

**SPECIAL ISSUE**

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**SENATE BILLS, 2019**

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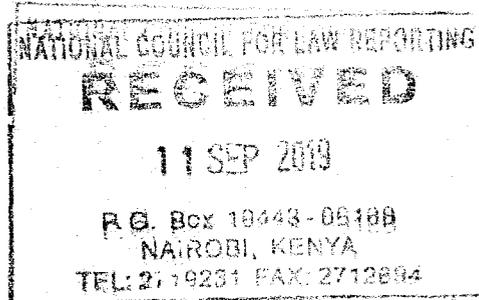
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**THE ALTERNATIVE DISPUTE RESOLUTION ACT,  
2019**

**A Bill for**

**AN ACT of Parliament to provide for the settlement of certain civil disputes by conciliation, mediation and traditional dispute resolution mechanism; to set out the guiding principles applicable; and for connected purposes**

**ENACTED** by the Parliament of Kenya, as follows—

**PART I – PRELIMINARY**

1. This Act may be cited as the Alternative Dispute Resolution Act, 2019.

Short title.

2. (1) In this Act—

Interpretation.

“advocate” has the meaning assigned to it under section 2 of the Advocates Act;

Cap. 16.

“alternative dispute resolution” means conciliation, mediation, traditional dispute resolution or any other mechanism of resolving disputes in which a person assist parties to resolve a dispute otherwise than through the normal judicial process or arbitration;

“alternative dispute resolution clause” means a contract clause within a written contract or a separate written agreement entered into by the parties agreeing to submit to alternative dispute resolution a dispute which may arise between them in respect of a defined legal relationship;

“alternative dispute resolution process” means all the steps taken in an attempt to resolve a dispute by alternative dispute resolution from the time a dispute is referred to alternative dispute resolution or steps are taken to resolve a dispute by alternative dispute resolution up to the time the parties reach an agreement or the alternative dispute resolution report is drawn up;

“Committee” means the Alternative Dispute Resolution Committee established under section 59A of the Civil Procedure Act;

“conciliation” means an advisory and confidential structured process in which an independent third party,

Cap. 21.

called a conciliator, actively assists parties in their attempt to reach, on a voluntary basis, a mutually acceptable settlement agreement to resolve their dispute;

“conciliator” means an impartial person accredited and registered to facilitate conciliation and includes employees and persons employed by that person;

“mediation” means a facilitative and confidential structured process in which parties attempt by themselves, on a voluntary basis, to reach a mutually acceptable settlement agreement to resolve their dispute with the assistance of an independent third party, called a mediator;

“mediator” means an impartial person accredited and registered to facilitate mediation and includes employees and persons employed by that person;

“party” means a person who is party to a dispute, and includes a legal person, a national government, a county government, or a state agency;

“Registrar” means the person assigned by the Judicial Service Commission under section 59AB of the Civil Procedure Act as the Alternative Dispute Resolution Registrar responsible for administrative services to the Committee;

“report” means the alternative dispute resolution report prepared by a conciliator, mediator or a traditional dispute resolver at the end of alternative dispute resolution process setting out the nature of the dispute, the stage the matter had reached and the outcome, and any other relevant matter subject to confidentiality as provided for under section 22 of this Act;

“Rules Committee” means the committee established under section 81 of the Civil Procedure Act;

“settlement agreement” means a written agreement between the parties entered into at the end of alternative dispute resolution process setting out the terms of agreement;

“traditional dispute resolution” means a process in which parties attempt to reach a mutually acceptable settlement agreement to resolve their dispute by the application of customary law of the community concerned and with the assistance of a third party called a traditional dispute resolver; and

“traditional dispute resolver” means a person or a group of persons who facilitates alternative dispute resolution process by the application of customary law, and may include an elder or a council of elders.

3. The object of this Act is to—

Object of the Act.

- (a) give effect to Article 159(2)(c) of the Constitution;
- (b) provide an effective mechanism for amicable dispute resolution;
- (c) promote a conciliatory approach to dispute resolution;
- (d) facilitate timely resolution of disputes at a relatively affordable cost;
- (e) facilitate access to justice;
- (f) enhance community and individual involvement in dispute resolution; and
- (g) foster peace and cohesion.

4. (1) This Act shall apply to certain civil disputes including a dispute where the National government, a county government or a State organ is a party.

Application of the Act.

(2) Despite subsection (1), this Act shall not apply to—

- (a) disputes subject to arbitration under the Arbitration Act;
- (b) disputes where a tribunal established under written law has exclusive jurisdiction;
- (c) election disputes;
- (d) disputes involving the interpretation of the Constitution;
- (e) a claim for a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights; or
- (f) disputes where public interest involving environmental or occupational health and safety issues are involved.

No. 4 of 1995.

5. The following principles shall apply to the resolution of disputes under this Act—

Guiding principles of alternative dispute resolution.

- (a) voluntary participation in the alternative dispute resolution process and a party may withdraw from alternative dispute resolution process at any time;

- (b) the right to information including the right to be informed of the existence of an alternative dispute resolution process prior to the commencement of process of determining a dispute;
- (c) confidentiality except in the case of traditional dispute resolution;
- (d) determination of disputes in the shortest time practicable taking into account the nature of the dispute;
- (e) impartiality in the determination of a dispute under this Act by the conciliator, mediator or traditional dispute resolver and disclosure of any conflict of interest that may arise;
- (f) a conciliator, mediator or traditional dispute resolver shall facilitate disputes which he or is competent to facilitate; and
- (g) the parties may use more than one alternative dispute resolution mechanism in an attempt to resolve a dispute.

