

LEGAL NOTICE NO.

**THE CIVIL PROCEDURE ACT
(CAP 21)
COURT ANNEXED MEDIATION RULES, 2020**

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LEGAL NOTICE NO.....

CIVIL PROCEDURE ACT
(Cap 21)

COURT ANNEXED MEDIATION RULES, 2020

IN EXERCISE of powers conferred by section 81 (2) (ff) of the Civil Procedure Act, the Rules Committee of the Judiciary makes the following Rules -

PART A: GENERAL

1. Short Title

These Rules may be cited as the Court Annexed Mediation Rules, 2020 and shall come into force on such date as the Chief Justice may, by notice in the Gazette appoint.

2. Interpretation

In these Rules unless the context otherwise requires:-

“Act” means the Civil Procedure Act, Cap 21, Laws of Kenya;

“case” means a civil proceeding commenced in any manner prescribed by law save where otherwise provided by the court;

“court” means the High Court, the Environment and Land Court, the Employment and Labour Relations Court and Subordinate courts as defined under Article 169(1) of the Constitution of Kenya, 2010;

“court record” includes the physical file and pleadings or documents contained therein as well as the electronic or digital file.

“Committee” means the Mediation Accreditation Committee;

“ filing ” includes the physical filing of documents at the mediation registry as well as electronic filing by uploading the said documents on the official Judiciary portal designated for that purpose;

“mediation” means an informal and non-adversarial process conducted either physically or virtually, where a mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings;

“Mediation Deputy Registrar” means a Deputy Registrar designated by the court to provide administrative support and manage the court annexed mediation program at the respective court and includes a Magistrate or Kadhi who is designated for that purpose;

“Mediation Registrar” means the person appointed by the Chief Justice under Section 59A (3) of the Civil Procedure Act;

“mediator” means a person whose name is for the time being, appearing on the list that is maintained by the Committee either as an accredited or qualified mediator;

“party” means any party to a dispute other than a criminal dispute and includes a party to a dispute not subject of a case that is pending in court;

“private mediation agreement” means a settlement agreement borne out of a mediation process conducted by a qualified mediator over a dispute that is not subject of a pending court case;

“qualified mediator” means a mediator who either possesses full accreditation status by the Committee, whether active or not; or is accredited by any other institution

recognized by the Committee; or possesses such other or further qualification as may be approved by the Committee;

“screening” means the process by which a screening officer reviews filed cases to determine their suitability for referral to mediation;

“screening officer” means a Mediation Deputy Registrar or other officer of the court specifically authorized to screen cases;

“settlement agreement” means the written and signed agreement borne out of a mediation process and includes a partial settlement.

3. Application

These rules shall apply to all cases as well as settlement agreements presented before the court for adoption, recognition and enforcement.

4. Establishment of mediation registries

Each court implementing the Court Annexed Mediation Program shall establish a distinct mediation registry headed by a Deputy Registrar or other officer assigned for that purpose.

PART B: COURT ANNEXED MEDIATION

5. Referral to mediation

- (1) Every case instituted after the commencement of these Rules shall be subjected to mandatory screening by a screening officer to determine its suitability for referral to mediation.
- (2) A case that is found suitable shall, by an order issued by the Mediation Deputy Registrar, be referred to mediation with or without any further orders.
- (3) A court before which a suit is pending determination may, at any stage before final judgment refer it to mediation.

(4) Parties may by consent request the court to refer their case to mediation:

Provided that nothing in these rules shall derogate from the jurisdiction of the court to refer any case to mediation as provided for under Section 59B; or to any other alternative dispute resolution method under Section 59C of the Act.

6. Procedure on screening

(1) Cases shall be screened as follows:-

a) In the family division, upon filing of the petition or other originating process, or at the close of pleadings or at any other appropriate stage as the court may determine.

b) In all other instances, cases shall be screened upon the close of pleadings.

(2) The screening officer shall endorse on the physical or electronic file a direction or order that the file has been so screened and found to be suitable or unsuitable for referral to mediation.

