

**THE ADOPTION OF ALTERNATIVE DISPUTE  
RESOLUTION IN KENYAN TAX DISPUTES**

**BY**

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**UNITED STATES INTERNATIONAL UNIVERSITY -  
AFRICA**

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**NDEGWA MUCHERU**

**A Research Project Report Submitted to the Chandaria School  
of Business in Partial Fulfillment of the Requirement for the  
Degree of Masters in Business Administration (MBA)**

**UNITED STATES INTERNATIONAL UNIVERSITY -  
AFRICA**

**SUMMER 2019**

## **STUDENT'S DECLARATION**

I, the undersigned, declare that this is my original work and has not been submitted to any other college, institution or university other than the United States International University – Africa, in Nairobi for academic credit.

**Signed:** \_\_\_\_\_

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This project has been presented for examination with my approval as the appointed supervisor.

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**Prof. Amos Njuguna**

**Signed:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Dean, Chandaria School of Business**

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## ABSTRACT

The application of Alternative Dispute Resolution (ADR) goes back into antiquity, with roots in resolving disputes between kingdoms and nations. ADR was adopted by merchants in the Middle Ages, with Ireland enacting the first Arbitration law in 1698. Traditional dispute resolution mechanisms were also adopted by African communities. By the 20<sup>th</sup> century ADR was well established as a dispute resolution process. In Kenya, ADR is enshrined in the Kenyan Constitution for use in court processes. Effective 2015, it has been adopted by the Kenya Revenue Authority as an alternative process to the resolution of tax disputes through the legal framework. ADR has also been adopted for tax dispute resolution in a number of markets, including Australia, South Africa, the United Kingdom, and the study benchmarks the KRA approach to ADR to that in these more established environments.

The purpose of this study was to evaluate the Alternative Dispute Resolution (ADR) mechanism in resolving tax disputes in Kenya, and propose strategies for enhancement of the process. The research objectives of this study were to review the ADR process; establish the effectiveness and efficiency of the ADR process in solving tax disputes; and propose strategies for the enhancement of the ADR process in Kenya.

A survey was done to evaluate Kenyan taxpayer attitudes to ADR with a non-probability judgmental sampling design applied in the study to select the sample. The population of the study was small, medium and large taxpayers that have resolved their tax matters with the KRA through the ADR mechanism. The questionnaire was distributed to a group of tax professionals in the taxpayer list working in various multinational and local organisations, with 40 participants contributing to the study.

The study concluded that taxpayers were neutral (that is, neither agreed nor disagreed) on the effectiveness of the ADR process. However, taxpayers were agreed that the use of an external mediator unconnected to the KRA would have resulted in a better outcome. Taxpayers were aware that the ADR process is enshrined in the Kenyan Constitution, and that the Tax Procedures Act is the main law providing for the resolution of tax disputes through ADR.

The taxpayers were of the view that there are no clear timelines for resolution of tax disputes through ADR in Kenya. They however agreed that the ADR process helps to bring certainty in tax disputes earlier, and that there are significant cost savings in resolving disputes through the ADR process. They also believe that the ADR process can help improve the efficiency of subsequent litigation before the Tax Appeals Tribunal. ADR proceedings were conducted in a confidential and without prejudice basis, and that their rights of review and appeal were not affected through participation in the ADR. However, taxpayers were neutral in their views regarding the objectivity of the ADR proceedings, and the neutrality displayed by the mediators in ensuring a level playing field during deliberations. That notwithstanding, they would recommend the ADR process to other taxpayers. Taxpayers are however of the view that the KRA has not done sufficient sensitization of the ADR process to taxpayers involved in tax disputes.

With respect to alternative dispute resolution channels, taxpayers were aware that tax disputes can be resolved through Court Annexed Mediation, but were neutral as to whether the ADR framework under the KRA encourages the use of ADR processes available through legal processes outside the tax appeals procedures, and likewise appear neutral as to the resolution of tax disputes through the appointment of an arbitral tribunal under the Arbitration Act, or through the Nairobi Centre for International Arbitration.

Taxpayers strongly felt that there was need for a Tax Ombudsman to provide a neutral or impartial redress channel for taxpayers that have exhausted the normal KRA complaints mechanism. They also agree that the Kenyan courts support the ADR process from a Constitutional view point. However, they are neutral in their perception regarding whether the ADR process is sufficiently embedded into the Tax Procedures Act, and also with respect to whether settlements can potentially be challenged as unconstitutional.

The study recommends that the KRA should invest in sensitizing taxpayers regarding the ADR process, and in embedding the requisite skills, motivation and resources in them to use the ADR process effectively. The ADR guidelines need to be widely publicized so that all taxpayers can be clear as to the requirements of the process. Also, KRA may wish to consider permitting the use of external mediators, unconnected to the KRA, if the parties deem it fit to do so.

## **ACKNOWLEDGEMENTS**

I acknowledge the support and guidance received from Tax Professionals in Kenya who immensely contributed to this study. I also thank the USIU Faculty who have walked with me through the academic journey.

## **DEDICATION**

To my wife and children.

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## **LIST OF ABBREVIATIONS AND ACRONYMS**

AA	-	The Arbitration Act
ADR	-	Alternative Dispute Resolution
ATO	-	Australian Tax Office
DSD		Dispute System Design
HMRC	-	Her Majesty's Revenue & Customs
ICPAK	-	Institute of Certified Public Accountants of Kenya
KRA	-	Kenya Revenue Authority
MAC	-	Mediation Accreditation Committee
NCIA	-	Nairobi Centre for International Arbitration
NCIAA	-	Nairobi Centre for International Arbitration Act, 2013
SARS	-	South Africa Revenue Service
SME	-	Small and Medium Enterprises
SPIDR	-	Society of Professionals in Dispute Resolution
TPA	-	Tax Procedures Act, 2015
UK	-	United Kingdom

## **CHAPTER ONE**

### **1.0 INTRODUCTION**

#### **1.1 Background of the Problem**

Conflict is ubiquitous in all societies and has many definitions. Generally, conflict is a phenomenon that is inevitable in all human society due to differences in interests, goals, values and aims among people (Kazeem, 2009). A dispute is a form of conflict that entails one person or organization that makes a claim or demand – arising from a perceived injury or from a need of aspiration on another who rejects it (Ury, Brett and Goldberg, 1988). Also, a dispute can be viewed as product of unresolved conflict (Law Reform Commission, 2008).

There is no single definition of alternative dispute resolution (ADR) as it is essentially an umbrella term that applies to numerous situations, meaning different things to different people (Muigua, 2012). For example, a businessman or corporate finds ADR as a quicker and more confidential means of resolving a commercial dispute without the unwanted publicity of legal redress through the court process. A corporate may also view it as a way of settling disputes between parties that are engaged in continuous trading relationships; directors of the same company; and in labour practice between management and labour (Faris, 1995).

Broadly however, ADR practice consists of processes and techniques which promote collaborative problem solving to assist disagreeing parties in coming to agreement, ideally in a consensus seeking fashion. These processes and techniques widely include mediation, facilitation and negotiation between parties. They frequently require convening practices, and extend to practices that include public or community involvement or input (Foster, 2011). Conflict resolution, through the processes of negotiation, mediation and arbitration, has become an acceptable and perhaps inevitable part of the legal profession in the 21st century. The term ADR is better described not as an alternative to litigation but rather another technique of dispute resolution (Fiadjoe, 2004).

ADR processes are different to the process of litigation, and the word ‘alternative’ is used to indicate these differences. Litigation is a conventional institutional method of dispute resolution under the judicial court system, given the judiciary’s mandate as one of the three arms of government and its mandate for interpretation, application and enforcement of the social values as enshrined in the legislation and common law. However, the two processes are not in competition with each other and are not necessarily a substitute for each other (Muigua, 2012). In practice, very few disputes end up being litigated by the courts, and most of those that do end up in court are settled before trial by informal methods of dispute resolution. Hence, we can conclude that although the word ‘alternative’ in ADR points to differences between ADR processes and the process of litigation, this separation is purely academic (Faris, 1995).

ADR is founded upon 3 primary processes: negotiation, mediation and arbitration (Faris, 1995). Each of these is unique in itself, but the key thread of commonality is the fact that they are consensual in nature – that is, the parties to the dispute voluntarily agree to use a particular process and the dispute is settled on the basis of their mutual consent (Mnookin, 1998). That notwithstanding, the differences between each are clear – a negotiation is a bilateral relationship whereas in the case of mediation and arbitration the relationship is trilateral given the involvement of a neutral third party (Muigua, 2012).

Negotiation is any form of communication between two or more people for the purpose of arriving at a mutually agreeable solution. In a negotiation, the disputants may represent themselves or may be represented by a negotiating agent or agents. The people involved in the negotiation, whether the disputants or their agents, maintain control over the negotiation process. The main advantage of this form of dispute settlement is that it allows the parties themselves to control the process and the solution.

On the other hand, Mnookin (1998) describes mediation as a non-binding process in which an impartial third party, called the mediator, facilitates the negotiation process between the disputants. As the mediator has no decision-making power, the disputants maintain control over the substantive outcome of the mediation. However, the mediator controls the process with the help of the disputants. With the consent of the disputants, the mediator sets and enforces the ground rules for the mediation process.

Arbitration is a process in which a neutral third party, or an odd-numbered panel of neutral parties, renders a decision based on the merits of the case. The parties to the arbitration can maintain some control over the design of the arbitration process, for example by contract or as set out by statute, or in other cases by designing an arbitration process appropriate to their dispute. Although the proceedings are fairly formal, the rules of evidence are more relaxed than court proceedings (Mnookin, 1998). The decisions of arbitration proceedings may be advisory or binding. If non-binding the parties are at liberty to commence legal proceedings if they are not satisfied with the decision, although the party doing so may run the risk of being required to bear the costs of doing so. On the other hand, if the decision is binding between the parties, it is difficult to overturn a binding arbitral award. A binding arbitration is usually agreed to voluntarily by the parties prior to the occurrence of the dispute (Fiadjoe, 2004).

In Europe, ADR was applied on commercial arbitration in the 10th and 11th centuries. The process was voluntary and participatory, with merchants who refused to accept the decision of an informal judge being ostracized by other merchants (Barrett, 2004). In 16<sup>th</sup> century, the commercial arbitration was frequently used in New York City during both the Dutch colonial period (1624 – 1664) and the British colonial period (1664 – 1776). ADR continued to evolve in any states over time but it was fully adopted after the world war I where it was used to resolve labour disputes and establish labour agreements to aid the war effort ending with the peace in Europe. The ADR was also used to solve crisis formed by the World War II. From the 1970s onwards, the United States of America has significantly developed the use of ADR in diplomacy, environmental law, the Federal and State Governments.

With the acceptance of the ADR as dispute resolution mechanisms, different bodies were formed to lead the ADR process. In 1926, the American Arbitration Association was created. This was a public service and not for profit organization. In 1962 the U.S. Supreme Court recognized labour arbitrators' expertise as a final authority, with the Ford Foundation creating the National Center for Dispute Settlement and Center for Mediation and Conflict resolution to apply labour-management ADR to civil rights, campus and community disputes. In 1972, the Society of Professionals in Dispute Resolution (SPIDR) was created as a membership organization for ADR practitioners. The SPIDR merged in 2001 with the Academy of Family Mediators and the Conflict Resolution Education

Network to form the Association of Conflict Resolution. In 1979, the Judicial Arbitration and Mediation Service (now called JAMS) was set up as a private for-profit ADR service provider, it is now the largest private ADR service provider in the world.

On the laws governing ADR, Ireland enacted the first arbitration law in 1698, which formed the foundation of arbitration used today. Such laws included parties to choose their own arbitrator, recording of the arbitration awards in a state court, and courts enforcing enactment of the arbitration awards. The first ADR statute in the United States, the Arbitration Act, was passed in 1888, providing voluntary arbitration and ad hoc commissions to investigate the cause of specific railway labour disputes. In 1920, the New York State passed the first modern arbitration law, and within 5 years, 15 other states followed suit. In 1962 the U.S. Supreme Court recognized labour arbitrators' expertise as a final authority, with the Ford Foundation creating the National Center for Dispute Settlement and Center for Mediation and Conflict resolution to apply labour management ADR to civil rights, campus and community disputes.

In Africa, ADR has been in existence for a longer period. Traditionally, ADR existed as a means of solving disputes (Muigua, 2012). According to Fiadjoe (2004), where elders lacked coercive means of resolving disputes, consensus was used to solve the dispute as alternative dispute resolution process. Muigua and Francis (2015) refers to this as Traditional Dispute Resolution (TDR) mechanisms. Such was applied by the Bushmen of Kalahari (Muigua & Francis (2015), the Kpelle of Central Liberia (Barrett, 2004), the Yoruba of Nigeria (Barrett, 2004), the chiefs in Ghana (Fiadjoe, 2004) and the Council of Elders in Kenya (Joseph, Osamba and Murage, 2017). Though the mechanism used by the elders and the chiefs who headed the traditional dispute resolution process varied, they had similar intention of solving the dispute in their communities. Such mechanisms used included but not limited to proverbs, persuasion, subtle blackmail, precedent and magic.

In Kenya, Article 159 of the Constitution recognizes the use of Traditional Dispute Resolution (TDR) and ADR mechanisms in addition to the court process. Article 209 of the Constitution further grants exclusive power to the National Government to impose Income Tax, Value Added Tax, Customs Duty and Excise duty, as well as any other tax or duty (Constitution of Kenya, 2010; Gachai 2018, Kashindi, 2017). Despite the constitution, there are other acts that inform the ADR. In 2015, the tax dispute process was overhauled through the enactment of a Tax Procedures Act, 2015 ("TPA"), which

introduced fundamental changes to the tax dispute resolution process. These included the merging of various tax appeals processes in disparate tax legislations, in particular, the Customs and Excise Act, the Income Tax Act and the Value Added Tax Act, and the creation of a uniform administrative process for lodging tax appeals (Kashindi, 2017). In the same year, in July 2015, the Commissioner-General of the KRA launched a framework on ADR that informed the process. KRA as a tax policeman in Kenya is the body that implements and oversees the tax ADR process in Kenya. In order to strengthen the process, the KRA sought to create an effective transparent structure as well as giving the process independence from the departments where the disputes originally arise (Caruso & Debelle, 2016).

## **1.2 Statement of the Problem**

In 2015 the Commissioner General of the Kenya Revenue Authority (KRA) launched a new dispute resolution framework via Alternative Dispute Resolution (ADR). This initiative provides for the resolution of tax disputes through an internal mechanism within the KRA (KRA, 2015). By 2017, it was reported that the initiative had yielded KShs 6.6 billion in taxation revenues within its first two years, with 140 disputes that had been pending before the Tax Appeals Tribunal (TAT), having been resolved through the ADR framework, and others being resolved in favour of taxpayers with no revenue yield to the KRA (Omar, 2017). This suggests that there has been a significant uptake of the initiative by Kenyan taxpayers.

Although significant progress has been made on ADR since its introduction by the KRA 2015, and despite significant progress in resolving ongoing tax disputes during this period, there has been little published research on ADR in the context of tax disputes in Kenya. In particular, the researcher is not aware of any published research setting out the perspectives of participants in ADR proceedings in Kenya as to the efficiency and effectiveness of the ADR process as promoted by the KRA. One notable exception is Kashindi (2017) who reviewed the constitutional, legal and policy framework of ADR to evaluate its viability for inclusion in ADR processes. However, his study did not extend to seeking the views of taxpayers on the efficacy of ADR in resolving tax disputes.

In comparison, there have been extensive studies carried out by tax authorities and independent researchers on more established ADR processes in more developed countries such as those carried out by the HMRC on the adoption of the ADR processes (HMRC, 2013a). In addition, although there are different ADR processes available in Kenya outside the KRA ADR process, there does not appear to have been any focus on convergence between these existing ADR processes and the KRA's ADR framework.

Therefore, the research evaluated the desired objectives of the KRA initiative to cover the gap. The research focused on benchmarking the KRA's approach to ADR to international best practice; establish the efficacy of their approach; and evaluate strategies to enhance the ADR process in resolving tax disputes in Kenya.

### **1.3 Purpose of the Study**

The purpose of this research was to evaluate the adoption of Alternative Dispute Resolution (ADR) process in resolving tax disputes in Kenya.