## **PART II – ACCREDITATION AND REGISTRATION OF CONCILIATORS AND MEDIATORS**

6. (1) A person shall not practice as a conciliator or a mediator under this Act unless that person has been accredited and registered as a conciliator or mediator by the Committee.

Requirement for registration.

(2) A person shall be qualified for registration and accreditation if the person—

(a) meets the requirements set out under Chapter Six of the Constitution; and

(b) such other educational and professional qualifications as the Committee may determine.

7. (1) A person who intends to practice as a conciliator or a mediator shall submit an application in the prescribed form together with the application fees to the Committee for accreditation and registration.

Accreditation and registration of conciliators and mediators.

(2) The Committee shall consider the application within thirty days from the date of receipt of the application, and—

(a) where the applicant meets the requirements for registration, register the applicant as a conciliator or a mediator; or

(b) where the applicant does not meet the requirements for registration, decline the application.

(3) The Committee shall, within seven days of determining an application under subsection (2), inform the applicant of its decision and where it declines an application, the reasons for the decline.

(4) The Committee shall keep a register of all applicants, accredited conciliators and mediators.

8. The Committee may revoke the registration of, or suspend a conciliator or a mediator if the conciliator or mediator—

Revocation of registration.

(a) fails to comply with the terms and conditions of the registration;

(b) has been adjudged bankrupt; or

(c) is in breach of a code of conduct and is found guilty of such breach.

9. (1) A person whose application for accreditation has been declined or whose registration has been revoked or suspended may make application to the Committee, within seven days of receipt of the reason for refusal of application for accreditation and registration, or revocation or suspension of registration, for review of the decision of the Committee.

Right of review and appeal against the decision of the Committee.

(2) A person who is dissatisfied with the decision of the Committee under subsection (1) may appeal to the High Court within seven days of receipt of the decision of the Committee.

10. (1) The Committee shall publish a code of conduct for conciliators and mediators.

Code of conduct.

(2) Without prejudice to the generality of subsection (1), the code of conduct shall—

(a) be consistent with this Act;

(b) where necessary, be consistent with internationally acceptable standards;

- (c) provide for initial and further or continuous training of conciliators and mediators; and
- (d) provide for complaints, disciplinary and grievances procedure concerning conciliators, mediators and traditional dispute resolvers, and relevant enforcement procedures.

### **PART III – CONCILIATION AND MEDIATION**

**11. (1)** A court before which a dispute is filed or pending may refer the dispute for determination through conciliation or mediation where—

Referral of cases to conciliation or mediation.

- (a) the dispute is with respect to a matter that provides for resolution through alternative dispute resolution;
- (b) the law requires the dispute to be settled through alternative dispute resolution;
- (c) the court is of the view that alternative dispute resolution will facilitate the resolution of the dispute; or
- (d) a party to the dispute, with the consent of the other party, apply to the court to have the whole or part of the dispute referred for resolution through alternative dispute resolution.

**(2)** A court shall not refer a dispute for resolution through conciliation or mediation if—

- (a) the court determines that there is no dispute between the parties requiring resolution through conciliation or mediation;
- (b) there is no dispute between the parties with regard to the matter agreed to be referred to alternative dispute resolution or covered under this Act;
- (c) the clause making provision for alternative dispute resolution of the agreement, contract or any arrangement entered into by the parties is inoperative, incapable of being performed or void;
- (d) previous attempts at determining the dispute through alternative dispute resolution have failed;
- (e) substantial public interest involving constitutional, environmental, or occupational health and safety issues are involved;

- (f) the costs that are likely to be incurred would be disproportionately high;
- (g) there is a likelihood of delay;
- (h) a binding judicial precedent is required; or
- (i) a party is likely to be prejudiced as a result of power imbalances.

(3) A court shall specify the time within which a report on the referral shall be filed with the court.

**12.** (1) Parties may, on their own initiative, use conciliation or mediation to resolve a dispute.

Submission to conciliation or mediation.

(2) A party shall, where an agreement makes provision for determination of a dispute through conciliation or mediation, refer the dispute arising from such an agreement to conciliation or mediation.

(3) A party to an agreement which has not made provision for submission of a dispute to alternative dispute resolution or a dispute covered under this Act may, with the consent of the other party to the agreement, submit a dispute arising out of that agreement for determination through conciliation or mediation.

**13.** (1) Resolution of a dispute through conciliation or mediation commences—

Commencement of conciliation or mediation.

- (a) when the court refers a dispute to a mediator for conciliation or mediation; or
- (b) a party submits to the other party to a dispute a request to refer the dispute for determination through conciliation or mediation.

(2) The person to whom a request to submit a dispute for determination through conciliation or mediation is sent respond to the invitation within fourteen days of receipt of the request or the period specified in the invitation.

(3) Where a person fails to respond to a request to refer the dispute for determination through conciliation or mediation within the period specified under subsection (2) or in the request, such person shall be deemed to have rejected the request.

**14.** (1) A party to a dispute shall—

Role of the parties.