(3) Where the screening officer makes a finding that the file is not suitable to be referred to mediation, he shall endorse on the file the reasons for his finding.

7. Screening criteria

The court shall develop a screening criteria to be used by all screening officers across the country. The criteria shall take into account, among others:-

a) the age of the case;

b) the value and nature of the subject matter;

c) whether or not the issues for determination in the case are pure points of law;

d) whether the case is a public interest litigation or one which raises issues of public concern;

e) generally, whether the case is one which would benefit the parties more if referred to mediation.

8. The Mediation file and register

(1) The court shall maintain a register of all cases referred to mediation.

(2) The register shall be in electronic format and shall contain information on the various steps undertaken in each mediation case including the following:-

- a) the date of referral to mediation
- b) mode of referral to mediation whether through screening, by consent of parties, or through direct referral by a judge or judicial officer
- c) the mediation file number
- d) the court or division from which the case is referred e.g. High Court, Environment and Land Court, or Family division etc
- e) type of case whether Succession, land etc
- f) the original case number
- g) the exact or estimate value of the subject matter
- h) names of parties and their representatives
- i) contact details of parties and their representatives
- j) name of the deceased person in succession cases
- k) name and contact details of the appointed mediator
- l) date of appointment of mediator and date of notification
- m) reason for appointment of mediator if appointment is done otherwise than as per the list of mediators
- n) outcome of the mediation
- n) date of filing of mediator's report, settlement agreement or non-compliance certificate
- o) date when claim for payment is forwarded
- p) any relevant remark about the file and the conduct of the mediation

(3) Upon the referral of a case to mediation, a mediation file shall be opened and maintained by the court throughout the pendency of the mediation proceedings. The court shall develop an appropriate system for the serialization of mediation files that is distinct from the court files.

(4) The mediation file shall contain among other documents:-

- a) a copy of the order referring the case to mediation
- b) the case summaries

- c) all interim orders issued during the pendency of the mediation
- d) attendance sheets signed by the parties and the mediator
- e) the mediator's report
- f) a copy the non- compliance report or settlement agreement as the case may be.

(5) The mediation file shall be confidential and shall be kept at the mediation registry, separately from the court file.

9. Notification of referral to mediation

- (1) Where a matter is referred to mediation, the court shall notify the parties and their advocates within seven (7) days of completion of screening. The notification shall be in the prescribed **Form 1**.
- 2) The parties and/or their advocates shall, within seven (7) days of receipt of the notification in sub rule (1) above file a case summary in the prescribed **Form 2**:

Provided that the court and the mediator shall not be prevented from proceeding with the mediation process only for the reason that a party has not filed his case summary.

10. Service of process

- (1) All notices and other process shall be served upon the parties and their advocates or authorised representatives upon the address supplied to the court at the time of filing of the case or the case summary.
- (2) Service shall be effected either physically, electronically or by post in accordance with the relevant procedural rules, and the court and the mediator shall maintain proof of service of any notice or document upon the parties.

11. Mediators under the program

- (1) Mediation under this Part shall be conducted by a person accredited as a mediator and whose status is active on the register of mediators maintained by the Committee.
- (2) The Committee shall continually update its register to capture the current details of its mediators, including their qualifications and experience and shall upload it on the official Judiciary website and other platforms for quick access by members of the public.
- (3) All mediators under the program shall subscribe to and be bound by a Mediator Code of Conduct prescribed by the Committee and shall be subject to the Committee's disciplinary process.
- (4) Each court station implementing the Court Annexed Mediation Program shall forward complaints against mediators to the Committee within seven (7) days of receipt of the complaint.
- (5) The Mediation Deputy Registrar or other designated officer for each court shall forward to the Committee annual confidential reports on the performance of mediators attached to that court for purposes of improving the program.