### **1.4 Research Objectives**

This study sort to answer the following research objectives:

1.4.1 To review ADR process in resolving tax disputes in Kenya;

1.4.2. To establish the efficacy (that is, the efficiency, effectiveness and fairness) of the ADR process in resolving tax disputes in Kenya; and

1.4.3. To evaluate strategies to enhance ADR process in resolving tax disputes in Kenya.

### **1.5 Significance of the Study**

As ADR is a relatively new initiative in tax dispute resolution in Kenya, diverse stakeholders are interested on evaluation of effective ADR process in the resolution of new and on-going tax disputes. The research benefited the following:

#### **1.5.1 Tax Consultants and the Legal Profession**

As tax dispute resolution has previously been litigious, large corporations have relied on the expertise of tax and legal professionals in dispute resolution. The effectiveness of the

ADR process could change the fundamental structure of the tax advisory industry given that it targets a shift away from tax litigation in favour of a negotiated tax settlement. Therefore, tax and legal professionals are keen to determine what impact this has on their future business.

### **1.5.2 Kenyan Taxpayers**

Based on the research findings, the benefits and absorption of ADR increases the goodwill on the part of taxpayers keen to adopt the ADR process to resolve any on-going or future disputes. The taxpayers as consumer and beneficiary of the ADR process are interested and informed with the output of the research.

### **1.5.3 The Kenya Revenue Authority**

The Kenya Revenue Authority ('KRA') is statutorily mandated by the Kenya Government to collect revenue on behalf of the Government of Kenya. The KRA benefits from research carried out on the ADR process as it seeks to enhance the process in meeting its tax collection targets.

### **1.5.4 The Kenyan Government**

As the recipient of tax revenue generated by the KRA, the Kenyan Government and in particular the National Treasury has a keen interest in the KRA's initiatives and monitors incremental tax revenue collected as a consequence of the ADR initiative. Conversely, the Government want assurance that the ADR process does not lead to the loss of financial revenue through settlements that are skewed more favorably towards taxpayers.

### **1.5.5 The Institute of Certified Public Accountants of Kenya**

The Institute of Certified Public Accountants of Kenya ('ICPAK') is the statutory professional accounting institute in Kenya, with a membership in excess of 18,000 accountants in Kenya across East Africa (ICPAK, 2017). This paper is of interest to ICPAK as feedback mechanism since assisted in the development of a suitable ADR framework for adoption by KRA (ICPAK, 2015).

### **1.5.6 Kenyan Business Associations**

These include associations such as the Kenya Private Sector Alliance, the Kenya Association of Manufacturers, the Kenya Bankers Association, the Eastern Africa Association and the East African Business Council. Memberships of these associations include representatives from most of Kenya's large taxpayers. The research findings inform these teams on their engagement with the KRA on behalf of their individual members, regarding the development of an appropriate ADR framework among other areas.

### **1.5.7 Researchers and Students**

The problem statement notes that there has been limited research carried out on the ADR process in the context of tax disputes in Kenya. This study will be a source of reference for researchers and serves as a useful launch-pad for further research in the area.

## **1.6 Scope of the Study**

The research study primarily focused on persons involved in the ADR process in Kenya and sought to evaluate the adoption of Alternative Dispute Resolution (ADR) process in resolving tax disputes in Kenya. The focus was on large taxpayers as their tax disputes generally tend to be more complex than those involving individuals and small businesses. Further, the large taxpayers' views regarding the process was more representative of their organizations position. However, the study did survey feedback from some small and medium enterprises as well. Further, only those who had been involved in the tax disputes were involved in the study, with those not involved in the ADR process being excluded. Data was collected by way of a questionnaire between October 2018 and March 2019.

## **1.7 Chapter Summary**

This section describes the overview of the project. In the foregoing discussion in this chapter, the following were considered: the background, statement of the problem, the purpose of the project, study research objectives, importance of the study, definition of terms, and the scope of the study. The next chapter covers a review of literature relevant to the study. Chapter three covers the methodology used in the study, chapter four the research findings while chapter five discusses the findings.

## **CHAPTER TWO**

### **2.0 LITERATURE REVIEW**

#### **2.1 Introduction**

This chapter expands this research objective by conducting a critical review of the ADR process, including considering its historical origins and its development over the years; its adoption in the Kenya legal framework and eventual extension to the resolution of tax disputes. It also evaluates the effectiveness, efficiency and fairness of the ADR process and conclude by examining the literature suggesting possible strategies for improvement of the ADR process in tax dispute resolution in Kenya.

The chapter contains a detailed review of the literature relevant to this research. It reviews secondary sources of information relating to the problem area, and highlights the knowledge gap which this research paper will seek to address. The chapter has three major parts based on the research objectives. A chapter summary has been included to give an overview of the literature reviewed at the end of the section.

#### **2.2 Review of the ADR Process**

##### **2.2.1 Historical Background to ADR**

ADR has existed as a means of dispute resolution over millennia. Indeed, ADR can be traced to traditional societies which, lacking coercive means of resolving disputes, sought to resolve disputes through consensus building (Fiadjoe, 2004). Fiadjoe further argues that societies in Africa, Asia and the Far East were practicing non-litigious means of dispute resolution long before the advent of the nation state, as the building of long-term relationships was the bedrock on which those societies rested.

Barrett (2004) traces ADR back to the 1800 B.C., to when the Mari Kingdom, in Modern Syria, used mediation and arbitration in disputes with other kingdoms. The Ancient Egyptians applied ADR in diplomacy, using the Amarna system of international relations in 1400 B.C., whereas the Phoenicians, in the Eastern Mediterranean, practiced entrepreneurship and negotiation between 1200 – 900 B.C. There is reference to ADR in the Bible, with King Solomon of Israel, in 960 B.C., arbitrating a dispute over a baby by threatening to split the child, thus helping to determine the rightful mother. The Greeks used public arbitrators in the city-states in 400 B.C., with arbitration decisions being

‘published’ on temple columns. In 300 B.C. Aristotle praised arbitration over the existing court system. In 452 A.D., Pope Leo the Great, faced with the possible destruction of the city of Ravenna, Rome’s western capital, by Attila the Hun, successfully negotiated for it to be spared (NADRAC, 1997).

By the 10th and 11th centuries, commercial arbitration was widely used in Europe under a practice referred to as the ‘law merchant’. This process was developed, adjudicated and administered by merchants. The process was voluntary and participatory, with merchants who refused to accept the decision of an informal judge being ostracized by other merchants. The process initially remained separate from the traditional courts, in part it was relatively specialized depending on the trade. However, by the late Middle Ages, state courts took over the work of the law merchant inasmuch as the courts lacked the technical expertise of the merchant judges who had practical insights on the trade (Barrett, 2004)

ADR gained impetus in the 16th century, with Count Maximilian mediating an end to the Thirty Years War for the Holy Roman Empire, settling boundaries for the next century, and with commercial arbitration being in wide use in New York City during both the Dutch colonial period (1624 – 1664) and the British colonial period (1664 – 1776) (NADRAC, 1997). Ireland enacted the first arbitration law in 1698, which was in force for the next 250 years. The law introduced principles which remain relevant for arbitration today, with the parties being allowed to choose their own arbitrator, arbitration awards being recorded in a state court, and courts could enforce awards (Fiadjoe, 2004).

By the 18th century, Benjamin Franklin, in his capacity as Pennsylvania’s Indian commissioner, learnt persuasion, compromise and consensus building from Native Americans, and printed some of their peace documents. George Washington thought to include an arbitration clause in his will in 1770, and between 1776 and 1785 Benjamin Franklin, John Adams and Thomas Jefferson negotiated in Europe on behalf of the then weak United States, as it sought to establish a diplomatic history for the young nation. Between the 18th and 19th century, there were repeated negotiations and compromises on temporary solutions to the slavery issue. In 1865, Generals Lee and Grant negotiated the terms of the South’s surrender, thus ending the United States’ Civil War. The first ADR statute in the United States, the Arbitration Act, was passed in 1888, providing voluntary

arbitration and ad hoc commissions to investigate the cause of specific railway labour disputes (NADRAC, 1997).

By the turn of the 20th century, ADR was well established as a dispute resolution process. Teddy Roosevelt mediated a peace agreement ending the Russo-Japanese War in 1906 and was awarded the Nobel Peace Prize. ADR processes were used to resolve labour disputes and establish labour agreements to aid the war effort in World War I, with wartime agreements all ending with the peace in Europe (Barrett, 2004). In 1920 New York State passed the first modern arbitration law, and within 5 years, 15 other states followed suit. The American Arbitration Association, a public service not-for-profit organization, was created in 1926. ADR was used by the War Labour Board during World War II, and used ADR (NADRAC, 1997).

Closer home, in Africa, African communities have since time immemorial used various conflict management mechanisms that have been passed on from one generation to the other. These can be referred to as Traditional Dispute Resolution mechanisms (Muigua and Francis, 2015). A number of examples have been documented over the years. The Bushmen of Kalahari resolve disputes over mates, food and land by gathering the community together, and everyone gets a chance to air their concerns in an open and inclusive process of mediation and consensus building. Likewise the Kpelle of Central Liberia use a moot court system to resolve family disputes, with sessions attended by neighbours, and family members, with the mediator being someone with a kinship tie to the participants or some political standing.

Amongst the Yoruba of Nigeria, disputes at the family level are taken before the *mogaji* (lineage head) and *bale* (elderly head of the district), with the elders asking questions after the two sides present their case, and working towards a compromise in which both sides accept some of the blame. The elders may rely on various techniques including proverbs, persuasion, subtle blackmail, precedent and magic, with their only real power being that that they can threaten social excommunication or use emotional blackmail. The traditional head of the Yoruba, the *Olubadan*, also acts as an arbitrator in many disputes (Barrett, 2004). Similarly, in Ghana recognition is still given to non-litigious dispute resolution, under which parties to a dispute refer the matter to a chief or respected community elder. (Fiadjoe, 2004).

Kenyan communities also practiced forms of ADR (Muigua, 2015). For example, the Agikuyu ethnic community had a structure of governance based on three major segments, namely the family group (*mbari* or *nyumba*), the clan (*muhiriga*), and age grade (*riika rimwe*). In the event of conflict, the minor conflicts were handled by the *mbari* or *nyumba*, and unresolved issues were escalated to the *muhiriga*, and after that, to the Council of Elders and who would handle the case until a solution was found (Joseph, Osamba and Murage, 2017).

The traditional and informal justice forums continue to be popular across Africa for three main reasons: First, the vast majority of Africans still live in rural villages where access to the formal state justice system is limited. Secondly, the justice offered by formal courts may be inappropriate as they may result in the breaking of individual social relationships which can cause conflict within the community and affect economic cooperation on which the community depends. Lastly, state justice systems operate with extremely limited infrastructure which does not have the resources to deal with minor disputes in settlements or villages (Muigua, 2012; 2015).

## **2.2.2 Outline of Effective ADR Processes**

A key aspect of an effective dispute resolution process is how it is designed. Dispute System Design (DSD) involves an organization's conscious effort to channel disputes into a series of steps to manage conflict. Further, DSD focused on the design and implementation of a dispute resolution system consisting of a series of procedures of handling disputes (Ury, Brett and Goldberg, 1988). Jone (2016) notes that despite the global trend towards using ADR in tax dispute resolution, the concept of DSD has not been extensively used in analyzing the effectiveness of tax dispute resolution systems around the world, with only two studies (other than her own) having been undertaken using the six DSD principles enunciated by Ury, Brett and Goldberg.

Ury, Brett and Goldberg identify interests, rights and power as the three basic elements of any dispute which must be considered in resolving a dispute, and identify that in resolving a dispute the parties may focus on one or more of the basic factors. Firstly, the parties may seek to reconcile their underlying interests – interests being people's needs, desires, concerns or fears, these being the tangible things that one says they care about or want. They may opt for negotiation or mediation to achieve this. Secondly, they may

resolve disputes by relying on some independent standard with perceived legitimacy or fairness to determine who is right. These rights may be codified in law or contract, or may relate to socially accepted standards of behavior such as reciprocity, precedent, equality and seniority. Thirdly, they may resolve a dispute on the basis of power, this being the ability to coerce someone to do something he would not otherwise do, for example by imposing costs on the other side or threatening to do so. However, there is an interplay between these three elements, and that there are instances where one or other element gives a more desirable outcome than the other.

Generally reconciling interests is less costly than determining who is right, and determining who is right is less costly than determining who is more powerful. However, it is not always possible to reach agreement on the basis of interest. A rights procedure may be needed to clarify the rights boundary within which a negotiated resolution can be sought. Alternatively, where one party wants to demonstrate that the balance of power has shifted in its favour, it may conclude that only a power contest will adequately enable it make its point. Ury, Brett and Goldberg (1988) suggest that an effective system of dispute resolution is one where most disputes are resolved through reconciling interests, some through determining who is right, and the fewest through determining who is more powerful.

Ury, Brett and Goldberg (1988) highlight 6 basic principles of dispute system design, as follows:(1) Focus on reconciling interests, by designing negotiation procedures, and giving parties the skills and resources needed to use those procedures, (2) Build in procedures that allow parties to ‘loop back’ to interest-based negotiation from rights or power approaches – these include advisory arbitration and cooling off periods, (3) Include low cost rights and power backups in case interest-based negotiations fail, for example arbitration rather than litigation, (4) Build in procedures for consultation before potential disputes, and for feedback after disputes. This may help avoid potential conflict and feedback will help the parties to avoid disputes in future, (5) Arrange dispute resolution procedures from low to high cost. This assures that high cost methods are only used after lower cost methods are exhausted. Lastly, (6) Provide people with the skills, motivation and resources they need to use interest-based negotiation procedures. From a political perspective, the system designer must garner support for the new procedures, overcome resistance to change and motivate disputants to use the new system. An effective way of

doing so is by involving the disputing parties in the diagnosis and design process. Further research by Jone (2016) suggests that other dispute resolution practitioners have expanded this model further.

Unlike Ury, Brett and Goldberg (1988), Costantino and Merchant (1996) set out six principles for designing a conflict management system within an organization, namely: (1) Develop guidelines for whether ADR is appropriate: This is to prevent indiscriminate use of ADR when it is not appropriate, (2) Tailor the ADR process to the particular problem: This is in view of the fact that there are different ADR processes and the best system identifies the appropriate ADR process for each dispute, (3) Build in preventive methods of ADR: This will include training potential disputants in interest-based problem solving, and using processes such as negotiated rule making, (4) Make sure that disputants have the necessary knowledge and skill to choose and use ADR: This entails training about conflict management and publicity about the dispute system and how to access it, (5) Create ADR systems that are simple to use and easy to access: The systems should resolve disputes early, at the lowest organizational level, and with the least bureaucracy. Lastly, (6) Allow disputants to retain maximum control: This includes the disputant's control over the choice of ADR method and the selection of any third party wherever possible. They further suggest that an evaluation process should be created at the beginning of the conflict management design process, not at the end, to ensure that the evaluation measures progress continuously in accordance with the system's defined goals and objectives.

Rowe (1997) on the other hand offers six specifications for an effective system: (1) The values of the system – this includes a commitment to fairness and freedom from reprisal, support by top managers, a powerful senior manager who understands and is an advocate for the conflict management system, prevention of conflict where appropriate through active listening and effective communication, and openness to constructive questions and dissent as a means to continuous improvement rather than disloyalty or disrespect. (2) The presence of many options – including interest based and rights-based options, with interest based options being available in parallel, rather than sequential and required steps of a single procedure. Parties may also agree to 'loop forward' from an interest-based option to a rights based option (or a rights and power based option), or 'loop back' from a rights-based option to an interest based option. (3) Multiple access points – this entails

having a variety of people who have been trained to act as ‘fair gatekeepers’ for the conflict management system so that disputants can find access points of different ethnicity and gender, and varied technical backgrounds.(4)

An organizational ombudsperson – this is a ‘designated neutral’ operating inside an organization who is available to help informally with any workplace concern and to provide workplace mediation as necessary. She may further serve as a counselor, informal go-between and facilitator, informal fact-finder, upward-feedback mechanism, consultant, problem prevention device and change agent. The ombudsman ought to report outside ordinary line and staff structures to the Chief Executive Officer or equivalent senior officer and maintain strict confidentiality. (5) Wide scope – the system should be used by all organizational members without regard for rank, and all conflicts that are of interest to people in the organization can be addressed through the system. And (6) Continuous improvement – this entails an oversight committee built into the system and meeting regularly to improve the effectiveness of the system.

Lynch (1998) suggests that an effective conflict management system:(1) Responds to the interest of all stakeholders, (2) Reflects important values – such as integrity, professionalism, respect and cooperation, (3) Promotes the mission of the new agency – this study was specifically done for Revenue Canada, (4) Is supported by highly visible leadership from key leaders in all stakeholder groups, (5) Provides loop-backs forward and backward between rights-based and interest based options, (6) Is fair, friendly, flexible and fast, (7) Promotes resolution at the lowest possible level and (8) Provides structures and systems that assist the organization in moving from ‘conflict resolution’ to ‘conflict management’, including the prevention of conflict.