- (a) take reasonable measures to resolve the dispute through alternative dispute resolution before resorting to judicial process;
- (b) co-operate with the other party and the conciliator or the mediator in the resolution of the dispute;
- (c) participate in good faith in alternative dispute resolution process;
- (d) maintain confidentiality as provided for under section 30 of this Act; and
- (e) where an agreement is reached, ensure the agreement is written and sign the agreement.

(2) A party is considered to have taken reasonable measures to resolve a dispute through alternative dispute resolution under subsection (1)(a) by—

- (a) notifying the other party of the issues that are in dispute and offering to settle them through alternative dispute resolution;
- (b) responding in the affirmative to a notification under paragraph (a);
- (c) providing relevant information and documents to the other party to enable that other party understand the issues and how they might be resolved;
- (d) considering whether the dispute can be resolved through an alternative dispute resolution process;
- (e) where an alternative dispute resolution mechanism is agreed to—
  - (i) participating in the determination of the conciliator or mediator to facilitate the process; and
  - (ii) attending the alternative dispute resolution process.

**15.** (1) The parties to a dispute may appoint a conciliator or mediator to facilitate alternative dispute resolution process.

Appointment of a conciliator or mediator.

(2) Unless the parties otherwise agree, there shall be one conciliator or mediator.

(3) Where the parties fail to agree on the appointment of a conciliator or mediator, each party shall appoint their preferred conciliator or mediator.

(4) Where the parties appoint more than one conciliator or mediator, the conciliators or mediators shall act jointly.

**16.** (1) A conciliator or mediator shall, in facilitating the determination of a dispute, be independent and impartial.

Role of a  
conciliator or  
mediator.

(2) In determining a dispute, a conciliator or mediator shall—

- (a) conduct an assessment of the parties to the dispute and the dispute before commencement of conciliation or mediation to determine whether conciliation or mediation is appropriate;
- (b) provide a written statement regarding the conciliation or mediation process to the parties at least one day before commencement of conciliation or mediation process setting out—
  - (i) what conciliation or mediation is about;
  - (ii) the rights and obligations of the parties;
  - (iii) the role of parties; and
  - (iv) the role of the conciliator or mediator;
- (c) advise a party who does not have a legal representative or professional advisor in the conciliation or mediation process of their right to seek independent legal or professional advice;
- (d) ensure, at all stages in conciliation or mediation, that a party has the capacity to participate in the process;
- (e) facilitate communication, understanding, and assist parties to identify their needs and interests to enable the parties resolve the dispute;
- (f) prepare a report within three days of the conclusion of the conciliation or mediation process or such period as may be directed by the court; and
- (g) prepare and authenticate a settlement agreement.

(3) A conciliator or mediator shall conduct the conciliation or mediation process in such manner as he or she considers appropriate for the effective determination of the dispute and shall, for this purpose—

- (a) take into account the wishes of the parties including any request by a party that the conciliator or mediator hear oral statements; and
- (b) take steps to ensure the speedy settlement of the dispute.

**17.** (1) A conciliator or mediator shall, before accepting the appointment to act as a conciliator or mediator in the resolution of a dispute, disclose any circumstance which may—

Disclosure by a conciliator or mediator.

- (a) create a likelihood of bias; or
- (b) affect the conduct of the conciliation or mediation process.

(2) A conciliator or mediator shall promptly disclose to the parties any circumstance which arises during conciliation or mediation and which is likely to affect—

- (a) the impartiality of the conciliator or mediator; or
- (b) the conduct of the conciliation or mediation.

(3) Parties to a conciliation or mediation process may substitute a conciliator or mediator who makes a disclosure under subsection (2).

**18.** (1) The parties may revoke the appointment of a conciliator or mediator who, without reasonable cause, fails to—

Revocation of appointment of a conciliator or mediator.

- (a) commence the conciliation or mediation process within the period agreed by the parties; or
- (b) conduct conciliation or mediation within the rules.

(2) A conciliator or mediator may resign at any time after appointment.

(3) A conciliator or mediator who has resigned or whose appointment has been revoked shall, within seven days of revocation of appointment or resignation prepare a report and furnish a copy of the report to the parties and, to the court where the dispute was referred for resolution by that court.

(4) The parties shall, within fourteen days from the date of revocation of the appointment or resignation of a conciliator or mediator, appoint another conciliator or mediator.

19. (1) A person who is not a party to conciliation or mediation shall not attend the alternative dispute resolution process unless the parties agree and the conciliator or mediator consents to the attendance.

Attendance and representation in conciliation or mediation.

(2) A party to conciliation or mediation may be represented by an advocate, an expert or by such other person as the party shall consider appropriate.

(3) A conciliator or mediator may, where necessary and where the parties agree to pay the expenses, obtain expert advice on a technical aspect of a dispute.

(4) A request for the services of an expert may be made by the conciliator or mediator, or by a party with the consent of the other party.

(5) A party shall communicate, in writing to the conciliator or mediator and the other party, the name, address and the extent of the authority of any representative at least seven days before the representative's participation in conciliation or mediation.

20. (1) A conciliator or mediator shall, in consultation with the parties, determine the date and time for the conduct of the conciliation or mediation process.

Date, time and place of conciliation or mediation.

(2) The conciliator or mediator shall determine, in consultation with the parties to the dispute, a convenient place and time for the conduct of the conciliation or mediation process.