12. Appointment of mediators and allocation of cases

- (1) The Mediation Deputy Registrar or other officer designated for that purpose shall, within seven (7) days of referral of a case to mediation, appoint a mediator from the register and immediately notify the appointed mediator, the parties, and their advocates of the person appointed. The notice to the mediator shall be in the prescribed **Form 3** and the one to the parties and their advocates shall be in prescribed **Form 4** as set out in the schedule.
- (2) Upon being informed of his appointment, the mediator shall, within seven (7) days of receipt of the notice of appointment, notify the court whether he accepts or declines the appointment. The notice shall be in the prescribed **Form 5**.
- (3) Where the mediator accepts the appointment, he shall disclose the existence of any real or apparent conflict of interest, or any circumstances that would

otherwise affect the impartial and effective discharge of duties as a mediator in that case.

- (4) Parties may by consent select a preferred mediator from the list and notify the court within seven (7) days of receipt of the notification under sub rule (1) or at the time of filing their case summaries. In order to make an informed decision under this sub-rule, parties may request from the Committee for further or other information about the mediator.
- (5) The allocation of cases to mediators shall be done chronologically down the list of mediators, unless for some reason, there is need for a particular case to be allocated to a particular mediator. Where the Mediation Deputy Registrar or other designated officer allocates a case to a mediator otherwise than as per the list, he shall note on the mediation file and the electronic register, the reasons for such allocation.
- (6) In order to ensure the efficient running of the program, it shall be the duty of the Mediation Deputy Registrar to distribute cases equitably amongst the mediators in accordance with their skills, performance, experience, and availability.

13. Court mentions

- (1) The court shall within fourteen (14) days after the appointment of a mediator list the matter for mention before the Mediation Deputy Registrar or other designated officer. The mention may be conducted virtually.
- (2) Where the court deems it necessary for the efficient and/or expeditious disposal of any particular case or at the request of any of the parties, it may direct or order the attendance of the mediator during the mention.
- (3) The court shall, during the mention give directions as to the general conduct of the mediation, including the filing of case summaries and the required conduct of the parties during the mediation.
- (4) At the mention, the court shall inform the parties that they shall be required to attend the mediation sessions and participate in the process in good faith, and shall notify them of the consequences of non-compliance.

- (5) The mediator or any party to the dispute may request that a matter pending in mediation be listed for mention before the court in order to address a particular issue that may or is likely to delay, prejudice, or otherwise impede its resolution.

14. Commencement of mediation

- (1) The initial mediation session shall be conducted within fourteen (14) days from the date of the mention under rule 13(1).
- (2) The mediator shall fix a date for the initial mediation session and shall notify the parties and their advocates as well as the court at least seven (7) days before the return date. The notice shall be in prescribed **Form 6** as set out in the schedule.
- (3) Where the case was listed for mention in a manner as provided for under rule 12(2), the parties and the mediator shall agree on a suitable date for the initial session during or after the mention and may proceed with such session immediately after the mention.

15. Attendance at the mediation

- (1) It shall be mandatory for parties or their representatives to attend mediation sessions and to participate in the process in good faith.
- (2) The parties may be accompanied by an advocate or a representative of their choice.
- (3) The personal details and role of the representative shall be disclosed to all parties at the first meeting.
- (4) Where a natural person participates in the mediation through a representative who is not an advocate, such representative shall, at the initial session present to the mediator an authority signed by the party indicating that they have power to take part in the mediation process and to execute a binding agreement on behalf of that party. The authority under this sub-rule shall be in the prescribed **Form 7**.
- (5) Where the party is a corporation, partnership, government, government agency or entity, an officer duly authorized to represent and bind the party shall attend. The authorization shall be in writing indicating that such officer has the power to enter into a binding settlement agreement and shall be presented to the mediator

at the initial mediation session. The authority under this sub-rule shall be in the prescribed **Form 8**.

- (6) A State counsel or other officer appearing on behalf of the Attorney General shall, unless the contrary is confirmed, be deemed to have the express authority to bind the Office of the Attorney General or the ministry, government department or other organ on whose behalf he appears.
- (7) The mediator may adjourn a session where a party fails to attend. Where the session is rescheduled to another date, a notice indicating the new date, time and place of mediation shall be issued to the parties and a copy filed with the court.
- (8) The mediator shall avail attendance sheets to be signed by himself and the parties in attendance at each session and shall file it with the court. The attendance sheets shall be in the prescribed **Form 9** set out in the schedule and shall be made readily available online by the court and in hard copies at designated places.
- (9) The mediator shall provide guidance on the process of mediation as is appropriate for each case.