Slaikeu and Hasson (1998) noted that the parties can loop backwards or forwards, depending on individual circumstances. They state that a good system encourages the preferred path by providing multiple options for collaboration and higher-authority procedures that are both fair and perceived as fair by participants, and that participants should always have the right to choose from all methods and to be provided with independent and confidential assistance in selecting and using the available options. The Society of Professionals in Dispute Resolution (SPIDR), building on work already done by earlier authors, has also offered guidelines on the design of integrated conflict management systems (SPIDR, 2001).

SPIDR suggests that to implement an integrated conflict management system successfully an organization must develop support throughout its infrastructure, with all people believing that conflict can and should be managed through one of the many channels of the integrated conflict management system. They outline various supporting strategies, processes and structures to achieve this, including: (1) Sincere and visible championship by senior management and workplace/union leaders;(2) A continuous oversight body composed of representatives from all key stakeholder groups;(3) A person/persons functioning in the role of internal independent confidential neutral(s),(4) A central coordinating point (office or group), (5) System evaluation and monitoring mechanisms, (6) Critical mass training, ‘just in time’ or ‘on the spot’ training for individuals as needed, and education of managers, supervisors, union personnel and human services personnel. Others were (7) Alignment of the ‘philosophy’ of conflict competency, with the mission, vision, values and policies of the organization;(8) Institutionalized incentives for effective conflict management, woven into the performance appraisal system, (9) An interest-based communication strategy developed through discussions with workplace stakeholders and carefully implemented from the start of the process, (10) Cost incentives that encourage managers and employees to deal with conflict early and effectively; and(11) Sufficient financial and human resources allocated to the system. SPIDR note that input from users and decision maker at all levels of the organization is essential for an integrated conflict management system to work. However, they acknowledge that there is no ideal integrated conflict management system that will fit all organizations; each system must be tailored to fit the organization’s needs, circumstances and culture.

Jone (2016) concludes that although the six models are articulated differently, there are a number of similarities within the principles, as each model builds on those that came before it. She attempts to reconcile the different models by synthesizing them into a list of 14 General Dispute Systems Design Principles, as follows: (1) Stakeholders should be included in the design process. (2) The system should have multiple options for addressing conflict including interest, rights and power based processes. (3) The system should provide for loops backward and forward. (4) There is notification before and feedback after the resolution process. Notification taking a proposed action can help prevent disputes through misunderstanding and miscommunication, and help identify points of difference earlier on so that they can be negotiated. Likewise post dispute analysis and feedback can help parties to learn from disputes to prevent similar disputes

in future. (5) The system has a person or persons who function as internal independent confidential neutral(s). (6) Procedures are ordered from low to high costs: this is to reduce the costs of handling disputes. (7) The system should have multiple access points. The system should offer a choice of persons whom system users may approach in the first instance. (8) The system includes training and education for stakeholders. This should entail training on conflict management as well as education about the dispute system and how to access it. (9) Assistance is offered for choosing the best process: This includes the use of guidelines, coordinators and process advisors. (10) Disputants have the right to choose a preferred process: This is in the context of a multi-option system. (11) The system is fair and perceived as fair: The system should foster a culture that welcomes good faith dissent. (12) The system is supported by top managers: There should be sincere and visible championship by senior management. (13) The system is aligned with the mission, vision and values of the organization. Lastly, (14). There is evaluation of the system. This is to identify strengths and weaknesses of design and foster continuous improvement.

DSD has not been extensively considered in the context of tax dispute resolution. This is in part because tax disputes are not regarded as interest-based disputes, as they are more focused on obtaining a result, specifically how much ought to be paid out. Bentley (2006) argues that dispute resolution that is rights and power based favors the revenue administration and collection authority. The potential cost of a tax dispute to the taxpayer results in the revenue authority becoming the effective arbiter of both parties' rights as the taxpayer has to withdraw. The revenue authority's power to impose tax, interest and penalties, or the threat to do so, becomes a further factor that influences the outcome of the dispute. In addition, the revenue authority is much better resourced than the taxpayer and also has more experience handling tax disputes. Thus, unlike typical disputes, in a tax dispute there is a power imbalance between the taxpayer and the revenue authority which limits the application of an interests-oriented system.

Bentley (2007) suggests that ADR provides an improvement in taxpayer compliance by making it easier to resolve disputes with revenue authorities or to allay concerns. It also improves the effectiveness and efficiency of tax administration as ADR focuses on avoiding time consuming and expensive litigation before the courts, which aligns with the aim of DSD in reducing the cost of handling disputes and resulting in more acceptable

and permanent settlements. Hence it is considered appropriate to use DSD principles in evaluating the design of tax dispute resolution systems.

### **2.2.3 The Kenyan approach to ADR**

ADR as a dispute resolution process is enshrined in the Constitution of Kenya (2010). Article 159 of the Constitution recognizes the use of Traditional Dispute Resolution (TDR) and ADR mechanisms in addition to the court process (Caruso & Debelle, 2016). The Article provides that in exercising judicial authority, the courts and tribunals shall be guided by the principles that justice shall be done to all, irrespective of status; justice shall not be delayed; alternative forms of dispute resolution including reconciliation, mediation, arbitration and TDR mechanisms shall be promoted; justice shall be administered without undue regard to procedural technicalities; and the purpose and principles of the Constitution shall be protected and promoted (Gachai 2018). There is however a caveat that the TDR mechanisms shall not be used in a way that contravenes the Bill of Rights, are repugnant to justice and morality or result in outcomes that are repugnant to justice and morality, or are inconsistent with the Constitution or any written law.

Article 209 of the Constitution further grants exclusive power to the National Government to impose Income Tax, Value Added Tax, Customs Duty and Excise duty, as well as any other tax or duty, through legislation, save for property and entertainment taxes which are a preserve of the County Governments. Indeed, many other statutes make provision for the charge, assessment and collection of a wide range of taxes (Gachai, 2018).

Tax dispute resolution in Kenya has typically been adversarial and tribunal or court-based, with disputes going through a formal appeals process. The tax dispute process was overhauled in 2015 through the enactment of a Tax Procedures Act, 2015 (“TPA”), which introduced fundamental changes to the tax dispute resolution process (Caruso & Debelle, 2016). These included the merging the various tax appeals processes in disparate tax legislations, in particular, the Customs and Excise Act, the Income Tax Act and the Value Added Tax Act, and the creation of a uniform administrative process for lodging tax appeals (Gachai, 2018). The new Tax Appeals Tribunal was empowered to consider both

matters of fact and law, and new requirements were introduced for the selection of suitable members of the Tribunal (Kashindi, 2017).

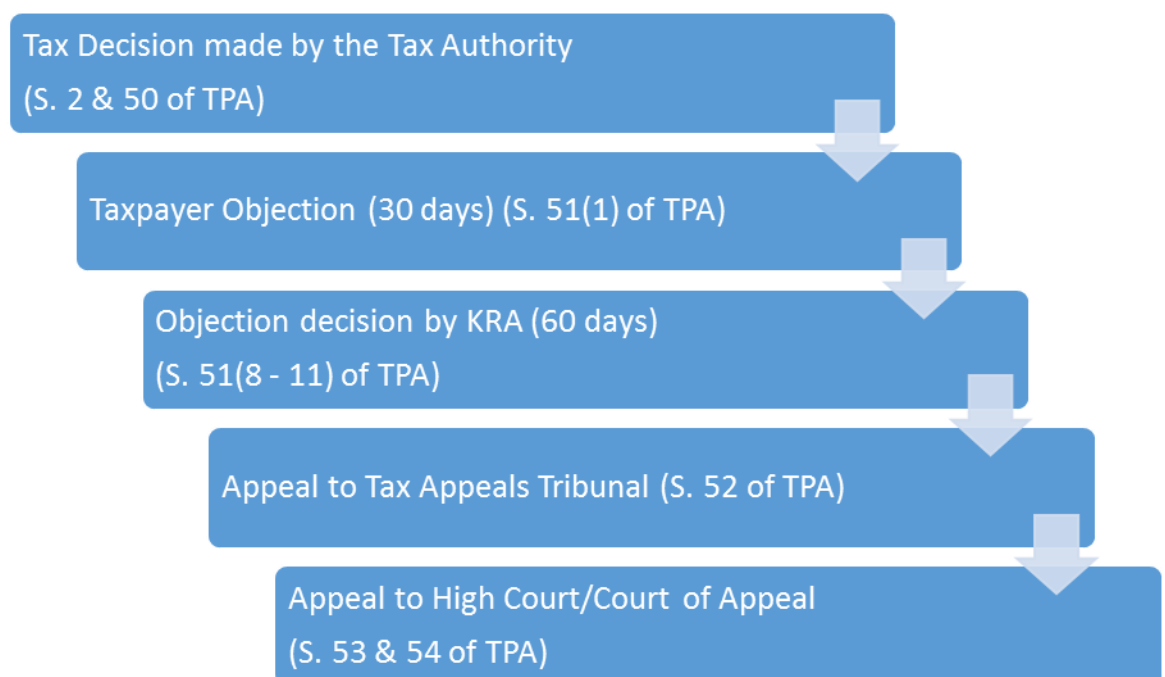
The TPA provides for tax returns to be submitted in the approved form and manner prescribed by the Commissioner. However, the Commissioner is not bound by the tax return, and he may assess a taxpayer's tax liability using any information available to him. A taxpayer is treated to have made an assessment for the deficit where he submits an Income Tax self-assessment return showing a deficit for a year of income; or where he submits a Value Added Tax return showing an amount payable (Gachai, 2018). Where a taxpayer fails to submit a tax return under any tax law, the Commissioner may, based on information available and to the best of his judgment, make an assessment – referred to as a default assessment – for the deficit in the Income Tax or Value Added Tax return, or the tax payable by the taxpayer in any other case. The Commissioner is required to notify the taxpayer of the assessment in writing, clearly showing the amount of tax assessed and the period it relates to, as well as the late submission or payment penalty and the late payment interest, and the due date for payment of the tax, penalty and interest, which should be no less than 30 days from the date of service of the notice. The notification should also indicate the manner of objecting to the assessment (TPA, 2015).

The Commissioner may also make an assessment - referred to as an 'advance assessment' - of the tax payable if the taxpayer has not submitted a return for the reporting period. This advance assessment may be made before the date on which the taxpayer's return for the period is due, and in accordance with the tax law in force at the date the assessment is made. The requirements for the notice to the taxpayer are identical to those for a default assessment (Mokaya, 2017). The provisions governing tax decisions, objections and appeals are in Part VIII of the TPA. Under this Part, a taxpayer wishing to dispute a tax decision must first lodge an objection to the decision in writing within 30 days of being notified of the decision (Mokaya, 2017). The notice of objection must state precisely the grounds of objections, the amendments required to be made to correct the decision, and the reasons for the amendments. In the event the tax decision relates to an amended assessment, the taxpayer may only object to alterations and additions to the original assessment (Caruso & Debelle, 2016). The taxpayer should also pay the entire amount of tax due under the assessment that is not in dispute. The burden rests on the taxpayer to prove that a tax decision is incorrect (Mnookin, 1998)..

Where a notice of objection has been validly lodged within time, the Commissioner must consider the objection and decide either to allow the objection in whole or in part, or disallow it. The Commissioner's decision is referred to as an 'objection decision', and should include a statement of findings on the material facts and the reasons for the decision, and be notified to the taxpayer in writing (Omar, 2017). Where the Commissioner has not made an objection decision within 60 days from the date the taxpayer lodged a notice of the objection, the objection shall be allowed Muigua (2018).

According to Mokaya, (2017) A taxpayer that is dissatisfied with a tax decision may appeal the decision to the Tax Appeals Tribunal (TAT), in line with the Tax Appeals Tribunal Act, 2013 (TATA). Thereafter, any party to the proceedings before the TAT that is dissatisfied with the decision of the TAT may lodge an appeal with the High Court within 30 days of being notified of the decision (or such other period the High Court may allow), in line with the provisions of TATA. Similarly, a party to proceedings before the High Court that is dissatisfied with the decision of the High Court may lodge an appeal to the Court of Appeal within 30 days (or such other period the Court of Appeal may allow).

The table below summarises the tax dispute structure:



Source: Mokaya, 2017

Section 55 of the TPA provides that the Courts or TAT may permit the parties to settle a dispute outside the Court or Tribunal. However, such settlement must be made within 90 days from the date the Courts or TAT permit the settlement. Where the parties fail to settle the dispute within this period, the dispute is referred back to the Court or Tribunal that permitted the settlement. It is this section of the TPA that appears to provide for the resolution of taxpayer disputes through ADR (Muigua, 2018). The TPA provisions are further buttressed by Section 28 of the TATA which provides that the parties may apply to the TAT, at any stage during the proceedings, to settle the matter out of the Tribunal, and the TAT may grant the request under such conditions it may impose, with the parties to the appeal reporting to the Tribunal the outcome of settlement of the matter outside the Tribunal.

In July 2015, the Commissioner-General of the KRA launched a framework on ADR. Its stated intent is that it affords taxpayers with tax disputes a second chance to achieve an amicable resolution, through the establishment of an internal mechanism giving taxpayers the option to seek review of a tax dispute outside of the environment where the dispute is generated. In order to strengthen the process, the KRA sought to create an effective transparent structure as well as giving the process independence from the departments where the disputes originally arise (Mokaya, 2017).

Typically this means that the ADR conversations are conducted before a tax team of officers not directly involved in the audit process, giving a measure of independence to the process. The ADR process applies to disputes at all stages of the appeals process, including disputes on which tax assessments have not been confirmed, disputes on which tax assessments have been confirmed but the parties (taxpayer and the KRA) mutually agree to a self-review and disputes before the Courts but where the parties desire an out-of-court settlement (Mnookin, 1998). The Commissioner General has indicated that the Kenya Revenue Authority will target to ensure the resolution of the bulk of tax disputes prior to the confirmation of assessments (KRA, 2015). It was reported that over KShs 35 billion was locked in various tax disputes before the ADR framework was launched in June 2015. By April 2017, KRA had recovered about KShs 6.6 billion in taxation revenues from disputes resolved through the ADR mechanism, with about 140 tax disputes that had been pending before the Tax Tribunal having been resolved through ADR (Omar, 2017).

#### **2.2.4 Benchmarking the Kenyan Approach to International Best Practice**

There appears to have been limited analysis in benchmarking the Kenyan approach to ADR in the context of resolving tax disputes. This may be because at the time of writing this paper the ADR framework has only been in force for about 3 years, and thus there has been limited scope for its assessment to date. It is however worthwhile to compare the ADR framework in Kenya with that in countries with more established ADR frameworks.

The Australia Tax Office (ATO) is obliged to act as a model litigant under the Attorney-General's Legal Service Directions, which requires the ATO to endeavor, where possible, to avoid, prevent and limit the scope of legal proceedings including by giving consideration in all cases to ADR before initiating legal proceedings and by participating in ADR where appropriate. The requirement to consider ADR is a continuing obligation from the time the litigation is contemplated and throughout the course of litigation. Further to this, to the extent that the ATO is a party to civil proceedings in the Federal Court, it is also required to file a genuine steps statement in relation to actions taken, or not taken, to resolve the dispute prior to commencing proceedings under the Australia Civil Dispute Resolution Act, 2011. In addition, both the Federal Court and the Administrative Appeals Tribunal ('AAT') may direct the ATO to participate in certain ADR proceedings (Mookhey, 2013).

To this end, the Commissioner has through a Practice Statement instructed ATO staff with a role of management of tax disputes that they must consider whether it would be appropriate to participate in some form of ADR. In particular, the ATO commits to taxpayers and their representatives to identify opportunities for ADR, consider and respond to requests for ADR, suggest ADR where appropriate, and speak with and write to the taxpayer before ADR to explain the process and what they can expect from it. The ATO also considers that ADR may be appropriate where it will achieve a quicker or cheaper resolution particularly where the cost of litigating is out of proportion to the possible benefits; where it will narrow or clarify the facts and issues in dispute; where it will minimise the risks associated with evidentiary difficulties; or facilitate a certain or earlier payment of tax; or where it will maintain or improve the relationship between the parties in dispute. On the other hand, the ATO considers ADR to be inappropriate where resolution will result in a departure from an set ATO viewpoint; the cost and delay involved in ADR is disproportionate to the likely benefit, the dispute turns on issues of

law or there is a public benefit in having the matter judicially determined; the facts are clear and the application of the law is straightforward, or there is a concern that the case involves serious criminal fraud or evasion (ATO, 2013).

