PROMOTING THE USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCESSES IN MAGISTRATE COURTS - BY PROF. OFFORNZE D. AMUCHEAZI, (SAN, FCIArb, FICMC)

1.0 INTRODUCTION

A blowing wind of change in the Nigerian legal profession is the increasing use of Alternative Dispute Resolution (ADR) to complement the litigation forum. Primarily, ADR offers an appealing alternative to litigation. Cases are consistently resolved more quickly, cheaply and amicably than those heard in Nigeria's congested courts[1]. At the onset, ADR, it was feared, would take away briefs from lawyers, hence the initial reticence to embracing the concept.

However, the words of Lord Denning become instructive as was held in *Bremer v. South India Shipping Corp Ltd* that –

> *every civilized system of government required that the State makes available to all its citizens a means for the just and peaceful settlement of disputes between them. One of the functions of a lawyer has been the continued strife to evolve an efficient means of resolving disputes in our changing world*[2].

Therefore, some policy measures have been made to encourage and compel lawyers to advise on the various dispute resolution processes outside litigation. For example, Rule 15 (3) (d) of the Rules of Professional Conducts for Legal Practitioners (RPC) 2007 mandates lawyers to advise

[1] How Alternative Dispute Resolution Made a Come-back in Nigeria's Courts. <https://www.africaresearchinstitute.org/newsite/publications/counterpoints/alternative-dispute-resolution-made-comeback-nigerias-courts/>

[2] AC 909, 917 (1981).

clients on ADR options before instituting or undertaking, or continuing litigation. Failure to do this may constitute professional misconduct.

In the same vein, various High Court Rules have made provisions for parties to exhaust ADR mechanisms before instituting litigation in the High courts. In Lagos and Abuja for instance, the Pre-Action Protocol Form 01 and Certificate of Pre-action Counseling respectively are forms to be filed as conditions precedent before instituting litigious actions. These forms, annexed to the Writ of Summons and other processes, serve as evidence that parties have sought alternative means to resolve their disputes but unsuccessfully[3].

Parties are required, in most states, to complete some pre-action protocols or steps in advance of instituting action in civil cases, and to provide evidence that this has been done as part of the process of commencing actions. This normally requires notification of the claim and an invitation to the adverse party to settle the claim to avoid the action. Under the jurisdiction of the High Court of Lagos State, the extant rules, i.e. 2019 Rules and Practices Directions require a person who wishes to make a claim against another to prepare and deliver to the other party a memorandum of claim setting out concise details of the claim, including the basis upon which the claim is made, a summary of the facts, reliefs and remedies sought, and if monetary, how the amount is calculated and shall be accompanied by exhibits in support in support of the claim as well as a proposal for the settlement of the dispute through the use of alternative dispute resolution (ADR) mechanisms.[4]

Any lingering doubt as to the formalization of ADR in the Courts is dispelled by the creation of Multi-Door Court Houses (MDCH) across most states in the Federation. The MDCHs are tasked

[3] Order 2 High Court of the Federal Capital Territory Abuja (Civil procedure) Rules 2018; Order 5 High Court of Lagos (Civil Procedure) Rules 2019.

[4] Sofunde, Osakwe, Ogundipe & Belgore, Q&A Conducting Litigation in Nigeria: <https://www.lexology.com/library/detail.aspx?g=13fb44d2-607f-4807-abba-0fb2d699e30e>

with the duty to settle disputes referred to the institution by the courts. Parties are enjoined to comply with the MDCH directives and proceedings.

The gains of ADR in the superior courts of records notwithstanding, the fulcrum of this work is to critically appraise the utilization of ADR in the magistrate courts. The rationale for establishing the Magistrates' Courts is, in part, to ensure both speedy and quick dispensation of justice-substantial justice devoid of any form of technicalities. However, as is characteristic with common law courts, Magistrates' Courts have Rules of Court and are guided by these Rules. Unfortunately, by the nature and usage of these Rules by counsel, the necessary intendment of designating Magistrates' Courts as courts of summary jurisdiction may have been defeated. This is due to the fact that the Rules have constituted a clog in the wheel of progress in the dispensation of justice because they can be used to unduly delay proceedings. The bottleneck Rules have not allowed the Magistrates' Courts to actually be courts of summary jurisdiction[5].

