded the effectiveness.²¹⁴ There are also complex legal procedures and lack of awareness amongst the population which hinders the full realization of the intended outcomes.²¹⁵

3.3.3 Rwanda

Rwanda's approach of decentralisation involving Land mediation Committees has been successful in resolving many local disputes cost effectively.²¹⁶ Public

²⁰⁸ C Walker "Finite Land: challenges institutionalising land restitution in South Africa, 1995-2000"(2012)Journal of Southern African Studies vol 38 no 4 p809-826.

²⁰⁹ Walker (n 208 above)809-826.

²¹⁰ <https://www.gov.za/issues/land-reform> (accessed 6 October 2023).

²¹¹ Walker (n 208 above) 809-826.

²¹² Walker (n 208 above) 809-826.

²¹³ EM Bassett "The challenge of reforming land governance in Kenya under the 2010 Constitution"(2017)The Journal of Modern African Studies vol 55 no 4 p537-566.

²¹⁴ Bassett (n 213 above) 537-566.

²¹⁵ Bassett (n 213 above) 537-566.

²¹⁶ Mutisi (n 203 above) 41-74.

awareness campaigns and education programmes have also increased understanding of land rights amongst the communities. Despite its success, Rwanda is faced with resource constraints especially in remote areas which limit the effectiveness of the institutions.²¹⁷ The resolution quality also might vary based on the expertise of the committee members which can lead to potential inconsistencies.²¹⁸

All these nations are faced with their own challenges and limitations but there are common limitations that can be noted across these countries. Some of those limitations include the following: Resource constraints for example, limited financial and human resource has been seen to strain the implementation of legal frameworks and dispute resolution mechanisms.²¹⁹ The complexity of Land Tenure Systems where communal and customary land tenure systems complicate dispute resolution efforts therefore requiring subtle approaches and expertise²²⁰. Administrative hurdles, paperwork and lengthy legal procedures have been seen to discourage individuals especially those from disadvantaged communities from seeking legal redress.²²¹ Lack of public awareness where people have limited understanding of legal rights and available support systems within the communities has prevented individuals from using the available frameworks effectively.²²²

3.4 Conclusion

These countries have made efforts to develop legal and institutional framework which have been successful to a certain extent though there are challenges and limitations. These challenges can be addressed through targeted reforms, capacity building and community education.²²³ Addressing these challenges can enhance the

²¹⁷ Mutisi (n 203 above) 41-74.

²¹⁸ Mutisi (n 203 above) 41-74.

²¹⁹ B Rutherford “Land governance and land deals in Africa: Opportunities and challenges in advancing community rights’(2017)Journal of Sustainable Development Law and Policy(The) vol 8 no 1 p235-258.

²²⁰ Rutherford (n 219 above) 235-258.

²²¹ Rutherford (n 219 above) 235-258.

²²² Rutherford (n 216 above) 235-258.

²²³ Rutherford (n 216 above) 235-258.

effectiveness of these frameworks in resolving land disputes and can promote social stability through mediation.

Chapter 4-Outcomes and impacts of Mediation

4.1INTRODUCTION

This chapter will assess and compare the outcomes and impacts of mediation in land dispute resolution in South Africa, Kenya and Rwanda. An analysis of the sustainability of mediated agreements in each country will be done. It will evaluate the social, economic and environmental impacts of mediated resolutions. Common challenges faced in mediation of land disputes in the three countries will be outlined. A comparison of the lessons learned from the experiences of each country is important. This chapter will provide an analysis of case law and look at unique aspects which were learned from each case.

4.2 Mediation of land disputes in South Africa, Kenya and Rwanda has had different outcomes and impacts in these countries.

4.2.1South Africa

South Africa's use of mediation has had a huge role in addressing land disputes especially in the context of reforms post-apartheid.²²⁴ It has played a role in resolving conflicts between different racial and ethnic groups, promoting social unity and fostering economic growth and development.²²⁵

4.2.2 Kenya

Mediation in Kenya has been used to settle land disputes among communities especially in rural areas.²²⁶ The government in Kenya has established community land forums and alternative dispute resolution mechanisms to resolve conflicts

²²⁴ S Robins "Whose modernity? Indigenous modernities and land claims after apartheid"(2003)Development and Change vol 34 no 2 p265-286.

²²⁵ Robins (n 224 above)265-286.