South Africa also has an established ADR process, which is determined by the dispute resolution rules issued under the Tax Administration Act 2011. In brief, the rules provide that a facilitator – who may or may not be a South Africa Revenue Service (‘SARS’) official - will arrange an ADR meeting and notify all the parties, or if no facilitator is used, the parties will arrange it. SARS maintains a list of facilitators of ADR proceedings for this purpose. The taxpayer can represent itself, however, in exceptional circumstances and with the facilitator’s consent, the taxpayer may be excused from the facilitation and be represented by a representative of its choice. The meeting is conducted in an informal manner, and during the meetings both parties state their case and provide supporting documents as needed. During this process, the facilitator will endeavor to resolve the dispute. The facilitator is required to convene ADR proceedings within 20 days of their appointment. If no facilitator has been appointed, the parties themselves must convene such proceedings within 30 days. The ADR process must be concluded within 90 days after the commencement of the proceedings. The ADR proceedings may not be electronically recorded, and a facilitator or party to the proceedings is not required to record the proceedings. In addition, representations made during the course of the ADR meeting are made without prejudice and cannot be used against the taxpayer in any subsequent proceedings. If the dispute is not resolved by ADR the taxpayer can appeal to the Tax Board – if the tax in dispute is below R500,000 – or to the Tax Court (SARS, 2014).

ICPAK (2015) issued Comments on the KRA ADR mechanism soon after the ADR Framework, and highlighted two main concerns with the ADR process. Firstly, the ADR mechanism is an internal one, hence it provides a limited scope to ADR in general. The second, closely related to the first, was that the framework did not reflect the intention of the KRA to approach tax dispute resolution on a level playing field. They proposed that similar to the United Kingdom, facilitators identified for the purposes of ADR should undergo an internal certification course with the KRA that would train and thereafter bind them to a professional code of conduct to regulate their execution of their mandate.

In keeping with the South African model, they further proposed that the KRA should anchor the ADR process in the TPA; establish a criterion for the identification of facilitators and provide for the inclusion of professionals such as accountants in the list of facilitators; and regard the facilitator as a KRA official for purposes of the confidentiality provisions of revenue statutes. They also proposed that the KRA's ADR framework should include provisions requiring mutual agreement to engage a facilitator or not for ADR, and for the issuance of an assessment after agreement was reached to give it legality in the tax administration process, all these being processes already included in the South Africa ADR framework.

ICPAK (2015) however rejected the Australian model of housing the ADR framework within the framework of the Administrative Appeals Tribunal, as this would not meet the objective of Internal Dispute Resolution as envisaged by the KRA, although they suggest that the various ADR approaches utilized by the tribunal in ADR are helpful guides for the KRA to review in providing the alternatives for the internal ADR mechanism.

Kashindi (2017) concludes that the use of ADR in resolving tax disputes in Kenya is a viable proposition, more so given that it has been used successfully in several other countries, including Australia, the United Kingdom and South Africa, amongst others. However, he suggests that for ADR to be effectively and efficiently adopted to resolve tax disputes there have to be relevant revenue laws and institutions that provide for the application of ADR methods in tax disputes. By way of comparison, the Australian tax legislation defines how assessments and objections are made, but further provides a framework for the application of ADR in tax dispute resolution. The Australian tax authority has also established procedural regulations including practice statements and codes of settlement that entrench the utilization of ADR in resolution of tax cases. Likewise, the United Kingdom has tax dispute resolution legislation incorporates the use of ADR in tax disputes. Given that the Kenyan constitution provides for the application of ADR in all disputes, and the TPA and TATA similarly envision appeals being resolved outside the Court or Tribunal process, there is no hindrance to ADR processes being firmly anchored in legislation (Muigua, 2018).

Kashindi points out that there are many advantages of using ADR over litigation, as litigation is often associated with high costs of resolving disputes and a backlog of cases which delays access to justice. Party participation and satisfaction in litigation is also low, in comparison with ADR which preserves the trade secrets and public image of corporate entities, as well as preserving the relationship with the KRA. He further highlights that the preferred ADR mechanism used in resolving tax disputes is mediation, and this is the preferred means of dispute resolution in other markets such as the United Kingdom and South Africa. For example, in South Africa, mediation involves the use of SARS officials who are trained in the ADR mechanism and are deemed to act independently. This is in line with the KRA's approach to ADR under which the ADR conversations are conducted before a tax team of officers not directly involved in the audit process, giving a measure of independence to the process. Hence Kashindi is of the view that the facilitated mediation process in Kenya is well aligned with international best practice.

He further highlights that different countries have adopted different ways of going about ADR in resolving tax disputes, for example the United Kingdom's use of a piloting system, and South Africa's adoption of a reporting system. He suggests that the best approach to ensure that a country adopts effective mechanisms is by not borrowing heavily from a system adopted in other jurisdictions, but to identify the key common areas and strategies that could be borrowed and applied in Kenya through benchmarking. This should also be the case when drafting legal provisions and regulations relating to the use of ADR mechanisms.

In building a case for ADR adoption in Poland, leading accounting firm PWC point out that not all cases can be resolved through the ADR process. For example disputes in which the interpretation of the applicable regulations rather than the interpretation of facts is the essence of the problem should ideally remain under the jurisdiction of administrative court (PWC, 2013). In the same vein, the HMRC ADR panel would reject an ADR application where the HMRC considers that the issue involves a policy or legislative 'red line' which can only be resolved before the Tribunal (HMRC, 2013a).

## **2.3 The Efficacy of ADR Processes**

### **2.3.1 Effectiveness of ADR**

The KRA initiative to adopt ADR is against the backdrop of the adoption of ADR by other tax authorities across the globe, and it is therefore considered useful to evaluate how effective their ADR programmes have been.

The initial stages of the UK SME pilot found that out of the 150 SME cases that were otherwise headed for an internal HMRC review – an advanced stage of the UK disputes process – 97% of the taxpayers accepted an offer to resolve the dispute through mediation by an internal HMRC facilitator by agreement. 28 facilitations were completed by May 2011, resolving the dispute in whole or in part in 64% of cases, and taking on average 28 days. The HMRC facilitators were trained to listen, consider and to discuss the key issues in dispute with both parties and support them in reaching agreement as quickly as possible. The facilitators worked mainly through telephone contacts, but also on occasions through facilitated discussions, all conducted in open (three-way) session, rather than using private sessions with each party (Walton, 2011).

By 2012, the average age of Direct Taxes disputes entering the SME project was 23 months, whereas that of VAT disputes was 8 months. Out of 366 applications for facilitations, 151 were completed. 58% of cases were successfully resolved, a further 8% partially resolved. 34% of cases were unresolved. Out of the resolved cases, 33% were resolved by educating the customer/agent about the correct tax position, and 24% were resolved due to the facilitator obtaining further evidence. 23% were resolved by educating the HMRC decision maker about the correct tax position, whilst 20% were resolved through facilitators restoring communication between both parties. Similarly, for those that were only partially resolved, 50% were partially resolved by educating the customer/agent about the correct tax position, 40% were partially resolved due to the facilitator obtaining further evidence, and 10% were partially resolved by educating the HMRC decision maker about the correct tax position (HMRC, 2013a).

The second pilot's objective was to test the benefits of ADR in the resolution of large and/or complex tax disputes. It was initially expected that mediation using an external mediator, unconnected with either HMRC or the customer, would need to be used in all cases within the pilot. However, it was found that in most cases using mediation-trained

HMRC people who had no previous involvement in the case to facilitate structured discussions led to resolution. Hence the pilot relied both on mediation (involving the use of a trained mediator acceptable to both parties, and who was totally independent of both the HMRC and the customer) and facilitated discussion which was similar to mediation but with discussion facilitated by either an externally trained HMRC resource accredited to use mediation techniques, or a HMRC person as above working in tandem with a similarly trained person supplied by the customer. External mediation was used in 2 cases and facilitated discussion in 26 of the cases (HMRC, 2013b).

Phase I of the pilot (July 2011 to March 2012) took on 14 cases and resolved 11 of these. For phase II the main sources of applications were either tax advisors suggesting the use of ADR to clients, who would then authorize the adviser to make the application to HMRC, or HMRC stakeholders reviewing cases and getting agreement that ADR should be formally offered to the customer. Applications were initially accepted involving disputes at all stages of the appeals process as well as disputes pre-appeal. 67% of cases considered were accepted for the pilot. Out of the accepted requests for resolution of ADR, 35% were resolved by the time of the report, with the tax at stake of over £57 million, and with cases with tax at stake of £93 million still being worked on at the time of the report. Only 5% of cases failed to resolve from those accepted.

The process was well received by taxpayers with a 93% approval rating. It was found that facilitators could facilitate disputes in tax regimes different to their training and experience. It was also found that a key factor enabling ADR to help resolve dispute was the mediator/facilitator being accepted as a neutral party that could robustly challenge each side's position. In addition, having the relevant HMRC policy or technical specialists present or available, as well as the relevant decision makers for the customer, allowed for better interaction between the two sides. By engaging in the process, both parties looked afresh at the facts and arguments in the dispute, and issues could be 'unpacked' to understand whether they are a single or multiple, with a view to dealing with issues singly, if that helped, or in the alternative to enable separate issues to be dealt with to help uncover a solution that was not available to each issue separately. The process could also allow for an issue to remain unresolved but the possible outcomes to be explored, thus helping to identify an acceptable method to resolve the case as a whole (HMRC, 2013b).

The HMRC pilot studies were both considered successful, with key project objectives having been met. In particular, the HMRC facilitators were proven to be objective and even handed for all types of customers and it was evident that the external stakeholders supported the project. The ADR process has since become embedded in the tax dispute resolution framework in the UK (Ernst and Young, 2014).

The Kenya Revenue Authority, in its 7th Corporate Plan, has highlighted that they were have been able to use ADR to resolve 38 per cent of all their disputes through ADR, with 62% of the ADR disputes being resolved by end of June 2018, raising a total of Kshs 8 billion (KRA, 2019).

### **2.3.2 Efficiency of ADR**

There are varied viewpoints regarding whether the ADR process results in time and cost savings. Ernst & Young's UK firm (Ernst & Young, 2014) has found that the ADR process helps to bring certainty earlier, allowing provisions to be released and tax repayments to be freed up. They also note even where the parties in are unable to reach an agreed resolution the ADR process can help to improve the efficiency of any subsequent litigation, by clarifying the facts and narrowing the dispute to the key issues needed to be tested at the Tribunal. The ADR process can be completed in a short period of time, without adversely impacting the timetable for any subsequent litigation if agreement cannot be reached.

Large businesses in dispute with the HMRC have been able to apply for ADR of tax disputes since 2011. By 2015, around 40 large or complex cases had been successfully resolved through ADR, on top of over 45 high risk corporates programme cases, under which very large corporate groups and HMRC could jointly adopt an intensively project-managed approach to resolve a range of open tax disputes by settlement or moving forward to litigation (Lloyd & Dennis, 2015)

The HMRC pilot study for large taxpayers concluded that there were significant time and cost savings in resolving disputes through the ADR process for both HMRC and the customer. The HMRC consider that taking a case to First Tier Tribunal using Leading and Junior Counsel would cost in the region of £90,000 for HMRC with significant additional costs for the customer if they use Counsel. The study also found that for cases resolved in ADR, the average elapsed time was 24 weeks from application to resolution, whereas for

cases that did not resolve in ADR, the average elapsed time was 34 weeks from application to the ADR attempt. In contrast, the average time elapsed from making an appeal to the Tribunal Service and having that appeal heard was around 70 weeks.

It was also noted that with one exception (where it was agreed to obtain expert advice as to the meaning of the contract before resuming the ADR attempt), the ADR event took place and concluded in one day, with the vast majority of elapsed time from request to even being spent preparing for the ADR event and finding a date when all necessary people to the event were available. However, quantifying cost and time savings for disputes in which an appeal had not been lodged was difficult as there were many variables (including the possibility that an appeal may not be pursued). Similarly, whilst there were fewer variables where an appeal had been lodged with the tribunal service, there were still a significant number which made quantification difficult (HMRC, 2013).

Similar to the UK experience, the Australian Tax Office (ATO) has also reported positive feedback from use of the ADR process, with in-house facilitators saving thousands in costs to clients and perceptions of fairness improving over time. (ATO, 2016). However, there are different perspectives as to whether ADR processes always result in time and costs savings. In Ireland, for example, although research suggests that mediation and conciliation processes will often provide a speedy resolution to a specific dispute, it also concludes that there is no such thing as a free conflict resolution process, on the basis that where a court process is followed the financial cost is either carried by the state, whereas where the process involves private mediation the cost is often shared by the parties involved. (LRC, 2008).

Closer home, the KRA has, in presentations to stakeholders, touted good progress in implementing ADR in Kenya. In particular, it highlights that as at June 2017 there is increased uptake of ADR, with 188 cases resolved through ADR, resulting in a KShs 8.3 billion revenue yield, and reducing the time taken to resolve tax disputes. However, challenges do remain in managing the expectations and perceptions of participants in ADR proceedings, and the failure to meet deadlines. They also note that there is slow uptake of ADR outside the key cities of Nairobi and Mombasa (KRA, 2017). This is by and large due to the perceived benefits accruing to both parties in an ADR process, which include the prompt settlement of cases compared to the standard tax dispute process,

lower costs due to the shorter duration, lightening the burden of the courts, and building relationships and increasing trust in the tax authorities (PWC, 2013).

### **2.3.3 Fairness of Perceived Outcomes of the ADR Process**

A key design principle of Dispute System Design is that the system must be fair and must be perceived to be fair, and that it must foster a culture that welcomes good faith dissent (Jone, 2016). The existing tax appeals process permits a taxpayer who objects to an assessment raised by the KRA to lodge an appeal to the Tax Appeals Tribunal. However, there is a perception that the Tribunal is pro-tax authority (Mokaya, 2017), which may bring to question the efficacy of the formal dispute resolution process.

The HMRC pilot study concluded that successful mediations and facilitations had ensured that the right amount of tax had been identified and secured with less delay and cost for both parties. In addition, a better understanding of disputes had been gained and resource savings identified. However, the report noted that to get the best out of a facilitation or mediation day the right people had to be present with the seniority to make decisions for the customer and HMRC, sufficiently empowered to reach a binding decision on the day or to agree a proposal which they would recommend to their appropriate governance bodies (HMRC, 2013).

A key determinant in perception of the outcome of the process is the use of mediators well trained in ADR techniques. In the legal sphere, there is a Mediation Accreditation Committee (MAC) which is a committee established under section 59A of the Civil Procedure Act (Chapter 21, Laws of Kenya) with members gazetted through legal notice. The MAC is chaired by the Chairman of the Rules Committee, and is charged with the mandate to *inter alia* maintain a register of qualified mediators. The register also forms a pool from which mediators are nominated and appointed to take part in an ongoing Court-Annexed Mediation Pilot Project. The mediators are selected from interested applicants who meet Accreditation Standards set by the Committee (Kenya Law, 2016). It is noteworthy that this process could potentially be used as an alternative to the KRA-led tax ADR process for matters already before the Courts.

A key issue for taxpayers is the confidentiality of the issues discussed through the ADR channel. The ATO's Practice Statement on ADR provides that unless the parties agree otherwise, all ADR processes are conducted in a confidential and on a 'without prejudice'

basis. In addition, any communications between the parties is privileged and cannot be used in legal proceedings without the consent of the other party. The ATO Settlement Model Deed also contains specific confidentiality clauses for formal settlement arrangements. A further form of assurance is that a taxpayer's review and appeal rights should be unaffected by participating in ADR, subject to the terms of any settlement reached and compliance with legislative time frames. This assurance is embedded in the ATO practice notes. The ATO has taken a further step to provide that if a taxpayer believes that the ATO has not complied with the required standards under the Legal Services Directions 2005, it may make a complaint to the tax officer involved in the ADR process, and also escalate the issue to the tax officer's manager. A further escalation can be made through an online form accessed through the ATO website (ATO, 2013). It is noteworthy that there is no similar extensive guidance given by the KRA at the time of writing this project paper that would give protection to Kenyan taxpayers opting to participate in the ADR process.

ICPAK, in its submissions to the KRA with respect to its ADR framework, highlights that the KRA's approach to dispute resolution is through an internal mechanism and is thus a limited ADR process. They further highlight that the draft framework does not reflect the intention of the KRA to approach tax dispute resolution on a level playing field (ICPAK, 2015). The extent to which taxpayers are concerned about the objectivity of the process and the independence of the KRA will thus be a focal point of this study.