This means that there is a need to promote ADR in the Magistrate courts, the purported flexibility of its procedures notwithstanding. This paper offers a frontier proposition on the subject matter. It is hoped that policymakers will strongly consider a more holistic ADR integration in the Magistrate court.

The paper begins by discussing the tenets of ADR, briefly highlighting the types of ADR mechanisms. Then it proceeds to appraise existing legal frameworks for ADR application in magistrate courts, as well as the advantages of promoting ADR in the magistrate courts. The paper continues therefrom with proposing additional recommendations to augment the existing framework and concludes with a call to action for immediate implementation.

[5] Odoh Ben Uruchi "Creative Approaches to Crime: The Case for Alternative Dispute Resolution in the Magistracy in Nigeria" Journal of Law, Policy and Globalization Vol. 36, 2015.

2.0 TENETS OF ALTERNATIVE DISPUTE RESOLUTION

What is now termed Alternative Dispute Resolution (ADR) embraces four primary strands which are Negotiation, Mediation, Conciliation and Arbitration. Each has peculiar features and suitability to given circumstances. They are discussed below:

A. *Negotiation*

This is usually the first option of recourse for individuals seeking to settle differences through discussion. Should this fail, disputants may often approach an independent third party. Negotiation is a process in which two or more parties hold discussions in an attempt to develop an agreement on matters of mutual concern. This process of communication which involves the give and take of ideas and mulling over options in an endeavour to find common ground forms the basis of every non-adjudicative dispute resolution procedure.

Negotiation is an indispensable step in any ADR process as it is consensual just like all other ADR activities. It is believed to be the most satisfactory method of dispute settlement. It involves the discussions or dealings in a matter with the intention to reconcile differences and establish areas of agreement, settlement or compromise that would be mutually beneficial to the parties[6].

B. *Mediation*

This method involves a third party encouraging disputants to compromise in pursuit of a mutually agreed outcome. The participatory nature of the mediation process enables disputants to exercise a degree of control over the settlement, rather than having a decision imposed on

[6] <http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm>

them. In many cases, this makes for a "win-win" arrangement, and thus a durable resolution of the conflict[7]. The third party, referred to as the mediator, helps the disputants to reach an amicable settlement. The mediator has no vested interest in the outcome of the process other than to help the parties resolves their differences.

C. *Conciliation*

Conciliation, although similar in form to mediation, is markedly different and more formal. This is because conciliation is statutorily regulated in the Arbitration and Conciliation Act 2004. It involves a situation where the third party, known as the conciliator, uses his best endeavours to bring a party in a dispute to a voluntary settlement of their dispute. This process is more interventionist and is common in negotiations involving government agencies[8]. A party wishing to conciliate under the Act shall send to the other party a request for conciliation containing a brief statement of the subject of the case[9]. The conciliator should after listening to both parties, present its terms of settlement which the parties may either adopt or reject. The terms of settlement as adopted are binding on the parties and the parties can take an action in court to enforce same.[10]

D. *Arbitration*

Arbitration is the most formal of the ADR mechanisms and it is a process in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision

[7] ibid.
[8] A. Obi Okoye "Law in Practice in Nigeria" 2015, Snap Press Nigeria Ltd.
[9] Section 38, Arbitration and Conciliation Act 2004.
[10] Section 42 ACA

on the dispute.[11] Arbitration is different from mediation because the neutral arbitrator has the authority to decide the dispute. The arbitration process is similar to a trial in that the parties make opening statements and present evidence to the arbitrator. Compared to traditional trials, arbitration can usually be completed more quickly and is less formal. After the hearing, the arbitrator issues an award. Some awards simply announce the decision (a "bare-bones" award), and others give reasons (a "reasoned" award) although, under the Arbitration Act, all awards must contain the reason for the decision and thus bare-bones awards are subsequently accompanied by detailed reasons for the decision.