²²⁶ K Muigua "Managing natural resource conflicts in Kenya through negotiation and mediation"(2016)University of Nairobi p1-35.

efficiently.²²⁷ The mediation efforts have contributed to reducing violence and promoting peaceful coexistence.²²⁸

4.2.3 Rwanda

Rwanda has implemented various reforms to address land disputes, including mediation initiatives.²²⁹ The country has a community-based land tenure system and has used mediation to resolve conflicts related to land ownership and use.²³⁰ Mediation efforts have been effective in promoting stability, social harmony and economic development.²³¹ Rwanda's approach to mediation also emphasizes community participation and empowerment which has contributed to positive outcomes in many cases.²³²

4.3 The sustainability of mediated agreements in these countries

The sustainability of mediated agreements in these countries is dependent on various factors including the effectiveness of the mediation process, the enforcement of agreements and the socio-economic and political contexts in each country.

4.3.1 In South Africa mediated agreements' sustainability is dependent on the successful implementation of land reform policies.²³³ Mediation can facilitate agreements between disputing parties however the long-term sustainability is dependent on the government's ability to enforce these agreements, make necessary resources available and address historical injustices.²³⁴

4.3.2 Kenya's sustainability of mediated agreements is influenced by the effectiveness of local dispute resolution mechanisms and the land tenure legal

²²⁷ Muigua (n 226 above) 1-35.

²²⁸ Muigua(n 226 above) 1-35.

²²⁹ Mutisi (n128 above) 1-4.

²³⁰ Mutisi (n 128 above) 1-4.

²³¹ Mutisi (n 128 above) 1-4.

²³² Mutisi (n 128 above) 1-4.

²³³ L Boule and A Rycrof "Mediation: principles, process, practices"(1998)JS Afri.L P167-169.

²³⁴ Boule and Rycrof(n 233 above) 167-169.

framework.²³⁵ Mediation outcomes are more likely to become successful and agreements are in alignment with existing land laws and are supported by community acceptance and local authorities.²³⁶ The sustainability in Kenya also depends on the involvement of stakeholders, including communities, NGOs and government agencies in the implementation and monitoring of agreements.²³⁷

4.3.3 In Rwanda the sustainability of mediated agreements is due to the country's community-based approach to conflict resolution.²³⁸ Mediated outcomes are integrated into the legal framework and supported by the government's commitment to land reforms and social unity.²³⁹ The active involvement of locals and the clear legal framework and government support enhances the sustainability of mediated agreements in Rwanda.²⁴⁰

4.4. The social, economic and environmental impacts of mediated resolutions.

4.4.1 Mediated agreements have a far-reaching impact on society, economy and the environment which fosters positive changes.²⁴¹ Social impact can be seen by mediated agreements helping to resolve disputes by promoting peace and harmony within communities and reducing tensions.²⁴² This ensures stability with regards to social relations and reduces the likelihood of violence.²⁴³ Mediation involves active participation of community members, empowering them to voice out their concerns and get involved in decision making –processes.²⁴⁴ This empowerment enhances social cohesion and community resilience²⁴⁵. Mediation processes that respect local

²³⁵ E Lindenmayer and JL Kaye "A choice for peace?:the story of forty-one days of mediation in Kenya"(2009)International Peace Institute p1-36.

²³⁶ Lindenmayer and Kaye (n 235 above) 1-36.

²³⁷ Lindenmayer and Kaye (n 235 above) 1-36.

²³⁸ Mutisi (n 203 above)41-74.

²³⁹ Mutisi (n 203 above) 41-74.

²⁴⁰ Mutisi (n 203 above) 41-74.

²⁴¹ Dhiaulhaq et al (n80 above)132-145.

²⁴² Dhiaulhaq et al(n80 above)132-145.

²⁴³ Dhiaulhaq et al(n80 above)132-145.

²⁴⁴ Dhiaulhaq et al(n80 above)132-145.

²⁴⁵ Dhiaulhaq et al(n80 above)132-145.

customs and traditions play a role in preserving cultural heritage; ensuring traditional practices are taken into account in dispute resolution.²⁴⁶

4.4.2 Economic impact of mediation can be seen where resolving land disputes through mediation creates a stable environment that allows for investments.²⁴⁷ Investors are more likely to be attracted to engage in regions where land issues are settled efficiently, leading to economic growth and development.²⁴⁸ Mediated agreements related to land use can lead to improved agricultural practices and increased productivity.²⁴⁹ When land tenure is secure, farmers are more willing to invest in sustainable farming techniques.²⁵⁰ In areas that attract tourists, resolving disputes through mediation can lead to sustainable tourism development, promoting economic growth while preserving natural resources.²⁵¹

4.4.3 Environmental impact can be seen where mediated agreements often address issues related to natural resource use, ensuring sustainable management of forests, water bodies and other ecological resources.²⁵² This helps conserve the environment for future generations²⁵³. Resolving disputes related to protected areas or habitats through mediation can aid in biodiversity conservation efforts, protecting endangered species and preserving ecosystems.²⁵⁴ Mediation can also facilitate agreements on

²⁴⁶ Dhialulhaq et al(n80 above)132-145.