21. (1) A party shall submit to the conciliator or mediator and the other party to the dispute a statement of issues at least seven days before the first session of conciliation or mediation or within such period as the parties may agree.

Identification of issues in dispute.

(2) A conciliator or mediator may request each party to submit—

- (a) a written statement of that party's position;
- (b) the facts and grounds in support of that position;
- and

- (c) any documents and evidence that the party considers appropriate.

(3) A conciliator or mediator may request a party to submit additional information at any stage of conciliation or mediation process.

22. (1) A record, report, settlement agreement or any document submitted or prepared in the course of the conciliation or mediation process shall be confidential and not submitted to any person who is not a party to the conciliation or mediation proceedings.

Confidentiality of  
conciliation or  
mediation.

(2) For the purposes of subsection (1) a party shall not rely, as evidence in judicial proceedings, on—

- (a) the record of the conciliation or mediation;
- (b) a statement made at the conciliation or mediation;  
or
- (c) any information obtained during a conciliation or mediation process.

(3) A conciliator or mediator shall not disclose information submitted in the course of a conciliation or mediation process to any person who is not a party to the process without the consent of the parties.

(4) The parties may expressly waive the confidentiality requirement under subsection (1).

(5) The confidentiality requirement under this Act shall not apply where disclosure is—

- (a) required by law;
- (b) necessary to protect a child or a vulnerable person;
- (c) necessary to report or lessen a serious and imminent threat to the life, health or property of a person;
- (d) necessary to report the commission or prevent the likely commission of an offence;
- (e) necessary for the purpose of enforcement of the settlement agreement; or
- (f) necessary to prove or disprove a claim or complaint concerning negligence or misconduct of a conciliator or mediator based on conduct occurring during conciliation or mediation.

(6) Evidence submitted or used in a conciliation or mediation process which is admissible or subject to discovery in proceedings shall not be or become inadmissible or subject to confidentiality solely because it was submitted or used in conciliation or mediation.

23. (1) A conciliator or mediator may formulate terms of a possible settlement if it appears that there exist issues to a dispute to which the parties are agreeable and submit them to the parties for adoption and signature.

Settlement agreement.

(2) Where the parties reach an agreement, the conciliator or mediator shall prepare a settlement agreement within three days of such agreement.

(3) The conciliator or mediator shall explain the contents of the settlement agreement to the parties and, where the parties agree to the contents of the agreement, require the parties to execute the agreement in the presence of the conciliator or mediator.

(4) A settlement agreement shall, upon execution by the parties, be binding on the parties.

(5) A conciliator or mediator shall authenticate a settlement agreement and furnish a copy of the agreement to each party and, the court, where a dispute was referred to conciliation or mediation by a court.

24. (1) A conciliation or mediation process ends when

End of conciliation or mediation.

- (a) the parties execute a settlement agreement;
- (b) the conciliator or mediator, upon consultation with the parties, determines that further conciliation or mediation is not feasible;
- (c) the parties jointly submit a notice in writing to the conciliator or mediator that they do not intend to proceed with the conciliation or mediation process; or
- (d) a party submits a notice, in writing, to the conciliator or mediator and the other party that he or she does not intend to proceed with the conciliation or mediation process.

(2) Within seven days of the conclusion of a conciliation or mediation process the conciliator or

mediator shall submit a copy of the report to the parties and to the court, where the dispute was referred to conciliation or mediation by a court.

(3) Where the parties agree to settle the dispute, the conciliator or mediator shall submit, within seven days of the settlement, a copy of the report together with a copy of the settlement agreement the parties and to the court, where the dispute was referred to conciliation or mediation by a court.

**25.** A conciliator or mediator shall not, unless with the consent of the parties or required by law—

Role of a conciliator or mediator in other proceedings.

- (a) act as an arbitrator or representative or an advocate of a party in any judicial proceeding in respect of a dispute he or she facilitated; and
- (b) be presented by the parties as a witness in any proceedings arising out of or in connection with conciliation or mediation he or she facilitated.

**26.** (1) A conciliator or mediator is not liable for any act or omission in the performance of his or her role under this Act unless the conciliator or mediator is proven to have acted fraudulently, negligently or in bad faith.

Exclusion of liability.

#### **PART IV – TRADITIONAL DISPUTE RESOLUTION**

**27.** (1) A person shall not act as a traditional dispute resolver unless acquainted with the customary law to be applied in resolving the dispute.

Competence of a traditional dispute resolver.

(2) A traditional dispute resolver shall be impartial and apply the rules of natural justice.

(2) The Committee may, in as far as is reasonably practicable, prepare and maintain a list of traditional dispute resolvers.

**28.** (1) A party may submit a dispute for resolution through a traditional dispute resolution process.

Submission to traditional dispute resolution.

(2) A court before which a dispute is filed or pending may refer a dispute for resolution through a traditional dispute resolution process at any time where—

- (a) the court determines that traditional dispute resolution will facilitate the resolution of the dispute or a part of the dispute; or

(b) a party to the dispute, with the consent of the other party, apply to the court to have the whole or part of the dispute referred to traditional dispute resolution.

(3) A person shall not be forced or coerced to submit to traditional dispute resolution process.

(4) Traditional dispute resolution process shall be void where the process or settlement agreement contravenes the Constitution, a written law or public policy.