16. Place and time of conducting mediation

- (1) Mediation proceedings under these Rules shall be conducted virtually or physically at the court premises or such other place as the parties may agree.
- (2) Where mediation is conducted within the court premises, the Mediation Deputy Registrar shall give necessary facilitative assistance to the mediator and the parties.
- (3) Upon notice to the court, the entire mediation or sessions thereof may be conducted at the mediator's offices or such other place, on any day or time as may by consent be agreed upon by the parties.
- (4) A mediator shall not inconvenience the parties or charge any fees or expense to the parties or the court where he hosts the mediation at his office, and shall ensure that the parties duly sign attendance forms as proof of such attendance.
- (5) Where a physical mediation session is conducted at a place as provided for under sub rule (3) above, the mediator shall ensure its neutrality and shall, if need be, make necessary arrangement with the court to provide security.

17. Agreement to mediate

At the commencement of the mediation session, the mediator shall read and explain to the parties and their advocates the rules of engagement set out in an agreement to mediate and shall require the parties and their advocates or representatives to sign it. The agreement to mediate shall be in the prescribed **Form 10** set out in the schedule.

18. Confidentiality and inadmissibility

- (1) All persons taking part in a mediation process shall execute a confidentiality agreement and shall be bound by the rules of confidentiality relating to the conduct of mediation. The confidentiality agreement shall be in the prescribed **Form 11** set out in the schedule.
- (2) All communication made during mediation including the mediator's notes shall be confidential and shall not be admissible in evidence in any ongoing or subsequent legal proceedings.
- (3) All persons taking part in a mediation process shall treat as confidential all information obtained orally or in writing from or about the parties in the mediation and shall not disclose that information unless:-
 - a) they are required by law to disclose; or
 - b) the information relates to child abuse, child neglect, defilement, domestic violence or related criminal or illegal purposes.
- (4) The court shall put measures in place to guide the procedure on the making and processing of the disclosure under sub rule (3).
- (5) Subject to sub-rule (3), the mediator or any person present or appearing at a mediation session may not be summoned, compelled or otherwise required to testify or to produce records or notes relating to the mediation in any proceedings before any court of law.
- (6) No person present or appearing at a mediation session whether physically or virtually shall use any electronic device of any nature to record mediation sessions.

- (7) A breach of this rule shall constitute contempt of court.
- (8) This rule shall not apply to any settlement agreement, decree or order arising from the mediation.

19. Persons who may attend a mediation session

- (1) At every mediation session, unless otherwise agreed, only the parties to the dispute together with their advocates or representatives shall have the right to attend.
- (2) Unless otherwise agreed at the initial mediation session, each party to the dispute appearing without an advocate shall have the right to be represented by one representative.
- (3) A law firm representing a party to a case under mediation should, at any given time allocate that case to a particular advocate or advocates within the firm.
- (4) With the prior consent of all the parties, the following persons may attend a mediation session: -
 - a) Mediators enlisted on the Committee's list of mediators under the mentorship program. The mediators attending by virtue of this sub-rule must have been attached to the mediator appointed for that case as their mentor and must present a letter from the Registrar indicating that they are under a mentorship program as per the Committee's Mentorship Guidelines.
 - b) An advocate holding brief.
 - c) A pupil attached to an advocate on record for a party. Not more than one pupil from a given law firm may attend a case under this sub-rule and shall at all times attend in the company of the master advocate.
- (5) All persons attending a mediation session under sub rule (4) above shall be bound by the rules of confidentiality set out at Rule 18 and shall at their first appearance sign the confidentiality agreement.
- (6) The mediator shall ensure that the persons attending any mediation session are authorized and that the requisite consents have been obtained from the parties where necessary.