²⁴⁷ Andrew (n 26 above)117-130.

²⁴⁸ Andrew (n 26 above) 117-130.

²⁴⁹ Andrew (n 26 above) 117-130.

²⁵⁰ JD Michler and GE Shively “Land tenure, tenure security and farm efficiency: Panel evidence from the Philippines (2015) Journal of Agricultural Economics vol 66 no 1 p155-169.

²⁵¹ M Wang et al “Community participation and residents ‘support for tourism development in ancient villages: The mediating role if perceptions of conflicts in the tourism community”(2021)Sustainability vol 13 no 5 p2455.

²⁵² MJ Rowland “Bargaining for life: protecting biodiversity through mediated agreements”(1992) Envntl.L vol 22 p503

²⁵³ Rowland (n 252 above)503.

²⁵⁴ Rowland (n 252 above)503.

land use practices that enhance climate change resilience, such as reforestation initiatives or the establishment of green spaces in urban areas.²⁵⁵

4.5 Common challenges faced in the mediation of land disputes in countries

There are many common challenges faced in the mediation of land disputes in countries such as South Africa, Kenya, and Rwanda. Most land disputes have deep historical roots that involve colonial-era policies, displacement, and discriminatory practices.²⁵⁶ Inadequate and or ambiguous land records have led to disputes over land ownership and boundaries.²⁵⁷ The absence of accurate and accessible land documentation complicates the mediation process, making it challenging to establish rightful ownership.²⁵⁸ Rural areas where most land disputes occur; have limited access to professional mediation services.²⁵⁹ The lack of access disturbs the timely resolution of disputes.²⁶⁰ There are often unequal power dynamics due to land disputes involving parties with more power versus marginalised communities.²⁶¹ The power dynamics can affect the fairness of the negotiation process. Cultural norms and traditional practice related to land ownership can contradict with formal legal systems. It becomes a challenge for mediating disputes while respecting the cultural differences and finding a common ground for resolution.²⁶² The issues of corruption within legal and administrative systems undermine the integrity of mediation process.²⁶³ Undue influence often leads to biased outcomes that tarnish trust in the

²⁵⁵ A Knaster “Resolving conflicts over climate change solutions: making the case for mediation”(2009)Pepperdine.Dispute.Resolution Law journal vol 10 no 3 p1-59.

²⁵⁶ AO Akinola and H Wissink “Trajectory of land reform in post-colonial African states” (2019) Springer Nature Switzerland AG p1-189.

²⁵⁷ Akinola and H Wissink (n256 above)1-189.

²⁵⁸ Akinola and H Wissink (n256 above)1-189.

²⁵⁹ MS McKnight “Access to mediation services for rural, low-income and culturally diverse populations”(1997) Mediation Quarterly vol 15 no 1 p39-50.

²⁶⁰ McKnight (n259 above)39-50.

²⁶¹ C Baraldi “An interactional perspective on interpreting as mediation”(2015)Lingue Culture Mediazioni-Languagues Cultures Mediation (LCM Journal) vol 1 no1-2 p17-36.

²⁶² M LeBaron “Mediation and multicultural reality”(1998)Peace and Conflict Studies vol 5 no 1 p1

²⁶³ B Mohamad et al “The role of intergrity as a mediator between work satisfaction and work performance in the perspective of Islam: An empirical Approach using SEM/AMOS

mediation process. Weak or ambiguous land laws and regulations also hinder the mediation process.²⁶⁴ It is therefore necessary to have clear legal guidelines and framework in order to enforce mediated agreements. The rapid population growth and urbanisation increases the demand for land, which increases land-related disputes, this is another challenge that makes resolving land disputes more complex.²⁶⁵

4.6 The lessons learned from the experiences of South Africa, Kenya and Rwanda.

4.6.1 Lessons learnt from the experience in each country contribute valuable lessons to the broader understanding of effective conflict resolution in the context of land disputes. South Africa post-apartheid highlights the importance of an inclusive approach to mediation, considering the diverse interest and historical injustices among different racial and ethnic groups.²⁶⁶ The challenges faced show the need for comprehensive and well-implemented land reform policies to address historical inequalities and just distribution of land resources.²⁶⁷ Lessons from South Africa emphasise the importance of empowering local communities in the mediation process, fostering a sense of ownership and participation.²⁶⁸

4.6.2 Kenya' experience highlights the importance of continuous legal reforms to strengthen land tenure systems and ensure that mediated agreements align with updated legal frameworks.²⁶⁹ The success of mediation in Kenya is dependent on community involvement, emphasizing the importance of understanding and respecting local customs and traditions.²⁷⁰ Lessons from Kenya also highlight the

Model”(2014)International Journal of Research in Applied ,Natural and Social Sciences vol 2 no 1 p71-84.