**29.** (1) A traditional dispute resolution process ends when—

End of traditional  
dispute resolution.

- (a) the parties reach an agreement; or
- (b) a traditional dispute resolver, upon consultation with the parties, determines that further traditional dispute resolution is not feasible.

(2) At the end of a traditional dispute resolution process—

- (a) where a settlement agreement is reached, the traditional dispute resolver shall, within seven days of the settlement—
  - (i) prepare a settlement agreement for execution by the parties; and
  - (ii) submit a copy of the settlement agreement to the parties and to the court, where the dispute was referred to traditional dispute resolution by a court;
- (b) where traditional dispute resolution process is terminated by the traditional dispute resolver or a party to the dispute, the resolver shall, within seven days of the settlement—
  - (i) prepare a report; and
  - (ii) furnish a copy of the report to the parties or the parties and the court where the dispute was referred to traditional dispute resolution by a court.

(3) Except where a dispute was referred for resolution through traditional dispute resolution or at the request of the parties, a settlement agreement need not be in writing.

**30.** (1) A settlement agreement in traditional dispute resolution is binding between the parties.

Effect of settlement agreement.

(2) A settlement agreement may for the purpose of record and enforcement be registered at the court with jurisdiction or a court that referred the dispute to traditional dispute resolution.

**PART V—RECOURSE TO COURT AND  
RECOGNITION AND ENFORCEMENT OF  
SETTLEMENT AGREEMENT**

**31.** An advocate shall, prior to initiating judicial proceedings, advise a party to consider resolving the dispute by way of alternative dispute resolution.

Duty of advocate to advise on alternative dispute resolution.

**32.** (1) A party shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time of commencing judicial proceedings, stating that alternative dispute resolution has been considered.

Confirmation that alternative dispute resolution has been considered.

(2) A party entering appearance shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time that party enters appearance or acknowledges the claim, stating that alternative dispute resolution has been considered.

(3) An advocate shall file with the court an alternative dispute resolution certificate in the prescribed form, at the time of instituting judicial proceedings or entering appearance, stating that the advocate has advised a party to consider alternative dispute resolution.

(4) A court may take into account the fact that a party has considered or participated in alternative dispute resolution when making orders as to costs, case management or such orders as the court determines.

**33.** A party may apply to the High Court or the court that referred the dispute for resolution through an alternative dispute resolution process—

Resort to judicial proceedings.

- (a) for an interim measure of protection;
- (b) to challenge jurisdiction of the alternative dispute resolution;
- (c) to challenge the appointment or impartiality of the conciliator, mediator or traditional dispute resolver;

- (d) to challenge referral of the dispute to alternative dispute resolution; or
- (e) to challenge the settlement agreement.

**34.** (1) A referral of a dispute for determination through alternative dispute resolution under section 11 of this Act shall serve as a stay of proceedings.

Stay of proceedings.

(2) A court before which proceedings are brought in a dispute which is the subject of alternative dispute resolution agreement or pending before alternative dispute resolution process may, if a party so applies not later than the time when that party enters appearance or acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to alternative dispute resolution.

(3) Proceedings before the court shall not be continued after an application under subsection (2) has been made and the matter remains undetermined.

(4) Where the court declines to stay judicial proceedings, any provision of the alternative dispute resolution agreement to the effect that a settlement agreement is a condition precedent to the bringing of judicial proceedings in respect of any dispute is of no effect in relation to those proceedings.

**35.** (1) Where a referral to alternative dispute resolution leads to the settlement of a dispute or part of the dispute the settlement shall be—

Recognition and enforcement of a settlement agreement.

- (a) prepared and filed in court;
- (b) recorded by the court as a judgment of the court; and
- (c) enforced by the court as its judgment.

(2) Where the referral does not lead to a settlement, the court shall continue with the proceedings from the point at which the referral was made for alternative dispute resolution.

(3) A settlement agreement shall be recognized as binding and upon application in writing to the High Court or the court that referred the matter to alternative dispute resolution, be enforced subject to this section and section 36.

(4) Unless the High Court or the court referring the dispute for alternative dispute resolution otherwise orders, a party relying on a settlement agreement or applying for its enforcement shall furnish—

- (a) the original settlement agreement or a duly certified copy of it; and
- (b) the original report or a duly certified copy of it.

**36.** The recognition or enforcement of a settlement agreement may be refused where—

- (a) at the request of the party against whom it is invoked, that party furnishes to the High Court or the court referring the dispute to alternative dispute resolution proof that—
  - (i) a party to the alternative dispute resolution process was under some incapacity;
  - (ii) the settlement agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the country where the settlement agreement was made;
  - (iii) the party against whom the settlement agreement is invoked was not given proper notice of the appointment of a conciliator, mediator or traditional dispute resolver;
  - (iv) the party against whom the settlement agreement is invoked was not given proper notice of the alternative dispute resolution process or was otherwise unable to present its case;
  - (v) the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the referral to alternative dispute resolution, or it contains decisions on issues beyond the scope of the referral to alternative dispute resolution, provided that if the decisions on issues referred to alternative dispute resolution can be separated from those not so referred, that part of the settlement agreement which contains decisions on issues referred to

Grounds for refusal of recognition or enforcement of a settlement agreement.

alternative dispute resolution may be recognized and enforced;

- (vi) the appointment of the conciliator, mediator or traditional dispute resolver was not in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;
  - (vii) the alternative dispute resolution process was not conducted in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;
  - (viii) the settlement agreement has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which that settlement agreement was made; or
  - (ix) the making of the settlement agreement was induced or affected by fraud, bribery, corruption or undue influence;
- (b) if the High Court or the court finds that—
- (i) the subject-matter of the dispute is not capable of settlement by alternative dispute resolution under the law of Kenya; or
  - (ii) the recognition or enforcement of the settlement agreement would be contrary to the public policy.