20. The role of an advocate at the mediation

An advocate acting for a party in a mediation shall:-

- a) ensure that the party respects the notices by the mediator and the court and shall ensure the appearance of that party at every mediation session.
- b) explore with the party various options available so as to ensure speedy conclusion of the mediation.
- c) adopt an advisory role while the party takes the lead role in mediation sessions.
- d) be cooperative and encourage the party to cooperate during mediation sessions to ensure a speedy resolution of the dispute.

21. Non-compliance

- (1) Parties or their representatives who fail to comply with any of the mediator's directions, consistently fail to attend mediation sessions or deliberately misconduct themselves may be cited for contempt of court and shall be dealt with in the manner provided for under rule 22.
- (2) The mediator may, in the first instance request that the case be listed for mention before the Mediation Deputy Registrar or other officer designated for that purpose for directions aimed at facilitating the smooth continuation of the mediation process.
- (3) If after several attempts by the mediator to move the mediation process forward a party fails to comply, the mediator shall file a certificate of non-compliance in the prescribed **Form 12**. The Mediation Deputy Registrar or other officer designated for that purpose shall, upon the filing of the certificate of non-compliance refer the file back to the trial court.
- (4) It shall be the obligation of the mediator to satisfy himself that sufficient effort has been made to move the mediation process forward without success before filing a certificate of non-compliance. In assessing whether this obligation was met by the mediator, the court shall consider among others, the attempts made at contacting the parties, the number of sessions held if any, and the attempt by the mediator to explain the process to the parties.

22. Consequences for non-compliance

Upon the referral of the file under rule 21(3), the court may:-

- a) Order the party in default to pay a penalty fee as the court may deem fit; unless the party satisfies the court that there was a good cause for the non-compliance;
- b) Strike out the pleadings of the non-complying party; unless the party satisfies the court that there was reasonable excuse for the non-compliance and that striking out the party's pleadings would be inequitable in the circumstances;
- c) Make any other order as it deems fit, including an order that the parties conduct fresh mediation sessions within a specific period of time.

23. Conclusion of the mediation process

The mediation process shall come to an end upon:-

- a) The filing of the settlement agreement and the mediator's report where a settlement was reached
- b) The filing of a non-compliance report
- c) The expiry of 60 days from the date that the mediator was notified of his appointment to handle the case or where the period was extended, upon the expiry of such extended period.

24. Further mediation

Upon conclusion of the mediation, the court may, with the consent of the parties, make an order for further mediation.

25. Mediation settlement agreement

- (1) Where there is an agreement resolving some or all of the issues in dispute, such agreement shall, with necessary modifications be in the prescribed **Form 13** and shall be duly signed by the parties, their advocates or representatives, and the mediator.

- (2) The mediator shall, within ten (10) days of conclusion of the mediation file the agreement in court and avail copies of the duly filed agreement to the parties or their representatives.

26. Mediator's report

The mediator shall file in court a mediation report within ten (10) days of the conclusion of the mediation. The report shall be in the prescribed **Form 14**.

27. Adoption of settlement agreements

- (1) The Mediation Deputy Registrar or other officer designated for that purpose shall, within ten (10) days of being filed, place the settlement agreement before the trial court or other designated officer for adoption.
- (2) It shall not be necessary for the parties or the mediator to attend court for purposes of adoption of the settlement agreement and such proceedings may be conducted in chambers or virtually.
- (3) Where the court deems it necessary, it may seek further clarification from the mediator, the parties or their representatives before adopting the settlement agreement.

28. Directions on partial settlements

- (1) Where the parties reach a settlement on only some of the issues to the dispute, the mediator shall prepare and file a partial settlement agreement in a similar manner as provided for under rule 25.
- (2) A partial settlement agreement shall, with necessary modifications be in the prescribed **Form 15** and shall concisely state which issues the parties were able to agree upon and which issues remained unresolved.
- (3) The agreement shall, where the parties so request, indicate any specific directions or assistance that they would like the court to grant for the expeditious resolution of the remaining issues.