## **2.4 Evaluation of Strategies to Enhance ADR processes**

This section seeks to highlight strategies that the KRA and taxpayers may consider to enhance the existing ADR processes. These are not meant to be an exhaustive list, but are essentially 'quick wins' that can potentially increase the uptake of ADR.

### **2.4.1 Embedding ADR into Tax Administration Laws**

Article 210 of the Kenyan Constitution states that no tax or licensing fee may be imposed, waived or varied except as provided by legislation. Further to this, if legislation permits the waiver of any tax or licensing fee, a public record of each waiver must be maintained together with the reason for the waiver, and each waiver, and the reason for it, must be reported to the Auditor-General (KRA, 2015).

Kashindi (2017) concludes that this makes resolution of tax disputes as inflexible as possible, and could potentially result in ADR being challenged as being unconstitutional in the context of tax disputes. He compares the position with that in South Africa where Parliament enacted the Tax Administration Act (TAA) which prescribes circumstances under which SARS may settle a dispute with a taxpayer where it is in the best interests of the state to do so. In particular, Section 107(5) of the TAA provides that SARS and the taxpayer making the appeal may attempt to resolve the dispute through ADR under procedures specified in the rules provided in the TAA. Kashindi proposes that the Kenyan Parliament should take legislative steps to overcome this through amending the Tax Procedures Act and through rule-making.

#### **2.4.2 Wide Publication of the Formal Guidelines for the ADR framework**

According to Jone (2016), an effective ADR process must provide training and education for stakeholders. This should extend to training stakeholders in conflict management as well as education about the dispute system and how to access it.

Despite the Commissioner General having launched the ADR Framework in 2015, the author did not access the actual formal framework as it was yet to be made publicly available to taxpayers through the media or on the KRA website as at the time of writing this paper. Only the Commissioner General's speech on ADR was available on the website (KRA, 2015). The KRA has sought to articulate the ADR Framework through a series of trainings and workshops (eg KRA, 2017), however, although the slides are available online, these are targeted to a limited audience (Muigua, 2012).

By way of comparison, the HMRC has a clear link to guidance on United Kingdom ADR process, which is written in clear and simple language and is thus accessible to taxpayers (HMRC, 2014). Similarly, a search for ADR on the SARS website directs one to a comprehensive quick guide on ADR (SARS, 2014b). Kashindi (2017) proposes that the KRA should carry out intensive creation of awareness and sensitization to encourage the use of ADR among the legal community and the citizenry at large.

### **2.4.3 Convergence with Existing ADR Processes in Kenya**

The ADR mechanism for tax disputes introduced by the KRA is a relatively new process, only dating back to 2015. However, the concept of ADR has a reasonably long history in Kenya, with various steps having been taken to entrench aspects of ADR into the legal dispute resolution framework. This section seeks to explore whether there is scope for the ADR mechanism to be aligned with these existing processes (Gill, Williams, Brennan, & Hirst, 2014).

The Arbitration Act, Chapter 49 of the Laws of Kenya (AA) was enacted in 1995. The AA covers both domestic and international arbitration, and extends to any arbitration whether or not it is administered by a permanent arbitral institution (Muigua, 2012). The AA allows parties to enter into an arbitration agreement, which should be in writing, under which the parties agree to submit to arbitration all or certain disputes that may arise or may have arisen between them in respect of a defined legal relationship, whether or not this is contractual.

A party to court proceedings may apply to stay the proceedings before the court and refer the parties to arbitration, and thereafter the proceedings before the court will stop unless the court determines that the arbitration agreement is null and void, inoperative or incapable of being performed, or that there is in fact no dispute between the parties with regard to the matters agreed to be referred to arbitration (Muigua, 2018).

The AA provides guidelines regarding the number of and qualifications of arbitrators that may be appointed to attend to a dispute, and further provides that a person that is approached in connection to a with his appointment of an arbitrator shall disclose any circumstances that are likely to give rise to justifiable doubts as to his impartiality or independence. This requirement to disclose continues from the time of his appointment and throughout the arbitral proceedings. The AA also provides for the termination of the mandate and substitution of an arbitrator.

The parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of proceedings, failing which the tribunal may conduct the arbitration in a manner it considers appropriate. Witnesses giving evidence and every person appearing before an arbitral tribunal has at the very least the same privileges and immunities as witnesses and advocates in proceedings before a court. Likewise, the parties are free to

agree on the location where the arbitration will be held. Experts may be appointed by the arbitration tribunal to report to it on specific issues to be determined by the tribunal.

Where a party to arbitration is found to be in default without showing sufficient cause, the tribunal may draw adverse inferences from the non-compliance as the circumstances justify, and proceed to an award on the basis of such materials that have been properly provided to it. It may also make an order as to the payment of costs of the arbitration incurred as a result of non-compliance. The arbitral tribunal will also determine and apportion the fees and expenses related to the tribunal, and the arbitral proceedings are terminated by the final arbitral award, unless terminated earlier if the parties agree on earlier termination, the claimant withdraws their claim, or the arbitral tribunal finds that the continuation of proceedings has become unnecessary or impossible.

If during the arbitral proceedings the parties settle the dispute, the arbitral tribunal terminates the proceedings and records the settlement in the form of an arbitral award on agreed terms. The arbitral award is made in writing and signed by the arbitrator(s). It states the reasons upon which it is based, unless the parties agree that no reasons are to be given, or the award is an arbitral award on agreed terms. The award should state the date of the award and the location of the arbitration, and the award is taken to have been made at that location. A signed copy of the arbitral award is deliverable to each party.

Unless otherwise agreed by the parties, an arbitral award is final and binding on the parties to it, and no recourse is available against the award other than by way of the High Court setting aside the award. A domestic arbitral award can be enforced upon application in writing to the High Court, whereas an international arbitration award is recognized as binding and enforced in accordance with the provisions of any convention (such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations General Assembly in New York) to which Kenya is a signatory.

Further to this, the Nairobi Centre for International Arbitration Act, 2013 (NCIAA), establishes a regional centre for international commercial arbitration and an Arbitral Court. The NCIAA further provides for mechanisms for alternative dispute resolution. The NCIAA establishes the Nairobi Centre for International Arbitration, which is tasked with promoting, facilitating and encouraging the conduct of international commercial arbitration, as well as administering domestic and international arbitrations, as well as

alternative dispute resolution techniques. Although it is mandated to ensure that arbitration is reserved as the dispute resolution process of choice, it is also expected to develop rules encompassing conciliation and mediation processes. Further to this, it has a legal mandate to coordinate and facilitate, in collaboration with other lead agencies and non-state actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation. In addition, it is mandated to organize international conferences, seminars and training programmes for arbitrators and scholars, as well as educate the public on arbitration as well as other alternative dispute resolution mechanisms.

The Centre is also legally mandated to provide procedural and technical advice to disputants, provide ad-hoc arbitration by facilitating parties with necessary technical and administrative assistance at their behest, as well as provide advice and assistance for the enforcement of arbitral awards. The Arbitral Court consists of a President, two deputy presidents, fifteen other members, all of whom shall be leading international arbitrators, and the Registrar. The Court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it both under the NCIAA or any other written law. The Arbitral Court has the power to adopt and implement, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms. It is however important to note that the NCIA charges hourly fees for both mediation and arbitration.

The third ADR system in place is Court-Annexed Mediation, which was introduced through amendments made in 2012 to the Civil Procedure Act, Chapter 21 of the Laws of Kenya (CPA). Section 59A to 59D of the CPA establishes the Mediation Accreditation Committee (MAC) with 12 members appointed by the Chief Justice. The MAC is empowered to determine the criteria for certification of mediators, propose rules for certification, maintain a register of qualified mediators, enforce the code of ethics and establish appropriate training programmes for mediators. The CPA gives the court the discretion to refer a dispute to mediation upon the request of the parties where it deems it appropriate or if the law so requires. The mediation is conducted in accordance with the mediation rules. No appeal is available against a mediation agreement (Muigua, 2012).

The CPA further provides that other alternative dispute resolution methods are also applicable, although the section does not prescribe the methods. The courts are also empowered to enforce private mediation agreements. Hence these provisions provide a legal process through which a court can coerce parties to mediate, and the outcome of the mediation can be taken back to court for clarification. A pilot study, the Court-Annexed Mediation Project, has been launched on a limited and experimental basis, giving interested stakeholders an opportunity to see how mediation works for their particular sectors and applicability in settling disputes. This pilot is being run by the Judiciary within the Family and Commercial division (Kendagor, 2017). As of July 2017, about 1,550 cases had been screened and about a third referred for mediation. Of these, roughly one quarter reached a settlement, less than 100 failed to, and half a dozen were terminated while another 150 were still going on. The average time taken to settle cases via mediation was 66 days, or two months, compared to two years through the normal court process.

The three frameworks described above were put in place prior to the KRA-led ADR process, and embedded firmly into the law through formal legislation. A litigant to a tax dispute could potentially petition the courts to pursue a mediated solution to the tax dispute through these processes. However, it is noteworthy that the KRA-led ADR process does not appear to incorporate these possible avenues for resolution of tax disputes (Muigua, 2018). In particular, a key determinant in perception of the fairness of the outcome of the ADR process is the use of independent mediators well trained in ADR techniques. Although the Commissioner General of the KRA has stated that ADR will take place in a forum different from that where it originated, the ADR process is undertaken by KRA officials and carried out in KRA premises (KRA, 2015), which may bring to question the independence of the mediators to the tax disputes.

ICPAK (2015), in its review of the ADR framework, expresses a clear preference for the use of external mediators, and further propose amendments to the draft ADR Framework to make provision for a list of facilitators of alternative dispute resolution proceedings that may be either from within or external to the KRA. They also propose that a facilitator should only facilitate proceedings upon the mutual agreement of the parties. They further propose that facilitators identified for the purpose of ADR should undergo an internal certification course with the KRA that would train and thereafter bind them to a

professional code of conduct to regulate the execution of their mandate. There is scope therefore for the KRA-led ADR initiative to consider adopting some of these proposals so as to align to the existing ADR frameworks.

#### **2.4.4 Tax Ombudsman**

The KRA-led ADR initiative is designed to handle any tax related disputes arising in the course of tax administration. However, in some cases, tax disputes may deal with administrative or procedural issues that it would be difficult for a tax authority employee appointed as mediator to seek resolution of. To overcome this challenge, a number of jurisdictions have created the position of Tax Ombudsman, notably South Africa in the African region (NADRAC, 1997).

Rowe (1991) defines an internal ombudsman as a neutral or impartial manager within an organization that may provide informal and confidential assistance to managers and employees in resolving work related concerns. They may serve as a counsellor, informal go-between and facilitator, formal mediator, informal fact-finder, upward-feedback mechanism, consultant, problem prevention device and change agent. Their office is located outside ordinary line management structures within the organization.

In South Africa, an Office of the Tax Ombud was established in October 2013 to enhance the tax administration system, to provide an independent redress channel for taxpayers that had exhausted the normal SARS complaints mechanisms. The office works with taxpayers that have been unable to resolve a service, procedural or administrative complaint through the normal complaints management channels of SARS. In addition, the Tax Ombud may review, at the request of the Minister or at the initiative of the Tax Ombud, with the approval of the Commissioner, any systematic and emerging issues related to a service matter or the application of the provisions of the Tax Administrative Act, or any procedural or administrative provisions of a tax Act. The office is independent of, but funded through, SARS. The Tax Ombud is appointed by and reports directly to the Minister of Finance, and may only be removed by the Minister (Office of the Tax Ombud, 2017).

In Kenya there is an existing Commission on Administrative Justice which is also known as the Office of the Ombudsman. This is a Constitutional Commission that has a mandate to investigate any conduct in state affairs, or any act or omission in public administration

in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct (Muigua, 2012; 2018)

The mandate of the Commission extends to both national and county governments, and covers maladministration, such as service failure, delay, inaction and inefficiency; administrative injustices, relating to an act or decision carried out in the Public Service, or a failure to act when necessary; misconduct and integrity issues, such as improper conduct, abuse of power and misbehaviour in the public service; advisory opinions and recommendations on improvement of public administration; capacity building in Government; performance contracting through the rating of institutions; Alternative Dispute Resolution through different public institutions on matters affecting public administration; promotion of special rights, particularly for minorities and marginalized groups in public administration; promotion of Constitutionalism by all state organs; and also oversees the access to information under the Access to Information Act, 2016 (Commission on Administrative Justice, 2018).

Being an office responsible for handling all public complaints, it may not be an ideal body to handle tax related processes, and hence a separate Tax Ombudsman within the KRA would help to resolve some of the administrative and procedural issues faced by the KRA and focus the ADR process on more complex issues dealing with matters of interpretation of tax law, thus increasing the capacity of the ADR team within the KRA (Caruso & Debelle, 2016).

## **2.5 Chapter Summary**

This chapter reviewed prior literature relevant to the research topic and objectives. In particular, it has sought to analyze the literature relevant to the research objectives, by conducting a critical review of the ADR process, including considering its historical origins and its development over the years; its adoption in the Kenya legal framework and eventual extension to the resolution of tax disputes.

It also evaluated the effectiveness, efficiency and fairness of the ADR process in other jurisdictions and concluded by examining the literature suggesting possible strategies for improvement of the ADR process in tax dispute resolution in Kenya. The next Chapter sets out the framework used for implementation of this research.

## **CHAPTER THREE**

### **3.0 RESEARCH METHODOLOGY**

#### **3.1 Introduction**

This chapter discusses the overall methodology used in this study. The issues covered include: - research design, population and sample size, data collection methods, research procedures, data analysis methods and the chapter summary.

#### **3.2 Research Design**

The research was in the form of a descriptive study. Descriptive studies are designed to collect data that describe the characteristics of persons, events or situations (Sekaran and Bougie, 2013). The study focused on obtaining relevant data from a population of Kenyan taxpayers. This research design was selected to provide an in-depth analysis of the characteristics of the population being studied, which in turn assisted the researcher to draw conclusions relevant to the research.

#### **3.3 Population and Sampling Design**

##### **3.3.1 Population**

The population studied consisted of Kenyan taxpayers, covering small, medium and large taxpayers, with a key focus on large taxpayers in Kenya who have been the focus of ADR processes in resolving tax disputes. The justification on the selection was, disputes involving large taxpayers was generally more complex than those involving individuals and small businesses. The KRA defines Large Taxpayers as all companies with annual turnover in excess of KShs 750 million, plus their subsidiaries and associates; banks and insurance companies irrespective of turnover threshold; manufacturers of wines and spirits irrespective of turnover threshold; State Corporations with annual turnover/budget in excess of KShs 750 million; head office operations of Central Government Ministries and Departments; local authorities with City status; and individuals of High Net Worth (KRA, 2017b). As a consequence, the large taxpayers' views was easier to evaluate and draw conclusions from. However, views were also sought from a number of medium and smaller taxpayers as well as to secure a more balanced perspective. The research sought to establish the perception of the taxpayers towards the ADR process in the tax dispute resolution process.

From KRA data, by 2017, 140 disputes pending before the Tax Appeals Tribunal (TAT), had been resolved through the ADR framework (Omar, 2017). This formed the population of this study; 140.

### **3.3.2 Sampling Design and Sample Size**

#### **3.3.2.1 Sampling Frame**

The sample involved in the study were selected from a listing of entities involved in tax disputes resolved through ADR, including large, medium and small taxpayers.

#### **3.3.2.2 Sampling Technique**

A non-probability judgmental sampling design was used to select the sample. This was the best approach as the focus was on companies that had resolved their tax matters with the KRA through the ADR mechanism. Judgmental sampling involves the choice of subjects who are most advantageously placed or in the best position to provide the information required (Sekaran and Bougie, 2013). In light of this, a sampling method that permits the researcher to use expert judgment to select cases that assisted in meeting the research objectives was considered most appropriate in this study.

A group of tax professionals in the taxpayer list working in various multinational and local organisations were involved in the study. This were the primary individuals within the organization actively involved in the tax dispute resolution process. They were targeted as they had access to company information relevant to the research.

#### **3.3.2.3 Sample Size**

Using judgmental sampling, a sample size of 42 large taxpayers involved in ADR process were selected. This sample size was considered to be adequate because it facilitated in-depth qualitative review of the individual taxpayers' perceptions on the ADR process.