The above ADR mechanisms are not exhaustive. There are many other mechanisms such as the Early Neutral Evaluation (ENE), Hybrid model, etc. However, the four mechanisms discussed are the most common.

3.0 EXISTING LEGAL FRAMEWORKS FOR ADR APPLICATION IN MAGISTRATE COURTS

Magistrate Courts generally are created under the Magistrate Court Laws of the various states with clear mandates and jurisdiction. This covers both Civil and Criminal matters. In the Federal Capital Territory Abuja, 'District Courts' double as Magistrate Courts when sitting in civil matters. The challenge of congested dockets and the slow speed of dispensation of justice, which has become symptomatic of Nigeria's legal system, are also acute at the Magistrate Courts level.

[11] <https://www.wipo.int/amc/en/arbitration/what-is-arb.html#:~:text=Arbitration%20is%20a%20procedure%20in,instead%20of%20going%20to%20court>

The case for the introduction of Modern Judicial Practice and Procedure to enhance the efficiency of justice administration cannot be over-emphasized. Consistent with the modernization of judicial practice worldwide is the deployment of Alternative Dispute Resolution (ADR) Systems.[12]

The Lagos State Magistrates Court Law (MCL) 2009 is a pioneer statute on integrating ADR in the court. With respect to Alternative Dispute Resolution mechanisms, section 35 (1) of the MCL provides for reconciliation in civil cases thus –

> "*In civil cases, a magistrate shall, as far as there is proper opportunity, promote reconciliation among persons over whom the magistrate has jurisdiction and encourage and facilitate the settlement in an amicable way, of matters in difference between them.*"

By virtue of section 35 (2), the Magistrate may refer proceedings in relation to any action, part of or any matter arising out of it, for mediation to the Citizens' Mediation Centre established under the Citizens' Mediation Centre Law and/or Lagos Multi-Door Courthouse. Reference to the mediation section shall be made with the consent of the parties to the proceedings[13].

Furthermore, under section 36 (1), a Magistrate may, with the consent of the parties, refer all or part of the proceedings to mediation and arbitration. The Court shall determine the mediator and arbitrator and also the manner and terms of proceedings as the Court thinks just. Section 36 (2) provides that no such reference by the court shall be revocable by any party except with the consent of the Magistrate. On any such reference, the award of the mediators or arbitrators shall

[12] <https://nji.gov.ng/images/Workshop_Papers/2017/Refresher_Magistrates/s2.pdf>
[13] Section 35(3) MCL 2009.

be entered as the judgment in the proceedings and shall be as binding and effectual to all intents as if given by the Magistrate.[14]

Section 37 MCL 2009 admits of possible reconciliation in criminal cases. In criminal cases, a Magistrate may encourage and facilitate the settlement in an amicable way of proceedings for common assault or any other offence not amounting to a felony or not aggravated in degree, on terms of payment of compensation or other terms approved by him.

Doubling as Magistrate Courts in the Northern States, with few exceptions (e.g. Kano State), are District Courts that have jurisdictions purely in civil matters. Consequently, District Courts Law (DCL)[15] applicable in Abuja (as District Court Act) provides in section 26 as follows: "*A District Court shall, so far as there is proper opportunity, promote reconciliation among persons over whom the court has jurisdiction, and encourage and facilitate the settlement in an amicable way and without recourse to litigation of matters in difference between them.*"

By section 27 DCL, where a civil suit or proceeding is pending, the District Judge may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof. The use of the word "facilitate" suggests more direct and active participation of the Judge in the amicable settlement of the matter in contention.

In addition, Section 50 of the District Courts Law provides for Arbitration. Section 50(1) states that the District Judge may with the consent of the parties to any civil proceedings, order such proceedings to be referred to arbitration, whether with or without other matters within the jurisdiction of the court in dispute between the parties, to such person or persons and in such manner and on such terms as he thinks just and reasonable.

[14] Section 36 (3) MCL 2009.
[15] Cap 33, Laws of Northern Nigeria.