²⁶⁴ Mohamad et al(n 263 above)71-84.

²⁶⁵ A Locke and G Henley “Urbanisation, land and property rights”(2016)ODI report Jan.p1-53.

²⁶⁶ T Murithi and PM Ives “Mediation and the dilemma of inclusion”(2007)Centre for Humanitarian Dialogue(HD Centre) p77-86.

²⁶⁷ Murithi and Ives (n 266 above)77-86.

²⁶⁸ Murithi and Ives (n 266 above)77-86.

²⁶⁹ SF Coldham “Land-tenure reform in Kenya: The limits of law”(1979)The Journal of Modern african Studies vol 17 no 4 p615-627.

²⁷⁰ Muigua (n 51 above).

necessity of implementing measures to mitigate corruption within the land administration system in order to ensure preservation of the integrity of the mediation process.²⁷¹

4.6.3 Rwanda's emphasis on community –based solutions demonstrates the effectiveness of involving local communities in mediation process aligning with traditional conflict resolution mechanisms.²⁷² The country's experience showcases the importance of integrating mediated agreements into the legal framework, providing a foundation for enforcement and long-term sustainability.²⁷³ The lessons from Rwanda suggest the value of adopting a holistic approach that considers legal aspect and the broader socio-economic context and environmental considerations in land dispute resolution.²⁷⁴

4.7 Land mark cases that promoted mediation of land disputes in all three countries.

South Africa

- Government of the Republic of South Africa and others v Grootboom and others 2000²⁷⁵

Squatters who were evicted from an informal settlement in Wallacedene had minimal shelters made of plastic at a sports centre. They did not have access to basic sanitation. An action was brought by the group under section 26 and 28 of the South African Constitution. The Court's decision has impact on housing policy. It concluded that national housing program did not live up to the government's obligations under the constitution. The Constitutional Court held the state was obliged to take positive action to assist those living in extreme conditions. This case is important because it

²⁷¹ Muigua (n 51 above).

²⁷² P Clark "Hybridity, holism and traditional justice: The case of the Gacaca courts in post-genocide Rwanda (2007) *Geo Wash Int'l L.Rev* vol 39 p765.

²⁷³ Clark (n272 above) 765.

²⁷⁴ Clark(n272 above)765

²⁷⁵ Government of the Republic of South Africa and others v Grootboom and others 2000 (11) BCLR 1169 (CC).

highlights the government's responsibility to take reasonable legislative action, to ensure it achieves progressive realisation of rights using the available resources.²⁷⁶

- Port Elizabeth Municipality v Various Occupiers 2004²⁷⁷

This case dealt with the right to housing and heightened socio-economic rights in the context of land and housing. It is an important case in South Africa with significance for post-apartheid property rights and constitutional supremacy. The community of squatters were unlawfully occupying vacant private land within the jurisdiction of municipality. The municipal applied for eviction. The Constitutional Court ruled against eviction and relied on Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)

- Restitution of Land Rights Act Cases(LAMOSAs)cases²⁷⁸

Various cases have been brought under the Restitution of Land Rights Act such as the Land Access Movement of South Africa (LAMOSAs) cases. These cases often involve claims for the return of land dispossessed during apartheid. LAMOSAs is an independent federation of rural community based organisations. It advocates for land and agrarian rights. It came to light in 1991 as the Transvaal land restoration committee mainly to assist dispossesses communities in the former Transvaal region. One of LAMOSAs cases is Brakspruit Communal Property Association²⁷⁹ where the community has 320 landless households who rent from the farm owners. Through mediation the farmer had agreed to sell in 1996 but government did not make payments on time. The beneficiaries continued to farm and move onto the farm. The farmer is now refusing to sell and evicted the people. The farmer is only intending to sell to private sector and therefore the land has to be expropriated and the farmer compensated. In LAMOSAs and Others v Chairperson of the National council of Provinces and others, LAMOSAs was challenging parliament for failure to

²⁷⁶

https://en.m.wikipedia.org/wiki/Government_of_the_Republic_of_South_Africa_v_Grootboom(access ed 13 December 2023)

²⁷⁷ Port Elizabeth Municipality v Various Occupiers (CCT 53/03)(2004) ZACC 7;2005(1) SA217(CC);2004(12)BCLR 1268.