### **3.4 Data Collection Methods**

Primary data was used to answer the objectives of the study. Primary data is more reliable, and consists of current data. The primary data was collected through the use of an online questionnaire based on the research objectives. The questionnaire was prepared

by the researcher using google form which enabled him to send it via email and WhatsApp group to the respondents. The structured questionnaire used in the research was included in the Appendix. The questionnaire had three sections based on the research objectives. The questions were both open and close-ended questions which required the subject to give appropriate feedback to each questions. The questions on the objectives were measured on the five Likert scale; Where 1 as Strongly disagreed, 2 as Disagreed, 3 as Neutral, 4 as Agreed, and 5 as Strongly Agreed.

The questionnaire reduces the possible impact of bias in responses that may be occasioned by the presence of the researcher when obtaining the relevant information from the subjects. Further, questionnaire is time efficient as it takes fewer minutes for respondents to participate in the study hence data was obtained from key individuals in various organizations who were not be able to accommodate lengthy interviews due to their work schedules.

### **3.5 Research Procedures**

After obtaining approval from the research supervisor, the researcher piloted the questionnaire. The questionnaire was administered to ten persons to determine the validity and reliability. The feedback obtained from the pilot study was used to improve validity of the questionnaire; spelling mistakes, arrangement of the questions, font of the questions and structure of the questions. This was followed by approval to collect data by the research supervisor. Letter of authorization to collect data was also obtained. The researcher sought permission to collect data from professional auditors' online WhatsApp groups from the administrators of the groups. Members of the groups who had been involved in ADR were asked to participate in the study. The researcher also introduced himself to other identified respondents who had participated in ADR process and sent the questionnaires to them via email. The researcher sent reminders weekly and engaged the respondents directly on email, phone calls and use of WhatsApp group leaders to encourage participation in professional auditors' online forums.

### **3.6 Data Analysis and Presentation**

The data collected from the respondents was harvested, transferred to SPSS, cleaned and analyzed. The analysis was done based on the nature of the questions asked in the questionnaire on each objective. SPSS was used to analyze the data. Both descriptive and inferential analysis had been used. Descriptive statistics was used in demographic information of the respondents and on each objective. This was performed to show the distribution of the response and statistical tests conducted were frequency, percentages, mean and standard deviation. The inferential statistics was used to answer the study objectives. The tests used were chi-square, correlation, ANOVA and Friedman test. Chi-square and correlation statistical tests was used to determine the association of the variables. ANOVA was used to test the group statistical difference of the variables and Friedman test was used to rank the variables based on the test for several related samples. The findings of the results were presented in narrative form, as well as using tables and charts.

### **3.7 Chapter Summary**

This chapter covers the framework of data collection. It identifies the population to be researched on, and states how the sample for the research will be selected, and the data collection method to be used. Also, it covers the analysis methods and data presentation.

The next chapter covers the research findings.

## CHAPTER FOUR

### 4.0 RESULTS AND FINDINGS

#### 4.1 Introduction

This chapter covers the research results and findings as analyzed from the collected data. The purpose of this research was to critically evaluate the Alternative Dispute Resolution (ADR) mechanism in resolving tax disputes in Kenya, and propose strategies for enhancement of the process. The results have been arranged in three sections; the response rate, the demographic information and the specific research objectives. These were as follows;

##### 4.1.1 Response Rate

Using judgmental sampling, the total sample size was 42 key individuals from organizations actively involved in the tax dispute resolution process. The inclusion and exclusion criteria was the individual involvement in ADR process. Out of the 42 who participated in the study, two persons did not complete the questionnaire hence excluded from the study. The remaining 40 filled questionnaires was analyzed giving 95.2% response rate which was adequate for the analysis as presented on table 4.1.

**Table 4. 1 Response Rate**

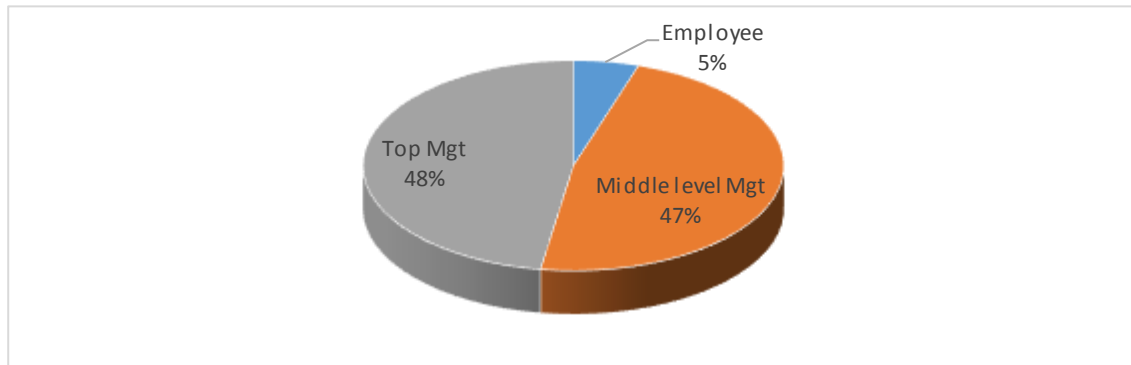
Category	Frequency	Percentage
Complete Responded	40	95.2%
Incomplete questionnaire	2	4.8%
Total	42	100.0%

#### 4.2 Demographic Characteristics

The demographic information has been analyzed using descriptive statistics; mean and standard deviation. The information captured and presented in this section were; position in the company, ownership of the organization, size of taxpayers, number of times involved in ADR process and professional qualifications.

#### 4.2.1 Position in the Company

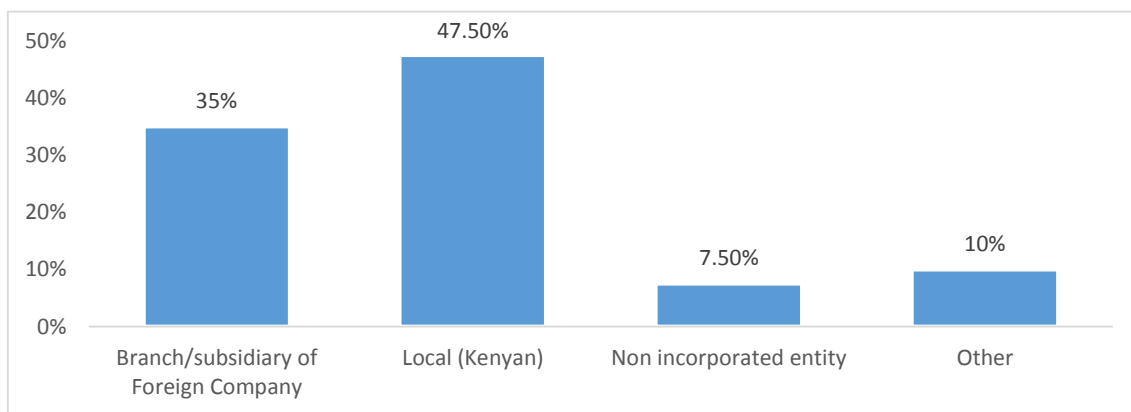
Figure 4.1 shows the respondents position in their companies. Those at top management position were 48% followed by those in middle level management position at 47%. Others were employees at 5%. This was good for the study as it shows the respondents were managers hence they had adequate ADR information of their companies.



**Figure 4. 1 Position in the Bank**

#### 4.2.2 Ownership of the Company

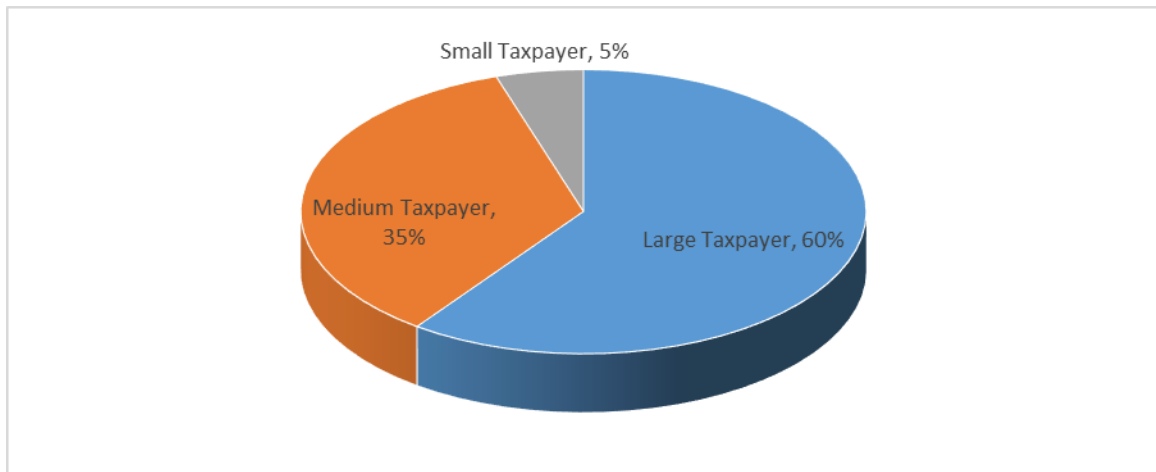
Figure 4.2 shows the ownership of the company. Most of the respondents were working in companies owned by local (Kenyan) at 47.50%. They were followed by those working in branch or subsidiary of foreign company at 35%. Non-incorporated entities were 7.5% and others were 10%. This shows most of the companies were locally owned or as subsidiary companies.



**Figure 4. 2 Ownership of the Company**

### 4.2.3 Size of Taxation

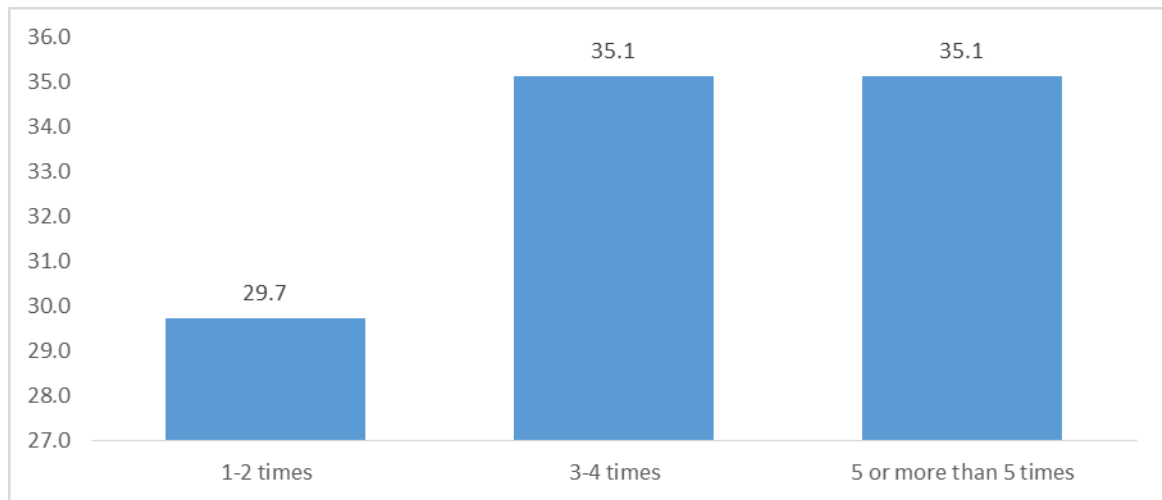
Figure 4.3 presents the companies' size of taxation based on KRA categorization. More than half of the respondents were large taxpayers (60%) followed by medium taxpayers at 35% and small taxpayers at 5%. This shows cumulative percentage of 95% were medium and large taxpayers. The focus of the population were large taxpayers in Kenya who were the major users of ADR processes in resolving their tax disputes. However, medium and smaller taxpayers involved in ADR were involved in this study.



**Figure 4. 3 Size of Taxation**

### 4.2.4 Number of Times Involved in ADR Process

Figure 4.4 shows the number of times respondents had been involved in the ADR process regardless of the years. There was similarity at which respondents were involved; 3 to 4 times and 5 or more than 5 times each at 35.1%. Those involved for 1 to 2 times were 29.7%. This shows more than half of the respondents (70.2%) had been involved in ADR process for more than 3 times.



**Figure 4.4 Number of Times involved in ADR Process**

#### 4.2.5 Professional Qualifications

Respondents were asked to state their professional qualifications. As presented on table 4.2, majority of respondents who specified their qualifications were MBA holders (with no professional certificates) at 23.7%, Bachelors of commerce with additional professional certificates were 18.4%, and masters' holders with additional professional certificates were 10.5%. Others were categorized with less than 10% as follow; LLB holders with professional certificates were 7.9%, LLB holders (with no professional certificates) were 5.3%, Bachelors of commerce holders (with no professional certificates) were 5.3%, and Phd holders were 2.6%. There was varied respondents who did not clearly specified their professional qualifications (26.3%). They indicated their qualifications as; accountants, advocate of the High Court of Kenya, degree holders, and Masters' holders.

**Table 4. 2 Professional Qualifications**

	Percent
MBA	23.7
LLB	5.3
Bcom	5.3
Phd	2.6
Bcom holders with other professional certificate	18.4
LLB holders with other professional certificate	7.9
Maters holders with other professional certificate	10.5
Other qualifications	26.3
Total	100.0

### 4.3 Review of the ADR Process

#### 4.3.1 Descriptive on the Review of the ADR Process

The descriptive of each of the three constructs under the ADR process were presented as follows:

##### 4.3.1.1 Effective ADR Process

Table 4.3 shows all the items on effective ADR process were ranked as 'neutral' with mean value of 3. Using the rounded mean to zero decimal places, the findings arranged in descending order were: 'The ADR process is simple to use and easy to access' (M=3.18, SD =0.958), 'During the ADR, parties are provided with the skills, motivation and resources they need to use interest based negotiation procedures such as mediation' (M=3.1, SD =1.057), 'The ADR procedures have been arranged from low cost to high cost, to ensure high cost methods eg litigation are only used after lower cost methods are exhausted' (M=2.6, SD =.982) and lastly 'The ADR process has many options/access points for resolution of disputes with options to loop forward or backwards between interest based and rights based options' (M=2.53, SD =1.109).

There was no item which was ranked as 'agreed' or 'disagreed'. All items were ranked as 'neutral'. Further, all the items had higher level of standard deviation ranging from 0.958 to 1.109. This shows the respondents views varied on effective ADR process.

**Table 4. 3 Descriptive on Effective ADR Process**

	Mean	Std. Deviation
The ADR process is simple to use and easy to access.	3.18	0.958
The ADR process has many options/access points for resolution of disputes with options to loop forward or backwards between interest based and rights based options.	2.53	1.109
The ADR procedures have been arranged from low cost to high cost, to ensure high cost methods eg litigation are only used after lower cost methods are exhausted.	2.6	0.982
During the ADR, parties are provided with the skills, motivation and resources they need to use interest based negotiation procedures such as mediation.	3.1	1.057

#### 4.3.1.2 Kenyan approach to ADR

Table 4.4 presents the descriptive findings on Kenyan approach to ADR. Using the rounded mean to zero decimal places, items were ranked as agreed and neutral. Items ranked as ‘agreed’ with mean value of 4 were; ‘ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010’ (M=3.85, SD =0.921), and ‘The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR’ (M=3.83, SD =0.747). Items ranked as neutral with mean value of 3 were; ‘ADR conversations are conducted before a tax team of officers not directly involved in the audit process, giving a measure of independence to the process’ (M=3.4, SD =0.928) and ‘The Kenya Revenue Authority has issued clear ADR rules’ (M=2.85, SD =1.122).

There was no item which was ranked as ‘strongly disagreed’ or ‘disagreed’. Further, only one item had a lower standard deviation indicating high level of agreement ‘The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR’ (SD=.747). Other Items had higher level of standard deviation ranging from 0.921 to 1.122. This shows the respondents views were varied on these items.

**Table 4. 4 Descriptive on Kenyan Approach to ADR**

	Mean	Std. Deviation
ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010	3.85	0.921
ADR conversations are conducted before a tax team of officers not directly involved in the audit process, giving a measure of independence to the process.	3.4	0.928
The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR.	3.83	0.747
The Kenya Revenue Authority has issued clear ADR rules.	2.85	1.122

#### 4.3.1.3 Benchmarking the Kenyan Approach of ADR to International Best Practice

Table 4.5 presents the descriptive findings on Benchmarking of the Kenyan Approach of ADR to International Best Practice. The items were ranked as neutral and disagreed as follows; ‘The Kenya Revenue Authority commits to taxpayers and representatives to identify opportunities for ADR and suggests instances where ADR may be appropriate’ (M=2.85, SD =1.122), and ‘KRA has staff with a role of management of tax disputes;

they consider whether it would be appropriate to participate in some form of ADR' (M=2.85, SD =1.122) were ranked as neutral while 'There are clear time lines for resolution of tax disputes through the ADR' (M=2.25, SD =1.032) was ranked as disagree. There was no item which was ranked as 'strongly agreed. Further, all the items had higher standard deviation of above 1. This shows the respondents views varied on Benchmarking the Kenyan approach of ADR to International Best Practice.