#### **PART VI – MISCELLANEOUS PROVISIONS**

**37.** Where the subject matter of alternative dispute resolution involves a dispute to which any limitation period under the Limitations of Actions Act applies, the parties to alternative dispute resolution process may agree in writing to suspend the running of the limitation period from the date of commencement of alternative dispute resolution process to the end of alternative dispute resolution process.

Limitation period.

Cap. 22.

**38. (1)** Unless the parties agree otherwise, the parties shall equally pay alternative dispute resolution expenses including the fees and expenses of—

Alternative dispute resolution expenses.

- (a) the conciliator or mediator;
- (b) any administrative assistance received;
- (c) experts called; and
- (d) any expenses incurred in connection with the alternative dispute resolution process and the settlement agreement.

(2) The alternative dispute resolution expenses shall be on the basis of a written agreement entered into between the parties and the conciliator or mediator at the commencement of the alternative dispute resolution process.

(3) The alternative dispute resolution expenses shall be reasonable and proportionate to the importance of the issue or issues at stake and to the amount of work carried out by the conciliator or mediator.

**39.** (1) The Chief Justice may make rules of practice and procedure, and regulations generally for the better carrying into effect of any provisions of this Act.

Rules and  
regulations.

(2) Without prejudice to the generality of subsection (1), the Chief Justice may make rules and regulations to provide for—

- (a) submission and referral of a dispute to alternative dispute resolution;
- (b) appointment of a conciliator, mediator or traditional dispute resolver;
- (c) the specific roles applicable to a mediator, conciliator, a traditional alternative dispute resolver or any other person facilitating alternative dispute resolution process;
- (d) the conduct of alternative dispute resolution process;
- (e) the forms to be used for submission or referral of a dispute to alternative dispute resolution, filing of a settlement agreement, or any matter to be filed;
- (f) the requirements and the process of application for accreditation and registration of conciliators and mediators, and related activities;

- (g) grounds for and the procedure relating to cancellation or suspension of registration;
- (h) professional conduct and etiquette of conciliators, mediators and traditional dispute resolvers;
- (i) any fee which may be charged for anything done under this Act; and
- (j) any other matter as may be necessary for the promotion of the objects and the regulation of the affairs of the Committee.

(3) For the purpose of Article 94(6) of the Constitution

- (a) the purpose and objective of the delegation under this section is to enable the Chief Justice to make rules and regulations to provide for the better carrying into effect the provisions of this Act
- (b) the authority of the Chief Justice to make rules and regulations under this Act shall be limited to bringing into effect the provisions of this Act and fulfilment of the objectives specified under this section;
- (c) the principles and standards applicable to the rules made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act.

Cap. 2.  
No. 23 of 2013.

## VII – TRANSITIONAL PROVISIONS

**40.** (1) All persons who were members, staff or agents of the Mediation Accreditation Committee established under section 59A of the Civil Procedure Act shall be members, staff or agents of the Committee and shall be deemed to have been appointed under this Act on the terms and conditions of service applicable to them immediately before the commencement of this Act.

The Mediation  
Accreditation  
Committee.  
Cap. 21.

(2) The members of the Mediation Accreditation Committee shall serve for a period of one year after the commencement of this Act.

**41.** Any register kept, registration effected, certificate issued, notice or information given, return made, form used or other thing done with respect to the Mediation Accreditation Committee on the commencement of this

Preservation of  
certificates,  
registrations and  
other acts.

Act, was in force or effect shall continue in force and have effect as if kept, effected, issued, given, made or done under the provision of this Act.

**42.** The Civil Procedure Act is amended in the manner specified in the Schedule.

Consequential amendments.

## SCHEDULE

(s. 42)

### CONSEQUENTIAL AMENDMENTS

**1.** Insert the following new definition immediately after the definition of the word Act—

Section 2 of Cap 21.

“Committee” means the Alternative Dispute Resolution Committee established under section 59A of this Act;

**2.** Delete the words “Mediation Accreditation” appearing immediately after the words “Establishment of” in the marginal note and substitute therefore the word “the”.

Section 59A of Cap 21.

**3.** Delete subsection (1) and substitute therefore the following new subsection—

(1) There shall be a Committee to be known as the Alternative Dispute Resolution Committee.