Perhaps the most significant provision in the Lagos MCL 2009 is the mandatory participation of legal practitioners in the ADR process. Section 38 (1) MCL enjoins a legal practitioner acting for parties in any proceedings in the Magistrates' Court to advise the parties to the proceedings on the process of Alternative Dispute Resolution (ADR) that may be used to resolve any matter in dispute.

More so, section 38 (2) states that it shall be the duty of any legal practitioner to write a letter of demand before commencing an action in all civil proceedings in a Magistrate Court. The letter of demand referred shall specify the nature of the claim and the remedy sought. Failure to write a letter of demand will go to the issue of costs as set out in the Magistrate Courts (Civil Procedure) Rules.

The implication of the foregoing, therefore, is that Magistrate and District Court Laws of Nigeria amply provide for alternative and amicable ways of resolving disputes, other than resort to litigation, which constitutes what is referred to as ADR systems[16].

3.1 *Practice Directions of the Small Claims Courts*

Presently, Nigeria has only three (3) Small Claims Courts, often called "Conciliation Courts" which are located in Lagos State, Kano State and Edo State. In Lagos State, the Small Claims Court was created out of the existing Magistrates' Courts, as a division of the Court. The applicable law is the Magistrates' Court Law of Lagos State 2009, which gives the Lagos State Judicial Service Commission the mandate to establish Magistrates' Court Houses, as it considers appropriate, necessary and expedient to accommodate the needs of the State. The law also

[16] ibid.

empowers the Chief Judge of the State to, in addition to the Magistrates' Court (Civil Procedure) Rules, make rules regulating the practice and procedure of the Magistrate Court so established. This sets the legal framework under which some Magistrates' Courts were in April 2018, designated as Small Claims Courts and the Practice Directions issued[17].

The Small Claims Court was established within the Magistrate Court, and the role of Small Claims Courts is decongesting the regular Magistrates' Courts, by providing a quicker and less expensive resolution of certain claims filed in the Court. To facilitate the process of decongestion, the Magistrates are enjoined to promote Negotiation and Mediation for amicable settlements between litigants. Article 9 of the Small Claims Practice Directions ('Practice Directions') provides that at the first appearance of the parties before the Court, the Magistrate shall promote, encourage and facilitate an amicable settlement of the dispute among the parties by mediating and providing settlement options to the parties as he deems fit. The process of mediating and facilitating amicable settlement of the dispute among the parties shall not exceed seven (7) days.

Article 9 (2) further provides that notwithstanding Article 9 (1), the parties are also encouraged to contact one another with a view to settling the matter amicably or to narrow the issues. However, the court must be informed on the hearing date if the case is settled by agreement before that date, and a consent judgment may be entered by the Court accordingly. Article 9 (3) provides that in the event parties are unable to settle the dispute amicably, the Magistrate shall hold a preliminary hearing for the purpose of giving directions for hearing of the claim or counterclaim (as the case may be) including a hearing time table, length of trial or hearing, exchange of witness

[17] <https://www.mondaq.com/nigeria/personal-injury/756388/lagos-state-small-claims-court-a-milestone-in-dispute-resolution>

list, formulation and settlement of issues, as appears to the Magistrate to secure the just, expeditious and speedy disposal of the claim or counterclaim.

It is clear that the Small Claims Court was established with the view to decongest the regular Magistrates' Court and simplify the dispute resolution process for litigants. While this is a commendable initiative, the system is slowly losing its efficacy because the numbers of cases filed in the Small Claims Courts are overburdening the Small Claims Registry, and while the intention is to decongest the regular Magistrates' Courts, the designated Small Claims Magistrates have been given an incredibly large workload.

To ease this burden, the provisions in the Practice Directions must be strictly enforced, perhaps even made conditions precedent before the Small Claims judge can be seized of the matter. The provisions in Article 9 of the Practice Directions of the Small Claims Court in Lagos State and Article 9 of the Practice Directions of the Small Claims Court in Kano State expressly encourage Magistrates to promote, encourage and facilitate amicable dispute resolution; with Lagos focusing on Mediation and Kano on Negotiation.

