



# ALTERNATIVE DISPUTE RESOLUTION (ADR) STATUS IN GOVERNMENTS



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- Legal Framework
  - ADR in Financial Management
  - Common Disputes in Government
  - Costs of litigation in Government
  - Good stories in Government ADR resolutions
  - Challenges
  - Recommendations.

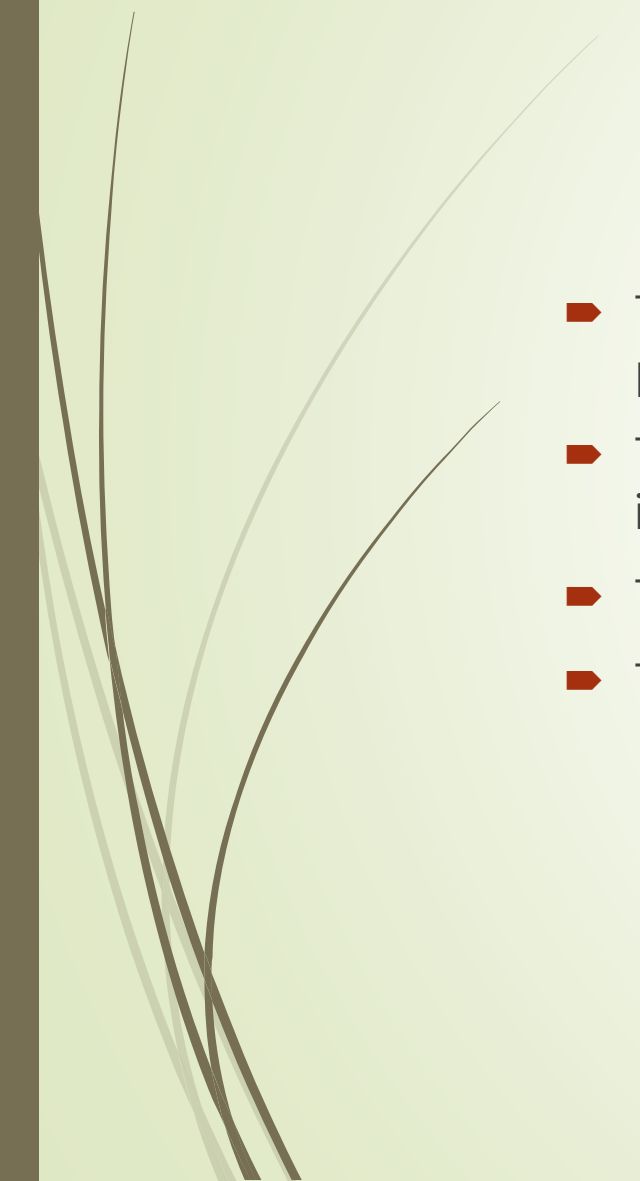


# Legal Framework

- Article 6(2) of the COK states that the two levels of government conduct their mutual relations on the basis of consultation and cooperation.
- Article 189(3) addresses the contemplated disputes between the two levels of government and the importance of amicable resolution of such disputes.
- The COK further states that national legislation shall provide procedures for settling intergovernmental disputes by ADR mechanisms, including negotiation, mediation and arbitration
- Section 30 of IGRA 2012 defines intergovernmental disputes as between the two levels of government and amongst county governments
- Section 31 provides for amicable resolution of such disputes through ADR mechanisms



# ADR in Financial Management

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- To safeguard value for money concept in avoidance of costly and prolonged litigation
  - To provide quick resolutions in finance related disputes to avoid accrued interests on delayed disputed payments
  - To build healthy supplier relationship
  - To address underlying motive in unnecessary disputes



## Common Government Disputes relate to the following:

- a) Powers and functions as provided in the Fourth Schedule of the COK 2010
- b) Transfer of functions
- c) Policies and legislation not aligned with Article 174 of the COK, 2010- Objects of devolution
- d) County boundaries
- e) Revenue
- f) Supplier payments
- g) Employment relations

## ..Cont

- Litigation is mainly between;
  - a) National government and County government(s);
  - b) County government(s) and National government agencies;
  - c) County government and County government;
  - d) County organ and another organ within the same county;
  - e) County Government and Employees
  - f) County Government and Suppliers
  - g) Between State agencies.
- IGR Act S. 33(2) provides that a party to an intergovernmental dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other IGR structure.
- The Parties have in most cases moved to courts before consideration of ADR.





# Selected costs of litigation

- In a case (Judicial Review Application No. 109 of 2014) involving the National Government and the County Government of Nairobi over land rates, subject matter valued at Kshs. 29 billion, the lawyer representing the County Government demanded for Kshs. 2 billion as instruction fees. However, the Court awarded Kshs. 724 million. Legal fee cost was 75 million
- No. 178 of 2016 involving the National Assembly and Council of Governors over the NGCDF Act, Average legal fees amounted to Kshs. 25 million
- In a dispute (E&L case No. 63 of 2015) involving the National Land Commission over grabbing of public land in Eldoret, estimated Kshs. 8 billion. Legal fee cost was Kshs. 200 million




## Cont.

- In a dispute (Nyeri ELRC No. 6 of 2015) involving the County Secretary of County Government of Tharaka Nithi and the County Government, legal fee paid was Kshs. 6,960,000
- In a case (Nairobi ELRC No. 1571 of 2015) involving the County Government of Machakos and the Kenya Medical Practitioners, Pharmacists and Dentist Union. Legal fee cost was Kshs. 13,650,000