- (4) Where the amount of costs payable and the party liable to pay were canvassed at the mediation and not agreed upon, the agreement shall be treated as a partial settlement for purposes of this rule.
- (5) A partial settlement agreement shall be adopted in the same way as a full settlement agreement but the court shall, at the time of adoption, give appropriate directions regarding the execution of the partial settlement and the expeditious disposal of the issues that remained unresolved. In giving its directions under this sub-rule, the court may take into account any specific request by the parties as envisaged under sub-rule (2).
- (6) Where the court directs that the unresolved issues be determined at trial, the court file shall immediately be placed before the court for hearing and determination on priority basis within ninety (90) days from the date the directions are made:
Provided that where the matter is not disposed of within the said period, the court shall, for reasons to be recorded, extend the time for a further period not exceeding thirty (30) days.

29. Enforcement of settlement agreements

- (1) Upon the adoption of a settlement agreement, the court shall issue an order or decree in the terms of the agreement.
- (2) Decrees and orders arising from the adoption of mediation settlement agreements shall be enforceable as any other order or decree of the court.
- (3) No appeal shall lie against a decree or order of the Court arising from a mediation agreement.
- (4) A party who is aggrieved by the failure to implement an order or decree arising out of a settlement agreement may move the court for its execution as provided for under the relevant procedural rules or apply for further orders or directions by the court.

30. Time

- (1) Pending the conclusion of mediation in accordance with the provisions of rule 23, the time limits applicable under all procedural rules of court shall not apply to cases once referred to mediation under these Rules.
- (2) Mediation proceedings shall take place and be concluded within sixty (60) days from the date that an appointed mediator is notified of his appointment to handle the case.
- (3) The court may, upon request by the mediator or the parties extend the time for a further period not exceeding ten (10) days having regard to the number of parties or complexity of issues.
- (4) Parties may, through a written, duly signed and filed consent agree to extend the period within which the mediation shall take place.

31. Interim measures by court

When a matter is pending in mediation, a party may apply before the trial court for an interim measure including the issuance of a conservatory order.

32. Setting aside an order or decree arising out of a settlement agreement

- (1) No application for setting aside of an order or decree arising from a mediation settlement agreement shall be filed except with the leave of court.
- (2) An application for leave shall be supported by an affidavit detailing the grounds upon which the applicant intends to rely on in setting aside the order or decree.
- (3) The following shall constitute the grounds upon which an application to set aside an order or decree arising from a mediation settlement agreement:-
 - a) Misconduct, fraud, or a fundamental mistake by the mediator as relates to the mediation proceedings that goes to the core of the matter. The misconduct, fraud or mistake should not have been known by the applying party at the time of execution of the settlement agreement and should be one which affected the process and outcome of the mediation in such a way that it would be unfair and inequitable to enforce it in its form.
 - b) Fraud, collusion, or misrepresentation by any party to the mediation (other than the party applying) or any witness or person who took part in the

proceedings and whose participation materially affected the outcome.

c) A fundamental mistake by any or all of the parties to the mediation as to the existence or state of the subject matter, person or thing; or to any set of facts that materially affected the parties' decision to enter into the subject agreement and which has rendered such agreement unfair and inequitable.

d) Where a party was, at the time of the making of the agreement, under some legal incapacity to take part in the subject mediation proceedings or to conclude and execute a binding settlement.

e) Where the settlement agreement is invalid under Kenyan or international law or is or has become incapable of enforcement under Kenyan law.

- (4) At the hearing of an application to set aside an order or decree, no party shall, without leave of court be allowed to canvass any other ground in support of the application other than those grounds set out at sub-rule (3).
- (5) Applications under this rule shall be heard and determined on priority basis within thirty (30) days of filing.

33. Immunity

A mediator in respect to mediation proceedings shall enjoy the same protection and immunity as that granted to judicial officers and judges.

34. Payment of mediators

- (1) Mediators shall be entitled to payment of a fee upon conclusion of mediation.
- (2) The scale of payment of mediator fees shall be determined by the Committee and shall be reviewed from time to time.
- (3) Where mediation proceedings are concluded by the filing of a certificate of non-compliance, the mediator shall be entitled to a fee prorated with the mediator's input in attempting to push the process forward. The Mediation Accreditation Committee shall formulate an appropriate scale of fees to be used for the payment of mediators.