It is important to this discourse to review the term "facilitating." This term may be interpreted in different ways. It can be interpreted to imply that the Magistrate should expedite amicable resolution using Alternative Dispute Resolution (ADR) mechanisms, or that the Magistrate should himself don the cap of the Mediator to act as a facilitator between the litigants. If we are to consider the second interpretation, placing the responsibility of Mediation on the shoulders of the Magistrate will not only overburden the Magistrate but make the likelihood of effectively utilizing Mediation near impossible, due to the heavy workload of the Court. According to the Practice Directions of the Small Claims Court in Lagos State, the process of mediating and facilitating

amicable settlement of the dispute among the parties shall not exceed seven (7) days. Will the Magistrate be expected to clear his docket for seven days to facilitate an amicable settlement?

Thus, the Court may consider appointing a Mediator, independent of the Court, to work with the litigants to resolve the dispute. The Court may also constitute a Panel of Accredited Mediators from which Mediators may be selected and appointed to facilitate settlement. It would not be necessary to establish a court-connected ADR Centre, as the Multi-Door Courthouses in the superior courts of record. This Panel of Accredited Mediators will simply function under the auspices of the Small Claims Court, and a small portion of the premises may be reserved to be used as a venue for Mediation. Using an independent Mediator will make it possible for the parties to fully utilize the seven days set aside for attempted resolution through ADR mechanisms, and will invariably alleviate the heavy burden placed on the Magistrates.

The Small Claims Court concept in Nigeria is still novel and gradually taking root in our judicial system. It is limited to claims involving liquidated money demand and does not cover tort, tenancy or other commercial disputes, and this should be expanded to ensure that it primarily remains a court that makes civil justice accessible to the poor.[18] The dockets of the Small Claims Magistrates who have to combine the small claims cases with the cases on their regular dockets are becoming increasingly difficult to manage in accordance with the timelines in the Small Claims Practice Directions. Regardless of this, the provisions of the Practice Directions of the Lagos State Small Claims Court are quite impressive. It dispenses with formal pleading as all the filings are done using the Small Claims Court Complaint Forms which are easy to understand by laymen who intend to represent themselves at the hearing.

[18] Funmilayo Odude, 'The small claims court system is new in Nigeria. But now is the time to strengthen it', <http://www.financialnigeria.com/the-small-claims-court-system-is-new-in-nigeria-but-now-is-the-time-to-strengthen-it-blog-451.html>

4.0 ADVANTAGES OF PROMOTING ADR IN THE MAGISTRATE COURTS

From the foregoing, we can infer that it is very helpful to promote ADR in the Magistrates Courts. One may readily observe the myriad of advantages of ADR in the court, some of which are highlighted below:

4.1 Quicker dispensation of cases

The Magistrate court, being a court of summary jurisdiction with very flexible procedures, is afflicted with an inundation of cases in its dockets. On closer review, many of these cases can easily be dispensed through negotiation and mediation without the need for trial before the magistrate. It is often discovered, at the ADR forum, that the claimant may, in fact, not have a course of action, or there is a miscommunication between parties which can the ironed out through non-adversarial dialogue. The ideal position should be such that matters set down for hearing are relevant matters which could not be resolved through ADR within the time frame stipulated by the law. Given the expedited nature of the court, with the aid of ADR, more cases can be quickly dispensed with saving both the courts and parties their time and resources.

A case scenario is reproduced as follows. A lawyer who had received training in ADR at the LMDC was instructed by a client who was being accused of copying a handbag design. The handbags were seized as litigation commenced. The design was not registered and therefore technically her client's case was meritorious, indeed, there was a court precedent confirming this position. However, it would take over 10 years before the Supreme Court was able to rule definitively in the case. After receiving training at the LMDC, the lawyer met with the Claimant's counsel and suggested settling the matter which he agreed to on the condition that her client compensates his client. She informed her client that he had excellent prospects of success if the matter continued

in court but as a businessman, her client sought a practical and speedy resolution to the matter. As a result, the matter settled and potentially lengthy litigation proceedings were avoided.[19]

4.2 Facilitating collaboration between parties

The ADR process in the Magistrate court is integrative and requires collaboration between parties and their counsel (if any) to reach an amicable resolution. Although the collaboration appears mandatory, however, the end result may become beneficial to the parties. This is so because ADR is non-combative. Eventually, if a mediated agreement is reached, the parties' relationship may remain intact unlike when they go to court directly without exploring any ADR mechanism.