# DISPUTES MEDIATED

Dispute	Issue	Status
Office block in West Pokot County	<ul style="list-style-type: none"> <li>County government allocated offices belonging to national government, by Transition Authority without consultation</li> <li>agreement reached that county government allocates funds in its 2015/16 financial year, or not later than 2017/18 FY for office construction</li> </ul>	<ul style="list-style-type: none"> <li>MoU signed between Governor and County Commissioner</li> </ul>
Land ownership between County government of Tharaka Nithi and Prisons Department	<ul style="list-style-type: none"> <li>On-going developments to disputed land halted</li> <li>ADR consultative meetings with both parties have been held.</li> <li>Proposals received from both parties and will be tabled for consideration, agreement and adoption</li> </ul>	<ul style="list-style-type: none"> <li>Both parties have ceased hostilities</li> </ul>



Dispute	Issue	Status
Inspection of meat for export in Nairobi County Slaughter Houses	<ul style="list-style-type: none"> <li>Nairobi County contends that county abattoirs are devolved functions while Ministry of Agriculture, Livestock and Fisheries, Veterinary Department's position is that export houses fall under national government</li> <li>ADR consultations established that the Ministry is yet to review its policy, law and regulations</li> <li>Both parties agree professionals involved bear the same skills, and therefore delegation to either level of government would be easy.</li> </ul>	<ul style="list-style-type: none"> <li>Both parties agreed to deploy Officers until the Ministry reviews its policies in line with devolution.</li> </ul>

Dispute	Issue	Status
<p>Privatization of public-owned Sugar Companies</p>	<ul style="list-style-type: none"> <li>County governments of Kisumu, Migori and Bungoma want assets and liabilities in sugar sector and factories (Nzoia, Muhoroni, South Nyanza, Chemelil and Miwani) to be transferred to them citing devolved functions and the land as ancestral</li> <li>National government's position is that land was legally acquired, factories are part of public investment which is a concurrent function</li> <li>a technical committee was formed to consider issues raised</li> </ul>	<ul style="list-style-type: none"> <li>A report is with IBEC for consideration and advise</li> </ul>

# DISPUTES MEDIATED BY IGRTC

Dispute	Issue	Status
Land ownership in Bomet County	<ul style="list-style-type: none"><li>Land allocated to Red Cross by national government for Part Development Plan while County government had identified it for office construction</li></ul>	<ul style="list-style-type: none"><li>ADR process is ongoing and IGRTC has scheduled a consultative meeting with both parties</li></ul>
Nairobi County and Ministry of Defence over Kayole Mihango road	<ul style="list-style-type: none"><li>Ministry of Defence did not want road constructed through the Embakasi Garrison Barracks while the County felt the road would better serve people if properly constructed</li><li>ADR consultative meetings held</li></ul>	<ul style="list-style-type: none"><li>Consensus reached with a road mapped by both parties.</li></ul>

Dispute	Issue	Status
Siaya County government and Ministry of Interior and National Coordination on ownership of houses.	<ul style="list-style-type: none"><li>• Siaya Agricultural Training College houses occupied by Ministry officials</li><li>• ADR resolved that State Department of Housing develops modalities to officially hand over the houses since the ATC and its assets had been transferred.</li></ul>	<ul style="list-style-type: none"><li>• Issue resolved, houses formally handed over</li></ul>



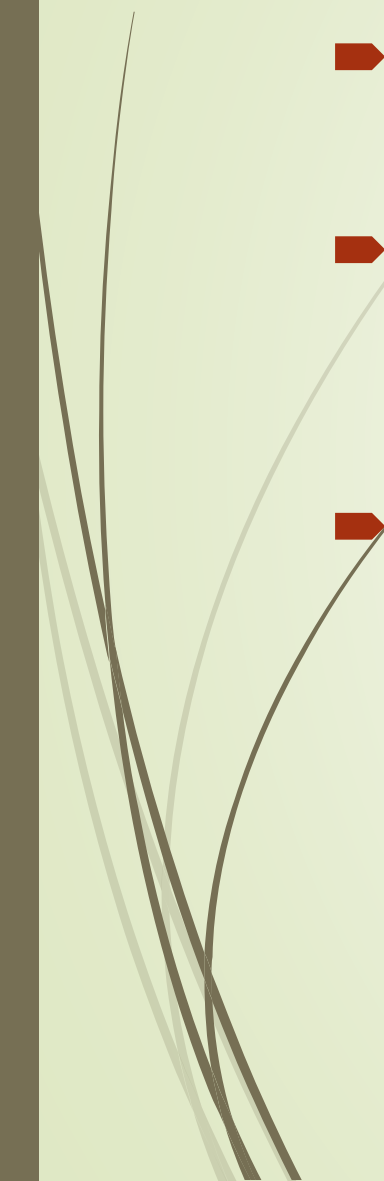
# Challenges in ADR Practice

- ADR Regulations-development was slowed
- Parties to disputes quickly resort to costly litigation as a first line of action.
- Limited acceptance of ADR mechanisms as an alternative to litigation- Distrust among disputants
- Legal departments unwillingness to opt ADR due to selfish interest for the litigation option spillovers.
- ( Fraud, collaborations with lawyers and outright corruption benefits)





# Recommendations

- Train staff and provide resources to handle disputes using different aspects of ADR.
  - Improve awareness of ADR among Counties and provide county legislations to operationalise ADR in most circumstances.
  - Counties to develop linkages with professional ADR providers for complex cases resolution.
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The End,

Thank you.