²⁷⁸ Pmg.org.za>docs>080618lamosa (accessed 13 December 2023)

²⁷⁹ Pmg.org.za>docs>080618lamosa (accessed 13 December 2023)

involve the public in terms of section 72(1)(a) of the Constitution in enacting the Restitution of Land Rights Amendment Act ²⁸⁰. The 31 December 1998 was a deadline for lodgement of claims under the Restitution Act. Post that date some people that were entitled to claim had not filled their claims and were being refused to lodge the claims and could only bring those claims under the Amendment Act. Court repealed the amendment act and declared it invalid. This case highlights historical injustices and the link to land conflicts. LAMOSHA showed the importance of restitution process and linked it to the restoration of dignity.

Kenya

- William ole Ntimama & Others v Attorney General (2002)²⁸¹

This case addressed the issue of land right for the Maasai community in relation to the establishment of the Amboseli National Park. This case highlights the importance of involving communities and land related issues in order to protect their rights and interest.

- Okiya Omtatah Okoiti and others v Attorney General and others (2014)²⁸²

This case while not specifically a land case, however it challenged the constitutionality of land acquisition procedures and emphasized the importance of due process in land matter. The Kenyan activist Okiya Omtatah filed a petition challenging the constitutionality of many government actions in the construction of Standard Gauge Railway which related to public interest and constitutional law. It is an important case because it put emphasis on the importance of adherence to legal processes for one to acquire land, contributing to the discussions of property rights and procedural fairness.

- Kenyatta University and another v National Land Commission and others (2022)²⁸³

²⁸⁰ Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and Others (CCT40/15)[2016]ZACC 22

²⁸¹ William ole Ntimama & Others v Attorney General (52/2002)(2006)BWHC 1

²⁸² Okiya Omtatah Okoiti & 2 others V Attorney General & 3 others [2014]eKLR

²⁸³ Kenyatta University and another v National Land Commission and others [2022]

This case involved dispute over land claimed by the Kenyatta University and the government. Government cabinet had decided to sub-divide the land without consulting the university and the vice chancellor of the university had to cede the title deed to the state. Questions were raised regarding the validity of the title deed held by the university and corruption was alleged. The university was facing imminent threat of losing land measuring at 40 acres. The High court issued an order barring interference with ownership of the university land by the government. The significance of the case was that it addressed the issues related to transparency in land transactions involving public institutions which is also important in mediation of land disputes.

Rwanda

- Gacaca Courts²⁸⁴

Despite it not being a single case, the gacaca Courts were an important post-genocide initiative in Rwanda. They were community-based courts aimed at achieving justice and reconciliation including addressing land disputes arising from genocide cases that arose from the 1994 Rwanda genocide. Alleged participation would in the genocide le witnesses from community to testify, accused would also provide his defence and the local community members would deliberate and make a collective decision based on the evidence. The courts emphasised restorative justice encouraging forgiveness and acknowledgement of wrongs. These cases are important because mediation was used to resolve conflicts that arose due to the genocide and the success of mediation was seen in the social harmony it brought. The conviction of Jean Kambada to life imprisonment in 1998 marked the first time head of government was convicted for genocide.

- Rwanda's Land Tenure Regularization Program(LTR)²⁸⁵

Rather than a single case, Rwanda implemented a comprehensive Land Tenure Regularisation Programme, involving legal reforms and widespread land registration. This initiative plays an important role as it addresses land tenure issues on a broader

²⁸⁴ <https://www.un.org/preventinggenocide/rwanda> (accessed 5 December 2023)

²⁸⁵ <https://www.afb.org>document> (accessed 13 December 2023)

scale It involves a range of coordinated reforms and developments that strengthen the land sector governance, leading to cost effective land administration systems..

- Greening Rwanda :Case of Gishwati Forest²⁸⁶

Efforts to restore the Gishwati Forest involve legal and environmental considerations, reflecting Rwanda's commitment to sustainable land use and conservation. This case highlights the importance of forward thinking progressive policies which are necessary in order to curb land conflicts.

