



# The Development of Court Annexed Mediation in Africa: Lessons from Uganda and South Africa

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# Introduction to CAM

- Many African countries are adopting CAM
  - Uganda has had CAM since 2003
  - South Africa adopted CAM 2014/2015
  - Kenya adopted CAM in 2016
- The models may differ but the objectives are similar

# Branding CAM for Africa

- Conceptually, mediation is not new. It has many similarities to our traditional justice systems which are more consensual than adversarial.
  - Mato Oput in Uganda dealing with the injustice of the Lord's Resistance Army insurgency.
  - In Rwanda, there are the Gacaca tribunals & Abunzi committee at village level.
- Formal court systems are more recent
  - Uganda: 1902
  - South Africa: 1652 (at the Cape)



# Branding CAM for Africa

- Formal court system has been running side-by-side with private dispute resolution mechanisms like arbitration and mediation.
  - Still, even with the formal court system and private mechanisms, CAM is growing worldwide
- CAM's roots date back to 1976 in the U.S.A.
- Many types of Court Annexed Mediation
  - Facilitative Mediation
  - Evaluative Mediation
  - Transformational Mediation
- Need to evolve an African flavour which takes into account our traditional justice systems.



# Push Factors

- Similar push factors for CAM all over the World
  - Call for multi door court house by Prof. Sander in USA (1976).
  - Justice Platt Report on Judicial Reform in Uganda (1995)
  - Lord Woolf Report “Access to Justice” in UK (1996)
  - Civil Justice Reform Project in SA
    - Approved by cabinet in 2010



# Push Factors

- Need to reform the civil justice system by addressing:
  - Case backlog
  - Need for increased efficiency in courts
  - Constitutional rights deprived from lack of speedy trials
  - Need to increase access to justice for all



# Cross-cutting issues: Pilot Projects

- Uganda
  - 2003-2005: Pilot at the Commercial Court for 2 years
  - 2005-2007: Evaluation
  - 2007: Institutionalisation at Commercial Court
  - 2013: Roll out to all other High Court Division & Magistrate Courts



# Cross-cutting issues: Pilot Projects

- South Africa
  - Pilot at the Magistrate's Courts in Gauteng & North West Provinces.
- Other Pilots
  - Kenya (High Court)
  - Ghana (High Court)
  - Lesotho (High Court)
  - Malawi (High Court & Magistrate's Courts)
- Cautious and pragmatic approach starting mostly in High Courts.



# Cross-cutting issues: Mandatory or Voluntary CAM?

- Uganda
  - Diversion system on filing a case in court. Mediation file opened.
  - Mandatory mediation (to attempt but not to settle).
  - Few exceptions
- South Africa
  - Voluntary submission
- Other countries
  - Kenya (mandatory)
  - Ghana (mandatory)
  - Lesotho (mandatory)



# Cross-cutting issues:

## Mediators

- Uganda
  - Uses hybrid system of judicial and non-judicial officers
  - Must have trained in mediation
  - Bound by an ethical code in schedule to the Rules
- South Africa
  - Court-accredited mediators
  - Affiliated to approved institution
  - Standards etc. subject to GN No. 854/2014
- Other Countries
  - Hybrid: Ghana & Malawi
  - Court-accredited: Kenya



# Cross-cutting issues:

## The Process

- Uganda
  - Court-managed (venue, summaries, roaster etc)
  - 60 day completion period
  - Sanctions: Non-attendance fee can be imposed.
  - 25% success rate at Commercial Court (roll out not computed)
  - Rules provide a default that each party bears their own costs.
- South Africa
  - Court-managed but referred to private mediators for the rest
  - No statutory completion period & sanction regime
  - Parties pay mediator according to government rate.
- Other Countries
  - Kenya: court-managed, no fees paid. Sanction regime in place.
  - Malawi: dual system (parties pay private mediators)



# Cross-cutting issues: Enforcement

- Uganda
  - Full or partial settlement is entered as a consent judgment of the court.
  - Where settlement has failed, case is referred back to court for litigation
- South Africa
  - Parties can request settlement to be converted into an Order of the Court but not automatic
- Other Countries
  - Settlement agreements converted into Orders of Court:
    - Kenya; Lesotho; Ghana and Malawi



# South Africa:

## What to Consider

- Already has a good quality legal framework for CAM.
- Pilots at the High Court as well.
- Options for evaluative mediation where appropriate.
- Inclusion of a time frame within which mediation must be completed, especially where a case has already been filed or has commenced.
- Clearer language as to enforcement of settlements.



# Conclusion

- The future of CAM in countries like Uganda and South Africa is bright.
- Countries like Uganda are soon to pioneer innovative mediation practices like appellate mediation
- As a result of CAM, litigants will now have more resolution options than ever before