4.3 Creation of job opportunities

With the creation of ADR centres in the Magistrates courts within the states of the Federation, there will be more job opportunities for experts in ADR who will be employed to facilitate dispute resolution between parties. As was pointed out above, Magistrates can refer cases to ADR, and given the workload in the courts, it is advisable for experts to handle such proceedings and report back to the Magistrate on the outcome.

4.4 Ensures compliance with the rules of court

The point has been made above that in many circumstances, especially in civil matters, resorting to ADR is a condition precedent to litigation. In the Lagos Small claims court, writing a demand letter and undertaking negotiation is imperative before a claim can be instituted. This implies that failure to comply with the provisions of the rules on ADR may lead to the claim being struck

[19] <https://www.britishcouncil.org.ng/sites/default/files/multidoor_courthouse.pdf>

out. Also, the parties and their counsel may be penalized for failing to comply with the ADR requirement.

5.0 RECOMMENDATIONS TO AUGMENT THE EXISTING FRAMEWORK

Having exhaustively considered the use of ADR in magistrate courts, the first issue to be addressed is the need for other states in the federation to follow the pace set by Lagos. The issue of rising caseload affects almost every state. Therefore, the relevant law-making organ must review existing legislation, improve on same and adapt to suit the particular jurisdiction. For example, a state seeking to create MDCH or Small Claims Court in its jurisdiction should specify whether the Magistrate will double as the mediator between the parties, or whether the Magistrate will simply refer the cases to named mediators.

This paper acknowledges the important role of ADR in magistrate court. It also goes further to suggest that the relevant policymakers for the Magistrate Courts should collaborate with leading ADR institutions and professionals for suggestions, service provision and advice on the effective procedural modes of effecting ADR directives in the court. The extant rules do not address in details procedural issues peculiar to the choice of ADR forum. For example, mediation and arbitration have peculiar procedures, and it cannot be contemplated by the rules for the Magistrate to preside over ADR matters that would otherwise require bespoke expertise. The rules simply state that the Magistrate shall encourage amicable resolution of disputes. Pursuant to this, new guidelines should be issued to delineate procedural steps vis-à-vis the relevant ADR mechanism. Caution must be taken so that in the course of making these guidelines, ADR mechanisms do not become unduly technical and protracted. Such guidelines must borrow from

the spirit of the Magistrate court law and rules which is to do justice in a quick, efficient, and satisfactory manner.

The remarkable advancements in ADR must be matched with aggressive publicity. Members of the public must be enlightened about the existence of the ADR mechanisms in the Magistrate court. Without proper sensitization, the Magistrate and even the High courts will be overwhelmed with cases that could otherwise be disposed of in the ADR forum. This paper earlier stated that parties may be fined or penalized if they do not satisfy the condition precedent of attempting to settle disputes amicably. This can be avoided when the public is adequately informed of these provisions.

The courts must be adequately funded to utilize ADR. The funding is important with respect to training the magistrates and ADR personnel, providing logistics and facilities, equipping the courts and MDCH centres with ICT tools and payment of administrative staff. In essence, the lofty statutory provisions will be nugatory if the courts cannot operate effectively because of insufficient funding.

6.0 CONCLUSION

The critical nature of amicable dispute resolution in the face of a fast-paced economic climate cannot be overemphasised. The backlog of cases in the Magistrate Courts has made efficient adjudication impossible to achieve, thereby carrying with it economic implications. To this end, the efforts of the legislators to decongest the magistrate court through inserting the provisions of ADR options should be commended. Moving ahead, the key consideration is whether there will be the implementation of all the issues raised in the preceding parts of this paper. Without

appropriate implementation, the aim of the laws will be defeated. Therefore, the courts must be funded; given the right personnel; and collaborate with ADR stakeholders to ensure the efficient use of ADR in the magistrate courts.