35. Remuneration of advocates

The Chief Justice may, by order made under Section 44 of the Advocates Act prescribe and regulate the remuneration of advocates representing parties during mediation under these Rules. In doing so, the Chief Justice may take into account the fees already charged by an advocate at the time that a case is referred to mediation and fees which may be charged by the advocate should the case be referred to the trial court for disposal.

PART C: REGISTRATION, RECOGNITION, AND ENFORCEMENT OF PRIVATE MEDIATION AGREEMENTS

36. Objective

The objective of the Rules made under this Part is to give effect to the provisions of Article 159 (2) (e) of the Constitution and Section 59 D of the Civil Procedure Act by providing a framework for the courts to register, recognize, and enforce private mediation agreements reached by parties.

37. Recognition and registration of qualified mediators

- (1) For a mediator to be recognized as a ‘qualified mediator’ within the meaning of Section 59 D of the Civil Procedure Act, he should either possess full accreditation status by the Committee, whether active or not; or be accredited by any other institution recognized by the Committee; or possess such other or further qualification as may be approved by the Committee.
- (2) The Committee shall maintain and publish a list of recognized institutions that may accredit mediators for purposes of recognition under sub-rule (1). The Committee shall also maintain and publish a list of qualified mediators for purposes of this part indicating, among others; their training and experience, the category or type of disputes that they mediate, as well as their geographical region.
- (3) For the purposes of this part, the Committee may, where any mediator is facing criminal charges, or a disciplinary action before any professional body or tribunal, or for any other sufficient reason suspend the qualification status of that mediator for a specific period or disqualify such mediator altogether.

38. Mediation registry to register private mediation agreements

A private mediation agreement reached by the parties with the assistance of a qualified mediator may be presented at the mediation registry for purposes of registration and adoption.

39. Requirements for the registration of a private mediation agreement

For a private mediation agreement to be registered by the court, it should: -

- a) have been reached with the assistance of a qualified mediator or mediators who should endorse his or their accreditation or other identifying number thereon
- b) relate to a dispute that is not subject of a pending court case
- c) relate to a dispute capable of being resolved by mediation under Kenyan or international law
- d) not be illegal
- e) one that is capable of being enforced by the court under Kenyan or international law
- f) be reduced into writing in the language of the court
- g) be dated and signed by the mediator, all the parties to the dispute, their advocates, or representatives if any
- h) indicate the place where the mediation took place and where the agreement was signed
- i) have resolved all the issues in dispute
- j) indicate concisely the nature of the dispute, the issues involved, and the agreement thereupon.

40. Presentation for registration

- (1) A private mediation agreement may, within 30 days of its signing be presented for registration to the nearest mediation registry where it was concluded.
- (2) Presentation to court for registration shall be done by the mediator.
- (3) The agreement shall be presented to court for registration as an annexure or attachment to an affidavit duly sworn by the mediator. The affidavit shall, with necessary modification be in the prescribed **Form 16** and shall among others

indicate:-

- a) that the person presenting was a mediator in the dispute and witnessed the execution of the agreement
- b) that the entire mediation process, including the execution of the agreement was voluntary
- c) that the agreement complies with the requirements set out at Rule 39 hereof
- d) the agreement is, or is likely not to be affected by the grounds for setting aside set out under Rule 32 (3) hereof.

41. Registration of a private mediation agreement

- (1) Upon presentation of a private mediation agreement in accordance with Rule 39, a court officer designated for that purpose shall endorse the affidavit, the agreement, and any annexures thereto with a stamp of the court.
- (2) The assessment of the payable filing fees shall be done in accordance with the scale for the time being applicable to fees chargeable for filing affidavits in other court cases.
- (3) Each agreement shall, upon filing be serialised and registered in a register for private mediation agreements.

42. Recognition of private mediation agreements

All private mediation agreements presented and registered in under this Part shall be recognised by the court and shall form part of the record of the court.