**Table 4. 5 Descriptive on Benchmarking the Kenyan approach**

	Mean	Std. Deviation
The Kenya Revenue Authority commits to taxpayers and representatives to identify opportunities for ADR and suggest instances where ADR may be appropriate.	3.25	1.056
There are clear time lines for resolution of tax disputes through the ADR.	2.25	1.032
KRA has staff with a role of management of tax disputes; they consider whether it would be appropriate to participate in some form of ADR.	3.23	1.00

#### **4.3.2 Normality Test on Review of the ADR Process**

Table 4.6 shows the output of the normality test. Normality test was performed to ensure data was normally distributed and there were no outliers that would affect the results. Using Skewness and kurtosis statistical tests where normality is positive with skewness range of -2.0 and + 2.0 and kurtosis range of -5.0 to +5.0, the output shows the data was normally distributed. The skewness value ranged from -0.517 to 0.903 and kurtosis value ranged from -0.973 to 0.886.

**Table 4. 6 Normality Test on Review of the ADR Process**

	Skewness	Kurtosis
The ADR process is simple to use and easy to access.	0.184	-0.182
The ADR process has many options/access points for resolution of disputes with options to loop forward or backwards between interest based and rights based options.	0.112	-0.859
The ADR procedures have been arranged from low cost to high cost, to ensure high cost methods eg litigation are only used after lower cost methods are exhausted.	0.903	0.151
During the ADR, parties are provided with the skills, motivation and resources they need to use interest based negotiation procedures such as mediation.	0.066	-0.56
ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010	-0.517	-0.4
ADR conversations are conducted before a tax team of officers not directly involved in the audit process, giving a measure of independence to the process.	-0.502	0.886
The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR.	-0.476	0.383
The Kenya Revenue Authority has issued clear ADR rules.	0.425	-0.591
The Kenya Revenue Authority commits to taxpayers and representatives to identify opportunities for ADR and suggest instances where ADR may be appropriate.	0.155	-0.678
There are clear time lines for resolution of tax disputes through the ADR.	0.35	-0.973
KRA has staff with a role of management of tax disputes; they consider whether it would be appropriate to participate in some form of ADR.	0.006	-0.585

### 4.3.3 Chi-square Test of ADR Process and Demographic Information

The chi-square test was used to determine the association between the demographic information and ADR process. As part of review of the ADR process, it was important to identify its association with the demographic information. The presentation of the findings based on each of the three constructs were presented as follows;

#### 4.3.3.1 Chi-square Test on Effective ADR Process and Demographic Information

Table 4.7, presents the p-value of the chi-square test between the effective ADR process and demographic information; ownership, size of taxation and number of times involved at ADR. There was only one item with positive and significant association between Effective ADR Process and Demographic Information; ‘The ADR procedures have been arranged from low cost to high cost, to ensure high cost methods eg litigation are only

used after lower cost methods are exhausted' had positive association with number of times involved at ADR  $\chi^2 (12, N=40) = 25.298, p < .05$ .

Besides this, there was no other item with significant association between the effective ADR process and demographic information. The chi-square test on all other items between effective ADR process and demographic information was not statistically significant with p-value greater than 0.05 ( $p > .05$ ). This shows the number of times involved at ADR process give more information on effective ADR process such as low cost to high cost arrangements.

**Table 4. 7 Chi-square Test on Effective ADR Process and Demographic Information**

Review based on Effective ADR process	Ownership p-value	Size of taxpayer p-value	Number of times involved at ADR p-value
The ADR process is simple to use and easy to access.	0.939	0.053	0.531
The ADR process has many options/access points for resolution of disputes with options to loop forward or backwards between interest based and rights based options.	0.515	0.329	0.195
The ADR procedures have been arranged from low cost to high cost, to ensure high cost methods eg litigation are only used after lower cost methods are exhausted.	0.345	0.209	0.013
During the ADR, parties are provided with the skills, motivation and resources they need to use interest based negotiation procedures such as mediation.	0.718	0.334	0.562

#### 4.3.3.2 Chi-square Test on Kenyan approach to ADR and Demographic Information

Table 4.8, presents the p-value of the chi-square test between the Kenyan approach to ADR items and demographic information; ownership, size of taxation and number of times involved at ADR. There was no item with significant association between the effective ADR process and demographic information. The chi-square test on all the items between effective ADR process and demographic information was not statistically significant with p-value greater than 0.05 ( $p > .05$ ). This shows Ownership of the company,

size of taxpayer, and number of times involved at ADR process had no significant association with Kenyan approach to ADR.

**Table 4. 8 Chi-square Test on Kenyan approach to ADR and Demographic Information**

Kenyan approach to ADR	Ownership p-value	Size of taxpayer p-value	Number of times involved at ADR p-value
ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010	0.988	0.687	0.097
ADR conversations are conducted before a tax team of officers not directly involved in the audit process, giving a measure of independence to the process.	0.701	0.994	0.941
The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR.	0.465	0.493	0.617
The Kenya Revenue Authority has issued clear ADR rules.	0.478	0.725	0.287

#### **4.3.3.3 Chi-square Test on Benchmarking the Kenyan Approach of ADR to International Best Practice and Demographic Information**

Table 4.9, presents the p-value of the chi-square test between the Benchmarking of Kenyan Approach of ADR and demographic information; ownership, size of taxation and number of times involved at ADR. There was only one item with positive and significant association between Benchmarking of Kenyan Approach of ADR and Demographic Information; ‘There are clear time lines for resolution of tax disputes through the ADR’ had positive association with number of times involved at ADR  $\chi^2 (9, N=40) = 21.542$ ,  $p < .05$ .

Besides this, there was no other item with significant association between the Benchmarking of Kenyan Approach of ADR and demographic information. The chi-square test on all other items between Benchmarking of Kenyan Approach of ADR and demographic information was not statistically significant with p-value greater than 0.05 ( $p > .05$ ). This shows the number of times involved at ADR process gives more information on Benchmarking of Kenyan Approach of ADR such as clear timeline for resolution of tax disputes.

**Table 4. 9 Chi-square Test on Benchmarking the Kenyan Approach of ADR to International Best Practice and Demographic Information**

Benchmarking the Kenyan approach to ADR to international best practice	Ownership p-value	Size of taxpayer p-value	Number of times involved at ADR p-value
The Kenya Revenue Authority commits to taxpayers and representatives to identify opportunities for ADR and suggest instances where ADR may be appropriate.	0.665	0.259	0.56
There are clear time lines for resolution of tax disputes through the ADR.	0.297	0.088	0.01
KRA has staff with a role of management of tax disputes; they consider whether it would be appropriate to participate in some form of ADR.	0.956	0.485	0.533

#### 4.3.4 Correlation on ADR Process

Correlation analysis was used to test the relation between items under each of the constructs. The findings were as follows:

##### 4.3.4.1 Correlation on Effective ADR Process

As shown on table 4.10, all the variables under effective ADR process were highly correlated except one item; ‘During the ADR, parties are provided with the skills, motivation and resources they need to use interest based negotiation procedures such as mediation’ which was not correlated with any other item ( $p > .05$ ). The correlated items were: ‘The ADR process is simple to use and easy to access’ which had positive and significant relation with; ‘The ADR process has many options/access points for resolution of disputes with options to loop forward or backwards between interest based and rights based options’  $r = .684$ ,  $p < .05$ ; and ‘The ADR procedures have been arranged from low cost to high cost, to ensure high cost methods eg litigation are only used after lower cost methods are exhausted’  $r = .684$ ,  $p < .05$ .

Also, ‘The ADR procedures have been arranged from low cost to high cost, to ensure high cost methods eg litigation are only used after lower cost methods are exhausted’ had Positive and significant relation with ‘The ADR process has many options/access points for resolution of disputes with options to loop forward or backwards between interest based and rights based options’  $r = .339$ ,  $p < .05$ . This clearly indicates that during the

ADR, parties are not provided with the skills, motivation and resources they need to use interest based negotiation procedures such as mediation.

**Table 4. 10 Correlation on Effective ADR Process**

		The ADR process is simple to use and easy to access.	The ADR process has many options/access points for resolution of disputes ...	The ADR procedures have been arranged from low cost to high cost...	During the ADR, parties are provided with the skills, motivation and resources...
The ADR process is simple to use and easy to access.	Pearson Correlation Sig. (2-tailed)	1			
The ADR process has many options/access points for resolution of disputes with options to loop forward or backwards...	Pearson Correlation Sig. (2-tailed)	.684**	1		
The ADR procedures have been arranged from low cost to high cost....	Pearson Correlation Sig. (2-tailed)	.322*	.339*	1	
During the ADR, parties are provided with the skills, motivation and resources...	Pearson Correlation Sig. (2-tailed)	.134	.042	-.282	1
		.409	.799	.078	

\*\* . Correlation is significant at the 0.01 level (2-tailed).  
\* . Correlation is significant at the 0.05 level (2-tailed).

#### 4.3.4.2 Correlation on Kenyan Approach to ADR

As shown on table 4.11, ‘ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010’ was positive and significantly correlated with ‘The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR.’  $r = .445$ ,  $p < .05$ . Similarly, the ‘The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR’ was positive and significantly correlated with ‘The Kenya Revenue Authority has issued clear ADR rules’  $r = .335$ ,  $p < .05$ . The variable ‘ADR conversations are conducted before a tax team of officers not directly involved in the audit process, giving a measure of independence to the process’ had no correlation with any other item. This shows the involvement of ‘tax team not directly involved in the audit process does not give measure of independence to the process.

**Table 4. 11 Correlation on Kenyan approach to ADR**

		ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010	ADR conversations are conducted before a tax team of officers not directly involved ...	The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR.	The Kenya Revenue Authority has issued clear ADR rules.
ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010	Pearson Correlation	1			
ADR conversations are conducted before a tax team of officers not directly involved.	Pearson Correlation	.432	1		
	Sig. (2-tailed)	.055			
The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR.	Pearson Correlation	.445**	.288	1	
	Sig. (2-tailed)	.004	.071		
The Kenya Revenue Authority has issued clear ADR rules.	Pearson Correlation	.275	.281	.335*	1
	Sig. (2-tailed)	.086	.079	.035	

\*\* . Correlation is significant at the 0.01 level (2-tailed).  
 \* . Correlation is significant at the 0.05 level (2-tailed).

**4.3.4.3 Correlation on Benchmarking the Kenyan Approach to ADR on International Best Practice**

As shown on table 4.12, all the variables under Benchmarking the Kenyan Approach to ADR on International Best Practice had no significant correlation with any other item ( $p > .05$ ). This shows the need to benchmark the Kenyan approach to ADR on international best practice had no significant effect with the ADR process.

**Table 4. 12 Correlation on Benchmarking the Kenyan Approach to ADR on International Best Practice**

	The Kenya Revenue Authority commits to taxpayers and representatives to identify opportunities for ADR.	There are clear time lines for resolution of tax disputes through the ADR.	KRA has staff with a role of management of tax disputes; they consider whether it would be appropriate to participate in some form of ADR.
The Kenya Revenue Authority commits to taxpayers and representatives to identify opportunities for ADR.	Pearson Correlation	1	
	Sig. (2-tailed)		
There are clear time lines for resolution of tax disputes through the ADR.	Pearson Correlation	-.059	1
	Sig. (2-tailed)	.718	
KRA has staff with a role of management of tax disputes; they consider whether it would be appropriate to participate in some form of ADR.	Pearson Correlation	.213	.068
	Sig. (2-tailed)	.188	.675

### 4.3.5 ANOVA on ADR Process and Demographic Information

The ANOVA test, was performed to test the group statistical difference of ADR process and the demographic information. The one-way ANOVA analysis was used.

#### 4.3.5.1 ANOVA of ADR Process on Ownership

The first demographic information was ownership of the organization. Table 4.13 indicates all the ADR process had no statistical difference based on the ownership of the organization. For ‘effective ADR process’,  $F(3, 39) = 1.234, p > 0.05$ ; ‘Kenya approach to ADR’  $F(3, 39) = .114, p > 0.05$ ; and lastly, ‘Benchmarking Kenyan approach to international ADR’  $F(3, 39) = 2.506, p > 0.05$ . This means that ownership of the organization was not a significant determining factor of ADR process.

**Table 4. 13 ANOVA of ADR Process on Ownership**

		Sum of Squares	df	Mean Square	F	Sig.
Effective ADR process	Between Groups	1.548	3	.516	1.234	.312
	Within Groups	15.052	36	.418		
	Total	16.600	39			
Kenyan approach to ADR	Between Groups	.160	3	.053	.114	.952
	Within Groups	16.888	36	.469		
	Total	17.048	39			
Benchmarking Kenyan approach to international ADR	Between Groups	2.726	3	.909	2.506	.074
	Within Groups	13.049	36	.362		
	Total	15.775	39			

**4.3.5.2 ANOVA of ADR Process on Size of Taxation**

The second demographic information of interest to the study was size of taxation. Table 4.14 indicates all the ADR process had no statistical difference based on the size of taxation. For ‘effective ADR process’,  $F(2, 39) = 1.220, p > 0.05$ ; ‘Kenya approach to ADR’  $F(2, 39) = .118, p > 0.05$ ; and lastly, ‘Benchmarking Kenyan approach to international ADR’  $F(2, 39) = 2.011, p > 0.05$ . This means that size of taxation was not a significant determining factor of ADR process.

**Table 4. 14 ANOVA of ADR Process on size of Taxation**

		Sum of Squares	df	Mean Square	F	Sig.
Effective ADR process	Between Groups	1.027	2	.513	1.220	.307
	Within Groups	15.573	37	.421		
	Total	16.600	39			
Kenyan approach to ADR	Between Groups	.108	2	.054	.118	.889
	Within Groups	16.940	37	.458		
	Total	17.048	39			
Benchmarking Kenyan approach to ADR	Between Groups	1.547	2	.773	2.011	.148
	Within Groups	14.228	37	.385		
	Total	15.775	39			

**4.3.5.3 ANOVA of ADR Process on Number of times involved in ADR Process**

The third demographic information of interest to the study was number of times involved in ADR process. Table 4.15 indicates all the ADR process had no statistical difference based on the number of times involved in ADR process. For ‘effective ADR process’,  $F(3, 39) = .780, p > 0.05$ ; ‘Kenya approach to ADR’  $F(3, 39) = .812, p > 0.05$ ; and lastly, ‘Benchmarking Kenyan approach to international ADR’  $F(3, 39) = 1.167, p > 0.05$ . This

means that number of times involved in ADR process was not a significant determining factor of ADR process.

**Table 4. 15 ANOVA on Number of Times involved and ADR Process**

		Sum of Squares	df	Mean Square	F	Sig.
Effective ADR process	Between Groups	1.014	3	.338	.780	.513
	Within Groups	15.586	36	.433		
	Total	16.600	39			
Kenyan approach to ADR	Between Groups	1.080	3	.360	.812	.496
	Within Groups	15.969	36	.444		
	Total	17.048	39			
Benchmarking Kenyan approach to ADR	Between Groups	1.398	3	.466	1.167	.336
	Within Groups	14.377	36	.399		
	Total	15.775	39			

#### 4.3.6 Friedman Test on ADR Process

Having reviewed the different factors on ADR process, the ranking of the ADR process based on the test for several related samples was performed using the Friedman test. The result shows the ranking of the variables based on their mean ranking weight. As indicated on table 4.16, the ranking was significant  $\chi^2 (10, N=40) = 86.886, p < .05$ . On mean weight ascending order, ‘ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010’ and ‘The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR’ were the two variables ranked highly based on the agreement while ‘There are clear time lines for resolution of tax disputes through the ADR’ was the least on the ranking. Other factors reviewed were ranked as indicated on the table.