4.8 Unique aspects which were learned from case law.

Each country has unique lessons learnt from the cases they have experienced. Land related cases in South Africa highlight the importance of constitutional rights.²⁸⁷ The jurisprudence has put emphasis on the need to balance property rights and the broader constitutional imperatives of equality and social justice. ²⁸⁸The cases in South Africa have also underscored the role of restoring land rights as a means of addressing historical injustices and promoting reconciliation among various ethnic groups in South Africa.²⁸⁹

Kenya's land cases have revealed the deep connection between individuals and their land as a source of identity. ²⁹⁰The decisions in these cases recognise the cultural and social importance of land to communities.²⁹¹ The legal landscapes reflect on-going struggles to address past injustices including land dispossession

²⁸⁶ <https://www.environment.gov.rw/news-detail/how-rwandahttps://www.environment.gov.rw/news-detail/how-rwaanda--is-putting-its-forests-first-in-the-fight-against-climate-change-chagea-is-putting-its-forests-> (accessed 13 December 2023).

²⁸⁷ AJ Van der Walt "Property, social justice and citizenship: property law in post-apartheid South Africa" (2008) Stellenbosch Law Review vol 19 no 3 p325-346.

²⁸⁸ Van der Walt(n 287 above)325-346.

²⁸⁹ Van der Walt (n 287 above)325-346.

²⁹⁰ K Kanyinga "The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya"(2013) Kenya's Uncertain Democracy p66-85.

²⁹¹ Kanyinga(n290 above)66-85.

during colonial period.²⁹²The cases show the complexities of rectifying historical wrongs within the modern legal framework.²⁹³

Rwanda's cases highlight community –based solutions in resolving conflicts and promoting reconciliation.²⁹⁴Community involvement is key. The focus on land the Land Tenure regularisation programme demonstrates a commitment to a holistic approach to land management.²⁹⁵Legal reforms and land registration efforts aim to create a secure and transparent system promoting sustainable development in Rwanda²⁹⁶.

4.9 Conclusion

The case law in all three countries provide valuable knowledge into the complicated dynamics of land-related disputes and their resolution. The unique experiences highlight the importance of a distinct understanding of historical context, cultural considerations and constitutional principles in addressing land disputes.²⁹⁷Sustainable resolutions require inclusive approaches, legal reforms and community involvement to achieve social harmony, economic development and environmental conservation.

Chapter 5-Research findings, Conclusion and Recommendations

5.1 INTRODUCTION

This chapter will discuss the research findings and a conclusion will be generated based on the findings. It will show synthesis of the key similarities, differences and trends based on the three countries. It will contain recommendations to enhance use of mediation in land disputes. It will also provide recommendations for addressing challenges in land disputes

²⁹² Kanyinga(n290 above)66-85.

²⁹³ Kanyinga(n290 above)66-85.

²⁹⁴ O Adekola et al "Towards a holistic land evaluation in sub-Saharan Africa: novel framework with an application to Rwanda's organic land law (2005)Land Use Policy vol 103 p105291.

²⁹⁵ Adekola et al(n 294 above) 105291.

²⁹⁶ Adekola et al(n 294 above) 105291.

²⁹⁷ Van der Walt(n 287 above)325-346.

5.2 The research findings and a conclusion based on the findings.

Research findings show that historical injustices, including colonisation form the common backdrop for land disputes in South Africa, Kenya and Rwanda.²⁹⁸ Community involvement is always emphasised as important for understanding, preventing and resolving land disputes.²⁹⁹ Local perspectives, customs and traditions play a huge role.³⁰⁰ It can also be noted that legal reforms are essential to address challenges related to unclear land records, and power imbalance.³⁰¹ Mediation is also seen as an effective alternative to litigation, providing flexibility, efficiency and community-oriented solutions.³⁰² Capacity building and training is recommended to ensure effective resolution of land disputes.³⁰³ The synthesis reflects a consensus on the multifaceted nature of land disputes and the benefits of integrating technology and mediation.³⁰⁴ Each country's unique context contributes to the overall understanding of effective land dispute resolution strategies through mediation.

In conclusion the widespread presence of mediation in land disputes is intricately connected to historical, political and economic factors. The legacy of colonisation and political instabilities has had great impact on land tenure systems often contributing to disputes.³⁰⁵ Political decisions and government policies play a huge role in shaping the context for land disputes in South Africa, Kenya and Rwanda.³⁰⁶ Resource scarcity has also been the reason for increased tensions and mediation

²⁹⁸ MLM Mbaio "Undoing the injustices of the past: restitution of rights in land in post-apartheid South Africa, with special reference to the North-West province"(2002)Journal for Juridical Science vol 27 no 2 p88-114.

²⁹⁹ DJ Safari "The role and efficacy of the land adjudication committee as an Alternative Land Dispute resolution Mechanism in Narok Country "PhD dissertation University of Nairobi 2013.

³⁰⁰ Safari (n 299 above).

³⁰¹ L Cotula et al "Land tenure and administration in Africa: lessons of experience and emerging issues"(2004) International Institute for Environment and Development P1-44.