**4.** Subsection (2) is amended—

(a) by deleting the introductory clause and substitute therefor the following new introductory clause—

(2) The Committee shall consist of the following members appointed by the Chief Justice by notice in the *Gazette*—

(b) by deleting paragraph (a) and substituting therefor the following new paragraph—

(a) a judge of the High Court who shall be the chairperson;

(c) by inserting the following new paragraph immediately after paragraphs (a)—

(aa) the chairperson of the Rules Committee;

(ab) one magistrate nominated by the magistrates;

(d) in paragraph (d) by—

- (i) deleting the word “eight” appearing at the beginning of the introductory clause and substituting therefor the word “four”;
- (ii) deleting subparagraph (i) and substituting therefor the following new paragraph—
  - (iii) the Law society of Kenya;
- (iii) deleting subparagraph (iii);
- (iv) deleting subparagraph (iv);
- (v) deleting subparagraph (v); and
- (vi) deleting subparagraph (vi).

5. Delete subsection (3) and substitute therefore the following new subsection—

(3) The members of the Committee, other than the chairperson of the Rules Committee, shall serve for a term of three years renewable for one further term.

6. Delete subsection (4).

7. Insert the following new sections immediately after section 59A—

Insertion of new sections to Cap. 21.

Functions of the Committee.

**59AA.** (1) The functions of the Committee are to develop and promote use of alternative dispute resolution in dispute resolution.

(2) Without prejudice to the generality of subsection (1), the Committee shall—

- (a) accredit conciliators and mediators;
- (b) provide facilities for the settlement of disputes;
- (c) exercise any power for dispute resolution conferred on it by parties to a dispute but shall not be involved in the actual resolution of the dispute;
- (d) advise the Chief Justice on policy, guidelines, programmes, regulations and legislation on alternative dispute resolution;

- (e) provide guidelines on fees for alternative dispute resolution;
- (f) conduct research, provide education and issue specialised publications on alternative dispute resolution;
- (g) promote standards of professional competence and practice amongst conciliators, mediators and traditional dispute resolvers;
- (h) protect and assist members of the public in matters relating to alternative dispute resolution including by providing a fair, effective, efficient and transparent procedure for the resolution of complaints against conciliators, mediators or traditional dispute resolver;
- (i) set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of alternative dispute resolution services; and
- (j) do all such other things as are considered beneficial to and in furtherance of alternative dispute resolution.

The Registrar and staff of the Committee.

**59AB.** (1) The Judicial Service Commission shall designate a suitable person to be the Alternative Dispute Resolution Registrar, deputy registrars and other officers as may be necessary for the effective administration of the affairs of the Committee under this Act.

(2) A registrar or officer designated to provide services to the Committee under this section shall serve on such terms as may be specified in the instrument of appointment.

Functions of the Registrar.

**59AC.** (1) The Registrar shall perform the duties assigned to the Registrar under

this Act and any other duties as the Committee may direct, and in particular, be responsible for—

- (a) the day-to-day management of the affairs of the Committee;
- (b) the establishment and maintenance of a register in which all records of the Committee shall be kept;
- (c) the acceptance, transmission, service and custody of documents;
- (d) the facilitation of the enforcement of the decisions of the court and those of the Committee;
- (e) certifying that any order, direction or decision is an order, direction or decision of the Committee or the court;
- (f) causing to be kept records of the proceedings and minutes of the Committee and such other records as the Committee may direct;
- (g) managing and supervising the staff of the Committee; and
- (h) facilitating access to decisions and records of the Committee.

(2) The Registrar may consider and dispose of procedural or administrative matters in accordance with the rules or on the direction of the Committee.

Conduct of business  
and affairs of the  
Committee

**59AD.** The conduct of the business and affairs of the Committee shall be as provided for in the Schedule, but subject thereto the Committee may regulate its own procedure.

Vacation from office.

**59AE.** A person ceases to be a member of the Committee if—

- (a) the person is absent from three consecutive meetings of the Committee without the permission of the chairperson;

- (b) the nominating institution writes to the Chief Justice revoking the nomination;
- (c) the person resigns in writing, addressed to the Chief Justice;
- (d) the person is convicted of a criminal offence and sentenced to a term of imprisonment of not less than six months;
- (e) the person is declared bankrupt;
- (f) the person is unable to perform the functions of his office by reason of mental or physical infirmity; or
- (g) the person dies.

Section 59B of Cap. 21.

**8.** Delete and substitute therefor with the following new section—

Reference of cases to conciliation, mediation etc.

**59B.** All reference by an order in a suit and submission by the parties to conciliation, mediation, traditional dispute resolution or any other alternative dispute resolution, and proceedings thereunder shall be governed by the Alternative Dispute Resolution Act.

**9.** Delete.

Section 59C of Cap. 21.

**10.** Insert the following new Schedule.

Insertion of new schedule to Cap. 21.

**SCHEDULE** **(s. 59AD)**  
**CONDUCT OF BUSINESS AND AFFAIRS OF THE COMMITTEE**

**1.** (1) The Committee shall meet at least once every month to conduct its business.

Meetings.

(2) The first meeting of the Committee shall be convened by the Chief Justice and the Committee shall meet subsequently at such a time as it shall determine.

(3) Notwithstanding the provisions of sub-paragraph (1), the chairperson shall, upon a written request signed by at least five members of the Committee, convene a special meeting of the Committee at any time where it is considered expedient for the transaction of the business of the Committee.

(4) A meeting of the Committee shall be presided over by the chairperson, in the absence of the chairperson by a member elected by the members of the Committee present.

(5) The Committee may invite any person to attend any of its meetings and to participate in its deliberations but such person shall not have a vote in any decision of the Committee.

(6) The proceedings of the Committee shall not be invalidated by reason of a vacancy within its membership.

