REVISITING COURT-ANNEXED MEDIATION: WHOSE DISPUTE IS IT? THE ILLUSION OF PARTY AUTONOMY AND THE DIMINISHED ADVOCATE'S DUTY TO THE CLIENT

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Abstract

Kenya's Court-Annexed Mediation programme has delivered settlements and substantial economic value. Its success, however, exposes a constitutional tension. Mediation is legitimate because parties retain authority over the process and outcome, while the present framework permits court-directed referral, administrative appointment of mediators and sanctions for non-compliance. This essay argues that compulsory participation can place pressure on genuine consent and divide the advocate's loyalty between the client and the institution's preference for settlement. It proposes a narrower model of mandatory consideration and measures of success that examine consent, fairness and durability rather than settlement rates alone.

I. Introduction

There is a particular institutional satisfaction in announcing that an initiative has worked. Since Kenya's Court-Annexed Mediation programme was formally launched in April 2016 pursuant to the constitutional mandate under Article 159(2)(c) of the Constitution of Kenya, 2010, the Judiciary has had much to announce. The Judiciary now reports 40,636 referrals since 2016, 17,011 full agreements, 121 registries and KSh94.5 billion in resolved case value. Those figures deserve recognition. They show that disputes can be resolved without assuming that every disagreement must mature into a judgment. However, institutional statistics often acquire a dangerous kind of authority: the type that produces its own pathologies, a success so celebrated that it begins to resist scrutiny, and a metric so prominent that it gradually displaces the values it was designed to serve. This article interrogates whether CAM has remained faithful to the foundational principles of ADR, or whether, in its institutionalization, it has subordinated those principles to the administrative imperatives of case clearance, docket management, and statistical reporting. Mediation is ordinarily defended as a process of self-determination. The parties choose whether to negotiate, shape the terms and remain free to decline settlement. Once courts screen cases automatically, refer them administratively, appoint mediators and attach consequences to non-participation, the central question changes. The issue is no longer whether mediation works. It is whether efficiency can expand without converting party ownership into institutional management.

II. Promotion, Referral and Consent

Article 159(2)(c) of the Constitution directs courts to "promote" mediation and other forms of alternative dispute resolution. That verb matters. Promotion requires courts to make mediation available, credible and accessible. It supports explanation, encouragement and procedural incentives. It does not, without more, settle the constitutional limits of compulsion.

The Civil Procedure Act and the Court-Annexed Mediation Rules create a more directive structure. A court may refer a dispute where it considers mediation appropriate. Cases are screened, suitable matters may be referred by written order, and the Mediation Deputy Registrar appoints a mediator unless the parties jointly select one within the prescribed period. Parties, their advocates or authorised representatives must attend and participate in good faith. Persistent non-compliance may attract a penalty, the striking out of pleadings or another order the court considers fit.

The usual defence is that attendance may be compulsory while settlement remains voluntary. That distinction is legally important, but it is not psychologically complete.

A party enters the process because the court required it. The advocate knows that resistance may be treated as obstruction. The mediator works within a system whose public achievements are expressed through completed cases and settlement value. No rule formally commands agreement, but the surrounding architecture can make refusal appear institutionally disfavoured. Consent at the end may remain valid while the pathway towards it is heavily directed.

III. The Advocate's Divided Position

In ordinary litigation, counsel receives instructions, advises on law and evidence, and advances the client's lawful objective. The Civil Procedure (Court-Annexed Mediation) Rules, 2022, Rule 27 adds a different expectation in mediation. The advocate must explore options for speedy conclusion, adopt an advisory role and encourage cooperation with the mediator and the opposing party.

These duties can support skillful representation. They can also pull counsel away from the client's chosen end. A client may reasonably prefer judgment. The dispute may require a public declaration, authoritative interpretation, protection against repeated conduct or vindication after prolonged wrongdoing. An advocate who presses settlement merely because the file has entered mediation substitutes the institution's interest for the client's. Counsel should explain risks candidly, prepare the client carefully and negotiate competently. The professional duty of fidelity to the client requires that the final judgment about compromise remains the client's.

IV. Measuring Justice More Honestly

Kenya should refine court-annexed mediation, not retreat from it. The first reform is to distinguish mandatory consideration from automatic participation. Courts may require parties to attend an information session and explain a refusal. Referral should nevertheless allow a clear exemption where power imbalance, urgency, public interest, recurring illegality or the need for precedent makes mediation unsuitable. The Rules already identify pure questions of law and public-interest litigation as relevant screening considerations. Those safeguards should become accessible rights rather than internal administrative criteria.

The second reform concerns control. Party selection of the mediator should be the default, with registrar appointment used when the parties cannot agree. Sanctions should target deliberate obstruction, not principled opposition or a good-faith decision that settlement via mediation, is inappropriate.

The advocate's duty should be stated positively: protect informed client choice, participate honestly and ensure that any agreement reflects lawful and genuine consent.

The third reform concerns evidence.in addition to data on settlement rates, the Judiciary should publish data on party satisfaction, representation, enforcement disputes, repeat disputes, mediator complaints and reasons for non-settlement. The 2026 Annual Mediation Summit's commitment to a dashboard including user satisfaction is therefore significant. The lesson is not that mandatory referral is always illegitimate. It is that compulsion must be narrow, transparent and matched by safeguards.

V. Conclusion

Court-annexed mediation has shown that Kenya can resolve disputes faster, preserve relationships and return value to the economy. Its next achievement should be more demanding. It should prove that institutional success can coexist with constitutional autonomy. The dispute belongs to the parties.

The mediator facilitates it. The advocate protects the client's legal interests. The court creates conditions for resolution without making settlement an administrative expectation. Mediation succeeds not when every file settles, but when every settlement remains genuinely the parties' own, it is only then that that settlement durability is guaranteed.

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