³⁰² P Field et al "Integrating mediation in land used decision making "(2009) Screening vol 30 no 10 P1-40.

³⁰³ Field et al(n 303 above)1-40.

³⁰⁴ Field et al(n 303 above)1-40.

³⁰⁵ Mbaio (n 298 above) 88-114.

³⁰⁶ Cotula et al (n 301 above)1-44.

emerges as a critical to navigating these challenges.³⁰⁷ The effectiveness of mediation hinges on its ability to address not only the immediate issues but also the deeper historical and systematic factors influencing land conflicts. Addressing land disputes requires a comprehensive approach that considers legal, social, technological and environmental aspects. The common thread is recognition of the importance of community involvement, transparent legal frameworks and mediation strategies that are proactive and adaptable for sustainable land dispute resolution³⁰⁸. It can safely be concluded that though there are challenges that need to be addresses, mediation is an effective tool for resolving land disputes across countries.

5.3 Synthesis of the key similarities, differences and trends based on the three countries.

5.3.1 The key similarities show that all three countries experienced historical injustices relate to land including colonisation and forced displacements, addressing these historical injustices is a common challenge.³⁰⁹ There is recognition in all the countries of the significance of involving local communities in land mediation process.³¹⁰ Community participation is observed as important in order to achieve sustainable and culturally sensitive resolutions.³¹¹ Each country has undergone legal reforms to address land-related challenges.³¹² This is seen in legal frameworks continuously evolving to adapt to the changing circumstances and improve the effectiveness of land mediation.³¹³ Efforts to mediate in all three countries aim to contribute to socio-economic development by providing stable environments for investments, encouraging sustainable land use practices and fostering economic growth.³¹⁴

³⁰⁷ Cotula et al (n 301 above)1-44.

³⁰⁸ S Lezak et al “Frameworks for conflict mediation in international infrastructure development: A comparative overview and critical appraisal”(2019)Journal of Cleaner Production vol 239 p118099.

³⁰⁹ Mbao (n 298 above) 88-114.

³¹⁰ Safari (n 299 above).

³¹¹ Safari (n 299 above).

³¹² Cotula et al(n 301 above)1-44.

³¹³ Cotula et al(n 301 above)1-44.

³¹⁴ Lezak et al (n 308 above) 118099.

5.3.2 The notable differences in the three countries are the legal systems which differ according to structures and approaches to land mediation, reflecting historical and cultural variation.³¹⁵ The land tenure systems are different with each country having unique arrangements and practices that influence the mediation of land disputes.³¹⁶ Despite all countries putting emphasis on reconciliation, the strategies used for example South Africa's focus on restitution and Rwanda's community-based approaches show different paths towards achieving this goal.³¹⁷ Environmental considerations are different in each country for instance, Rwanda place places huge emphasis on environmental sustainability in its land management strategies showcasing a unique focus on balancing socio-economic development with conservation.³¹⁸

5.3.3 Common trends in these three countries include an adoption of community-centred approaches that recognize and respect local customs and traditions in resolving disputes.³¹⁹ Holistic land management is another trend which involves integrating legal, socio-economic and environmental considerations for comprehensive and sustainable solutions.³²⁰ There is also an increasing trend in leveraging technology for land management aiming to enhance transparency and efficiency in resolving disputes.³²¹ Legal systems in all three countries are also continually evolving indicating a trend towards adapting laws to address emerging challenges and improve the effectiveness of land mediation process.³²²

³¹⁵ EA Shewell "Mediation as a tool for conflict transformation: a comparative analysis of the South African Truth and Reconciliation Commission and the Rwandan Gacaca courts" PhD dissertation University of Stellenbosch 2020.

³¹⁶ PA Silva et al "Understanding the role of communication and mediation strategies in community-led territorial innovation: a systematic review" (2020) Interaction design and Architecture(s) Journal (IxD&a) vol 44 p7-28.

³¹⁷ Shewell (n 315 above).

³¹⁸ Shewell (n 315 above).

³¹⁹ Shewell (n 315 above).

³²⁰ Shewell (n 315 above).

³²¹ Silva et al (n 316 above)7-28.

³²² JP Platteau "The evolutionary theory of land rights as applied to sub-Saharan Africa: a critical assessment (1996) Development and change vol 27 no 1 P29-86.