2. (1) Subject to sub-paragraph (2), the quorum of a meeting of the Committee shall not be less than half of the members.

Quorum.

(2) Whenever there is a vacancy in the Committee, the quorum of the meeting shall not be less than three members.

3. Unless a unanimous decision is reached, a decision on any matter before the Committee shall be by a simple majority of the votes of the members present and voting and in the case of an equality of votes, the chairperson or person presiding over the meeting shall have a casting vote.

Decisions of the Committee.

4. (1) A member of the Committee who has a direct or indirect personal interest in any matter being considered or to be considered by the Committee shall, upon the relevant facts concerning the matter having come to his or knowledge, disclose the nature of his interest to the Committee.

Conflict of interest.

(2) A disclosure of interest made by a member of the Committee under sub-paragraph (1) shall be recorded in the minutes of the meeting of the Committee and the member shall not, unless the Committee otherwise determines—

- (a) be present during the deliberation on the matter by the Committee; or
- (b) take part in the decision of the Committee on the matter.

(3) A member of the Committee who makes a disclosure under sub-section (1) shall not—

- (a) be present in the meeting of the Committee held to determine whether or not the member should take part in the deliberations or decision of the

Committee in relation to the matter; or

- (b) influence any other member of the Committee in arriving at a particular decision in relation to the matter.

5. (1) Subject to the provisions of this Schedule, the Committee may determine its own procedure and the procedure for any committee of the Committee.

Rules of  
Procedure and  
minutes.

(2) The Committee shall cause the minutes of all proceedings of its meetings to be recorded and kept, and the minutes of each meeting shall be confirmed by the Committee at the next meeting of the Committee and signed by the chairperson or the person presiding at the meeting.

**MEMORANDUM OF OBJECTS AND REASONS****Statement on the Objects and Reasons of the Bill**

The principal object of the Bill is to put in place a legal framework for the settlement of certain civil disputes by conciliation, mediation and traditional dispute resolution. Resolution of disputes forms part and parcel of everyday life in any given society. Hence effective dispute resolution mechanisms in a country will guarantee peace, is an enabler of trade and investment, and contribute to economic, social and political development of the country.

Article 48 of the Constitution obligates the State to ensure access to justice, the ability of people to seek and obtain a remedy for grievances in line with human rights standards, for all persons. The Constitution under Chapter Ten provide for the Judiciary as one of the three arms of the National government whose mandate is to protect and serve justice. In Kenya, disputes are mainly resolved through the court process. This process is costly, takes longer for disputes to be resolved resulting in huge backlog in courts, parties are not in control of the outcome of a dispute and does not always result in reconciling the parties.

This Bill therefore seeks to implement Article 48 and 159(2)(c) of the Constitution with respect to enhancing access to justice and promoting the use of alternative dispute resolution mechanisms in resolving disputes.

Part I of the Bill provide for interpretations, the object, application and guiding principles of alternative dispute resolution. This law will apply to certain civil disputes including disputes where the government is a party. However, the law will not apply to disputes concerning interpretation of the constitution, claims for violation, infringement or denial of a fundamental right, disputes governed by the Arbitration Act, election disputes, and disputes involving public interest.

Part II of the Bill provide for accreditation and registration of conciliators and mediators. This is to ensure professionalism and to protect the citizens from quacks.

Part III of the Bill provide for conciliation and mediation. It sets how persons can use conciliation or mediation, the roles of the parties and the conciliator or mediator, and all the steps that must be taken right from the time parties begin the process up to the end.

Part IV of the Bill specifically provide for traditional dispute resolution. It outlines the competence of a traditional dispute resolver, submission to traditional dispute resolution, end of traditional dispute resolution and the effect of a settlement agreement.

Part V of the Bill provide for recourse to court, and recognition and enforcement of a settlement agreement. It sets out the duties of an advocate, stay of proceedings and also grounds for refusal to recognize a settlement agreement.

Part VI of the Bill provide for miscellaneous provisions. This Part gives parties power to suspend limitation period, sets out alternative dispute resolution costs and the power to make of rules and regulation for the better carrying into effect the provisions of the law.

Part VII on its part provide for consequential amendments. It amends the Civil Procedure Act with a view to rename the Mediation Accreditation Committee to the Alternative Dispute Resolution Committee and to make further provision as regards the Alternative Dispute Resolution Committee.

#### **Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms**

Clause 47 of the Bill delegates legislative powers to the Chief Justice. It provides that the Chief Justice may make rules of practice and procedure, and regulations generally for the better carrying into effect of any provisions of this Act. However, the Bill does not limit fundamental rights and freedoms.

#### **Statement on how the Bill concerns county governments**

The Fourth Schedule to the Constitution provides for the functional areas of both the National government and county governments. In the performance of these functions and exercise of powers, a county government may become a party to a dispute. This dispute can either be between a county government and another county government, a county government and the National government, or a county government and a private person. This Bill seeks to put in place a legal framework for the settlement of such disputes through alternative dispute resolution mechanisms.

The Bill therefore concerns county governments in terms of Articles 110(1)(a) of the Constitution in that it contains provisions that affect the functions and powers of the county governments as set out in the Fourth Schedule to the Constitution.

#### **Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution**

The Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 8th August, 2019.

SYLVIA KASANGA,  
*Senator.*