43. Enforcement of private mediation agreements

- (1) Where a party to an agreement that has been registered under Rule 41 wishes to have it enforced either by execution or otherwise, he shall make an application to court in prescribed **Form 17** indicating the intention to do so.
- (2) The registry shall, upon receiving the application under sub-rule 1 open a separate file for that settlement agreement.
- (3) The file under sub rule (2) shall be placed before the court within fourteen (14) days for adoption.

- (4) The court may order that other parties or the mediator be served; or that the applicant or other party be heard or examined on oath before adopting the settlement agreement or make such order as it may deem necessary.
- (5) Upon being satisfied that the settlement agreement is duly signed and that it meets the conditions set out under Rule 39, the court may adopt it as its judgment and issue an order or decree in the terms of the agreement.
- (6) A party who executed a settlement agreement and who was not heard before its adoption, or any other affected party with leave of court, may apply to set aside the adoption proceedings and/or resultant orders.

44. Adoption and enforcement of international private mediation agreements

- (1) Subject to the foregoing sub-rules, an international private mediation agreement may be registered and enforced under this Part.
- (2) For purposes of these Rules, an agreement will be regarded as an international private mediation agreement if:-
 - a) the dispute subject of the agreement was between individuals who are nationals of more than one country
 - b) where if the dispute was between bodies corporate, the parties are incorporated in more than one country or their central management and control is exercised in different countries
 - c) the subject matter of the dispute is situate in a country other than the country of origin of the parties or any of them, or the country where the mediation proceedings are conducted or agreement concluded
 - d) the agreement is presented for registration and enforcement in a country other than the country of origin of the parties, or the country where the subject matter is situate, or the country where the mediation proceedings were conducted or agreement concluded.
- (3) An international private agreement shall not be registered under this Rule unless:-
 - a) it is valid under Kenyan or international law as well as under the law of the country where the mediation proceedings took place and/or where the agreement was concluded and executed and

- b) it meets the requirements set out at Rule 39 hereof, and
- c) either of the parties is a Kenyan or ordinarily resident in Kenya; or the subject matter is situate in Kenya; or the mediation proceedings were conducted and agreement concluded in Kenya; or the enforcement of the agreement is expected to be conducted in Kenya and
- d) the mediation was conducted by a qualified mediator under these Rules:

Provided that where the mediation was conducted by a mediator who does not meet the requirements of Rule 37(1), the mediator will first be required to apply for the recognition and certification of his qualification status by the Committee before filing the agreement in court.

(4) Before registering an international private mediation agreement, the court shall satisfy itself of its compliance with the provisions of sub-rule 3 above and may, for sufficient reason to be recorded, decline such registration.

(5) The provisions of Rule 43 shall apply *mutatis mutandis* in the enforcement of an international private mediation agreement.

PART D: VIRTUAL MEDIATIONS

45. Rules applicable to virtual mediations

Virtual mediations shall be undertaken in accordance with the provisions of these Rules as well as all other court rules and practice directions for the time being governing the conduct of virtual court proceedings insofar as the same are applicable.

46. Guidelines for virtual mediations

The court shall develop and adopt appropriate standard guidelines to govern the conduct of virtual mediations as need arises.

47. Validity of virtual mediation agreements

All settlement agreements including private mediation agreements resulting from virtual mediations that have been conducted in compliance with these Rules, any other

relevant rules or practice directions, or the guidelines adopted by the court under Rule 46 shall be valid and capable of enforcement just like agreements obtained through physical mediation.

PART E: MISCELLANEOUS

48. Power of the court

Nothing in these Rules shall limit the power of the court to make such orders or to give such directions or notices to the mediator and the parties as it deems fit to facilitate the effective and expeditious conduct of the mediation process.

49. Extension of time

The court may, on such terms as it deems fit, extend the time fixed for the doing of anything or taking any step under these Rules.

50. Applications

All applications under these Rules shall, unless otherwise provided for shall be by notice of motion and shall be disposed off virtually or physically as the court may direct.

51. Amendment

The Rules Committee shall amend these Rules as and when need arises.

52. Repeal

The Practice Directions on Court Annexed Mediation, 2017 are hereby repealed.

SCHEDULE

17 FORMS