5.4 Recommendations to enhance use of mediation in land disputes.

In order to enhance the use of mediation in land disputes it is important to develop and implement awareness campaigns to educate the public about the benefits of mediation in resolving land disputes.³²³ Information should be provided on the process of mediation, its advantages and how mediation can be accessed.³²⁴ Offer training programs for mediators to enhance their skills and understanding on specific lands issues.³²⁵ Establish certification processes to ensure that mediators meet certain standards and qualification.³²⁶ Encourage community involvement through community –based mediation centres.³²⁷ It is important also to ensure access to legal advice and support for mediating parties in order to address mediation legal implications and rights.³²⁸

There is also a need for collaboration with legal professionals to provide guidance on the interpretation and application of relevant laws during mediation process.³²⁹ Implementation of digital solutions for documenting and managing mediation cases is also necessary³³⁰. The government also needs to develop and implement supportive policies that recognise and encourage land mediation.³³¹ This can be done by establishing government-sponsored mediation programs and provide financial incentives for parties opting for mediation over litigation. There is also a need for collaboration between government and multi-stakeholders such as NGOs to

³²³ Andrew (n 26 above)117-130.

³²⁴ Andrew (n26 above) 117-130.

³²⁵ SA Henning “A framework for developing mediator certification programs”(1999)Harv.Negot.L.Rev vol 4 P189

³²⁶ Henning (n 325 above) 189.

³²⁷ Safari (n 299 above).

³²⁸ Z Larisa and R Svetlana “Mediation and legal assistance”(2014) Russian Law Journal vol 2 no 2 P145-156.

³²⁹ Larisa and Svetlana (n 328 above)145-156.

³³⁰ B SUTİYOSO “Implementation of Mediation As Online Dispute Resolution (ODR) in Civil Jurisdiction”(2023) International Journal of Environmental Sustainability, and Social Science vol 4 no 1 P297-308.

³³¹ B Derevyanko et al “Legal Foundations for Resolving Land Disputes Through Mediation as An Alternative Dispute Resolution Method”(2023)European Energy and Environmental Law Review vol 32 no 5 P248-256.

create a holistic approach to land dispute mediation.³³² Establishment of a system for collecting feedback from participants in mediation process is necessary to continuously improve the quality and effectiveness of mediation services³³³. Lastly establish partnership with universities and research institutions to study and improve the effectiveness of mediation in specific contexts.³³⁴

5.5 Recommendations for addressing challenges in land disputes.

To address challenges in land disputes it's important to periodically review and update land laws to address emerging challenges and ensure clarity in land tenure systems.³³⁵ Implementation of reforms will strengthen the legal framework supporting mediation by providing clear guidelines for mediated agreements.³³⁶ Strengthening land-use planning process will minimise conflicting land use and ensure sustainable development.³³⁷ There is also a need to enhance the capacity of land administration institutions ensuring they have resources and expertise to handle land-related matters efficiently.³³⁸ Specialised land courts and tribunals with trained personnel to handle land disputes are necessary.³³⁹ Implementation of community-based conflict prevention programs would also be beneficial to address underlying issues that contribute to land disputes³⁴⁰. The government needs to strengthen mechanisms for accountability in land administration in order to reduce corruption and ensure fair and

³³² B Gray "Cross-sectorial partners: Collaborative alliances among business, government and communities"(1996)Creating collaborative advantage P57-79.

³³³ CW Moore The mediation process: Practical strategies for resolving conflict.2014 John Wiley & Sons.

³³⁴ NH Katz "Mediation and dispute resolution services in higher education"(2017) The mediation handbook:Research,theory and practice.Routledge P170-178.

³³⁵ UE Chigbu et al "Combining land-use planning and tenure security: A tenure responsive land-use planning approach for developing countries"(2017)Journal of Environmental Planning and Management vol 60 no 9 P1622-1639.

³³⁶ Chigbu et al (n 335 above)1622-1639.

³³⁷ Chigbu et al(n 335 above)1622-1639.

³³⁸ S Enemark and P van der Molen "A framework for self-assessment of capacity needs in land administration"(2006)Shaping the change:XXIII International FIG Congress: Proceedings P1-28.

³³⁹ C Odote "The role of the Environment and Land Court in governing natural resources in Kenya"(2019)Law/Environment/Africa P3335-356.

³⁴⁰ Safari(n 299 above).

transparent processes.³⁴¹ There is also a need for collaboration with NGOs and civil society in order to leverage the expertise and resources of these organisations to implement effective interventions.³⁴² Lastly database that collect and analyse data on land disputes should be developed in order to facilitate proactive and informed decision making.

³⁴¹ B Pranab and D Mookherjee “Decentralization, corruption and government accountability”(2006)International handbook on the economics of corruption vol 6 no 1 P161-188.

³⁴² Gray (n 332 above) 57-79.

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