**Table 4. 16 Friedman Rank on ADR Process**

	Mean Rank
ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010	8.08
The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR.	8.08
ADR conversations are conducted before a tax team of officers not directly involved in the audit process, giving a measure of independence to the process.	6.73
The Kenya Revenue Authority commits to taxpayers and representatives to identify opportunities for ADR and suggest instances where ADR may be appropriate.	6.43
KRA has staff with a role of management of tax disputes; they consider whether it would be appropriate to participate in some form of ADR.	6.43
The ADR process is simple to use and easy to access.	6.4
During the ADR, parties are provided with the skills, motivation and resources they need to use interest based negotiation procedures such as mediation.	5.96
The Kenya Revenue Authority has issued clear ADR rules.	5.05
The ADR procedures have been arranged from low cost to high cost, to ensure high cost methods eg litigation are only used after lower cost methods are exhausted.	4.58
The ADR process has many options/access points for resolution of disputes with options to loop forward or backwards between interest based and rights based options.	4.45
There are clear time lines for resolution of tax disputes through the ADR.	3.84
Test Statistics <sup>a</sup> N=40, Chi-square = 86.886, df = 10, Asymp. Sig. =.000	
a. Friedman Test	

#### **4.4 Efficacy of the ADR Process in Solving Tax Disputes**

##### **4.4.1 Descriptive on the Efficacy of ADR Process (EADR)**

The descriptive of each of the three constructs under the efficacy of the ADR process were presented as follows:

##### **4.4.1.1 Effectiveness of the Kenya ADR process**

Table 4.17 shows one item was ranked as agreed with mean value of 4; ‘The use of an external mediator, unconnected to the KRA, would have resulted in a better outcome’ (M=4.35, SD =1.027). Other items were ranked as ‘neutral’ with mean value of 3. Using the rounded mean to zero decimal places, the findings arranged in descending order were: ‘By engaging in the process, both parties looked afresh at the facts and arguments in the

dispute, and issues could be unpacked and areas of differences more clearly identified for resolution’ (M=3.23, SD =1.209), ‘Facilitators were able to facilitate disputes in tax regimes different to their training and experience’ (M=3.2, SD =0.853) and ‘Mediator/facilitator was accepted as a neutral party that could robustly challenge each side’s position’ (M=3.08, SD =1.023).

Most items were ranked as neutral, one item was ranked as agreed and there was no item which was ranked as disagreed. Further, all the items had higher level of standard deviation ranging from 0.853 to 1.209. This shows the respondents views varied on effectiveness of ADR process.

**Table 4. 17 Descriptive on Effectiveness of the Kenya ADR process**

	Mean	Std. Deviation
Mediator/facilitator was accepted as a neutral party that could robustly challenge each side’s position.	3.08	1.023
Facilitators were able to facilitate disputes in tax regimes different to their training and experience	3.2	0.853
By engaging in the process, both parties looked afresh at the facts and arguments in the dispute, and issues could be unpacked and areas of differences more clearly identified for resolution.	3.23	1.209
The use of an external mediator, unconnected to the KRA, would have resulted in a better outcome.	4.35	1.027

#### 4.4.1.2 Efficiency of ADR Process

Table 4.18 shows all the items were ranked as agreed using the rounded mean to zero decimal places. The findings arranged in descending order were: ‘Even where the parties in are unable to reach an agreed resolution the ADR process can help to improve the efficiency of any subsequent litigation, by clarifying the facts and narrowing the dispute to the key issues needed to be tested at the Tribunal’ (M=3.7, SD =0.939), ‘There were significant cost savings in resolving disputes through the ADR process for both the KRA and the customer’ (M=3.6, SD =1.057) and lastly, ‘The ADR process helps to bring certainty earlier, allowing provisions to be released and tax repayments to be freed up’ (M=3.58, SD =1.01). Further, all the items had higher level of standard deviation ranging from 0.939 to 1.057. This shows the respondents views varied on efficiency of ADR process.

**Table 4. 18 Descriptive on Efficiency of ADR Process**

	Mean	Std. Deviation
The ADR process helps to bring certainty earlier, allowing provisions to be released and tax repayments to be freed up	3.58	1.01
Even where the parties in are unable to reach an agreed resolution the ADR process can help to improve the efficiency of any subsequent litigation, by clarifying the facts and narrowing the dispute to the key issues needed to be tested at the Tribunal	3.7	0.939
There were significant cost savings in resolving disputes through the ADR process for both the KRA and the customer	3.6	1.057

#### 4.4.1.3 Fairness of the Kenya ADR process

Table 4.19 shows most items were ranked as agreed with only one item ranked as neutral based on the rounded mean to zero decimal places. Items ranked as agreed arranged in descending order were: ‘The taxpayer review and appeal rights were not affected by participating in the ADR’ (M=4.15, SD =0.864), ‘The ADR proceedings were conducted in a confidential and without prejudice basis’ (M=3.75, SD =0.954), and ‘Having been involved in an ADR process, I would recommend it to other taxpayers’ (M=3.63, SD =1.03). The item ranked as neutral was ‘The ADR proceedings conducted objectively, with the mediators ensuring a level playing field during the deliberations’ (M=3.3, SD =0.853). Most items were ranked as agreed, one item was ranked as neutral and there was no item which was ranked as disagreed. Further, all the items had higher level of standard deviation ranging from 0.853 to 1.03. This shows the respondents views varied on fairness of ADR process.

**Table 4. 19 Descriptive on Fairness of the Kenya ADR process**

	Mean	Std. Deviation
The ADR proceedings were conducted in a confidential and without prejudice basis.	3.75	0.954
The taxpayer review and appeal rights were not affected by participating in the ADR.	4.15	0.864
The ADR proceedings conducted objectively, with the mediators ensuring a level playing field during the deliberations.	3.3	0.853
Having been involved in an ADR process, I would recommend it to other taxpayers.	3.63	1.03

#### 4.4.2 Normality Test on Efficacy of the ADR Process

Table 4.20 shows the output of the normality test. Using Skewness and kurtosis statistical tests where normality is positive with the range of -2.0 and + 2.0 for skewness and -5.0 to

+5.0 for kurtosis, the output shows the data was normally distributed. The skewness value ranged from -1.968 to 0.298 and kurtosis value ranged from -1.243 to 4.015. Closer look on the table shows the item with higher standard deviation (-1.968) was also the same item with higher kurtosis value (4.015). This was reported as the way the question was designed.

**Table 4. 20 Normality Test on Efficacy of the ADR Process**

	Skewness	Kurtosis
Mediator/facilitator was accepted as a neutral party that could robustly challenge each sides position.	0.298	-0.617
Facilitators were able to facilitate disputes in tax regimes different to their training and experience	-0.146	-1.113
By engaging in the process, both parties looked afresh at the facts and arguments in the dispute, and issues could be unpacked and areas of differences more clearly identified for resolution.	-0.09	-1.243
The use of an external mediator, unconnected to the KRA, would have resulted in a better outcome.	-1.968	4.015
The ADR process helps to bring certainty earlier, allowing provisions to be released and tax repayments to be freed up.	-0.923	0.628
Even where the parties in are unable to reach an agreed resolution the ADR process can help to improve the efficiency of any subsequent litigation, by clarifying the facts and narrowing the dispute to the key issues needed to be tested at the Tribunal	-1.302	2.104
There were significant cost savings in resolving disputes through the ADR process for both the KRA and the customer.	-1.03	0.941
The ADR proceedings were conducted in a confidential and â€œwithout prejudice basis.	-0.769	0.645
The taxpayer review and appeal rights were not affected by participating in the ADR.	-1.308	3.029
The ADR proceedings conducted objectively, with the mediators ensuring a level playing field during the deliberations.	-0.375	0.291
Having been involved in an ADR process, I would recommend it to other taxpayers.	-0.502	-0.248

#### **4.4.3 Correlation Coefficient on Efficacy of the ADR Process and Dispute Resolution**

Correlation analysis was used to test the relation between the construct of study representing the independent variable and the dependent variable.

##### **4.4.3.1 Effectiveness of the ADR Process and Dispute Resolution**

As shown on table 4.21, only one item was positive and significantly correlated with the dispute resolution; ‘By engaging in the process, both parties looked afresh at the facts and

arguments in the dispute, and issues could be unpacked and areas of differences more clearly identified for resolution'  $r = .608$ ,  $p < .05$ . Other items under effectiveness of the ADR process had no significant correlation with the dispute resolution ( $p > .05$ ).

**Table 4. 21 Correlation on Effectiveness of ADR Process and Dispute Resolution**

		Tax disputes resolution
Mediator/facilitator was accepted as a neutral party that could robustly challenge each side's position.	Pearson Correlation	0.27
	Sig. (2-tailed)	0.092
By engaging in the process, both parties looked afresh at the facts and arguments in the dispute, and issues could be unpacked and areas of differences more clearly identified for resolution.	Pearson Correlation	.608**
	Sig. (2-tailed)	0
The use of an external mediator, unconnected to the KRA, would have resulted in a better outcome.	Pearson Correlation	0.07
	Sig. (2-tailed)	0.669

\*\* . Correlation is significant at the 0.01 level (2-tailed).

#### 4.4.3.2 Efficiency of the ADR Process and Dispute Resolution

As shown on table 4.22, there was positive and significant correlation between the efficiency of the ADR process and dispute resolution. The items on efficiency of ADR process correlated with dispute resolution were; 'Even where the parties in are unable to reach an agreed resolution the ADR process can help to improve the efficiency of any subsequent litigation, by clarifying the facts and narrowing the dispute to the key issues needed to be tested at the Tribunal'  $r = .661$ ,  $p < .05$ . ( $p > .05$ ) and 'There were significant cost savings in resolving disputes through the ADR process for both the KRA and the customer'  $r = .720$ ,  $p < .05$ .

**Table 4. 22 Correlation on Efficiency of the ADR Process and Dispute Resolution**

		Tax disputes resolutions
Even where the parties in are unable to reach an agreed resolution the ADR process can help to improve the efficiency of any subsequent litigation, by clarifying the facts and narrowing the dispute to the key issues needed to be tested at the Tribunal	Pearson Correlation	.661**
	Sig. (2-tailed)	0
There were significant cost savings in resolving disputes through the ADR process for both the KRA and the customer.	Pearson Correlation	.720**
	Sig. (2-tailed)	0

\*\* . Correlation is significant at the 0.01 level (2-tailed).

#### 4.4.3.3 Fairness of the ADR Process and Dispute Resolution

As shown on table 4.23, there was positive and significant correlation between the fairness of the ADR process and dispute resolution. The items on fairness of ADR process correlated with dispute resolution were; ‘The ADR proceedings were conducted in a confidential and without prejudice basis’  $r = .682$ ,  $p < .05$ , ‘The taxpayers review and appeal rights were not affected by participating in the ADR’  $r = .578$ ,  $p < .05$ , and ‘The ADR proceedings conducted objectively, with the mediators ensuring a level playing field during the deliberations’  $r = .470$ ,  $p < .05$ .

**Table 4. 23 Correlation on Fairness of the ADR Process and Dispute Resolution**

		Tax disputes resolution
The ADR proceedings were conducted in a confidential and without prejudice basis.	Pearson Correlation	.682**
	Sig. (2-tailed)	0
The taxpayers review and appeal rights were not affected by participating in the ADR.	Pearson Correlation	.578**
	Sig. (2-tailed)	0
The ADR proceedings conducted objectively, with the mediators ensuring a level playing field during the deliberations.	Pearson Correlation	.470**
	Sig. (2-tailed)	0.002

\*\* . Correlation is significant at the 0.01 level (2-tailed).

#### 4.4.4 ANOVA on Efficacy of ADR Process and Dispute Resolution

ANOVA was used to test group statistical difference on the efficacy of the ADR process in dispute resolution. Table 4.24 indicates all the strategies for the efficacy of the ADR process had statistical difference on dispute resolution. For ‘Effectiveness’,  $F(7, 32) = 3.756$ ,  $p < 0.05$ ; ‘Efficiency’  $F(7, 32) = 11.107$ ,  $p < 0.05$ ; and ‘Fairness’  $F(7, 32) = 5.787$ ,  $p < 0.05$ . This means that efficacy was a key determining factor on dispute resolution. However, to determine the degree of the effect, post-hoc results was performed but result could not be displaced due to fewer number of cases.

**Table 4. 24 ANOVA on Efficacy of ADR Process and Dispute Resolution**

		Sum of	df	Mean	F	Sig.
		Squares		Square		
Effectiveness	Between Groups	8.274	7	1.182	3.756	.004
	Within Groups	10.070	32	.315		
	Total	18.344	39			
Efficiency	Between Groups	23.094	7	3.299	11.107	.000
	Within Groups	9.506	32	.297		
	Total	32.600	39			
Fairness	Between Groups	12.192	7	1.742	5.787	.000
	Within Groups	9.630	32	.301		
	Total	21.822	39			

#### **4.5 Evaluation of Strategies for the Enhancement of the ADR Process in Kenya**

##### **4.5.1 Descriptive on Perceived Benefit (PB)**

The descriptive of each of the three constructs under the Strategies for the Enhancement of the ADR Process were presented as follows:

##### **4.5.1.1 Embedding ADR into Tax Administration Laws**

Table 4.25 presents the descriptive findings on embedding ADR into tax administration laws. The items were ranked as neutral and agreed. The only item ranked as agreed was; ‘The Kenyan courts support the ADR and seen as constitutional matter’ (M=3.65, SD =0.834). Others ranked as neutral were; ‘The ADR process is sufficiently embedded into the Tax Procedures Act’ (M=3.2, SD =1.043), and ‘ADR settlements can potentially be challenged as unconstitutional as they may not be in line with legislation’ (M=2.9, SD =1.057). There was no item which was ranked as ‘disagreed’. Further, two items ranked as neutral had higher level of standard deviation of above 1. This shows the respondents views varied on these items while the item ranked as agreed had standard deviation of less than 1 (0.834). This shows respondents had higher level of agreement than the items ranked a neutral with higher standard deviation.

**Table 4. 25 Descriptive on Embedding ADR into Tax Administration Laws**

	Mean	Std. Deviation
The ADR process is sufficiently embedded into the Tax Procedures Act.	3.2	1.043
ADR settlements can potentially be challenged as unconstitutional as they may not be in line with legislation.	2.9	1.057
The Kenyan courts support the ADR and seen as constitutional matter	3.65	0.834

#### 4.5.1.2 Wide Publication of Formal Guidelines

Table 4.26 shows all the items on wider publication of formal guidelines of ADR process were ranked as ‘neutral’ with mean value of 3. Using the rounded mean to zero decimal places, the findings arranged in descending order were: ‘There are clear guidelines in place regarding the ADR Framework in Kenya’ (M=3.05, SD =1.146), ‘The ADR guidelines are quickly and easily available to taxpayers who would want to consider engaging in an ADR process in resolving tax disputes’ (M=2.9, SD =1.15) and lastly ‘The KRA has carried out sufficient sensitization of the ADR process to taxpayers involved in tax disputes’ (M=2.48, SD =1.012). There was no item which was ranked as ‘agreed’ or ‘disagreed’. All items were ranked as ‘neutral’. Further, all the items had higher level of standard deviation of above 1. This shows the respondents views varied on wider publication of formal guidelines of ADR process.

**Table 4. 26 Descriptive on Wide Publication of Formal Guidelines**

	Mean	Std. Deviation
There are clear guidelines in place regarding the ADR Framework in Kenya	3.05	1.146
The ADR guidelines are quickly and easily available to taxpayers who would want to consider engaging in an ADR process in resolving tax disputes.	2.9	1.15
The KRA has carried out sufficient sensitization of the ADR process to taxpayers involved in tax disputes.	2.48	1.012

#### 4.5.1.3 Convergence with Existing ADR processes

Table 4.27 presents the descriptive findings on convergence with existing ADR processes. The items were ranked as neutral and agreed. The only item ranked as agreed was; ‘Tax disputes can be resolved through Court-Annexed Mediation’ (M=3.5, SD

=1.062). Others ranked as neutral were; ‘The ADR Framework under the KRA encourages the use of ADR processes available through legal processes outside the tax appeals procedures’ (M=3.35, SD =0.975), ‘Tax disputes can be resolved through the appointment of an arbitral tribunal under the Arbitration Act’ (M=3.25, SD =1.08) and ‘Tax disputes can be heard and determined at the Nairobi Centre for International Arbitration’ (M=3.08, SD =0.971). There was no item which was ranked as ‘disagreed’. Further, all the items had higher level of standard deviation ranging from 0.971 to 1.08. This shows the respondents views varied on convergence with existing ADR processes.

**Table 4. 27 Descriptive on Convergence with existing ADR processes**

	Mean	Std. Deviation
The ADR Framework under the KRA encourages the use of ADR processes available through legal processes outside the tax appeals procedures.	3.35	0.975
Tax disputes can be resolved through the appointment of an arbitral tribunal under the Arbitration Act.	3.25	1.08
Tax disputes can be heard and determined at the Nairobi Centre for International Arbitration.	3.08	0.971
Tax disputes can be resolved through Court-Annexed Mediation.	3.5	1.062

#### **4.5.1.4 Tax Ombudsman**

Table 4.28 shows the distribution of the two items under tax ombudsman were ranked as ‘neutral’ and ‘agreed’. Using the rounded mean to zero decimal places, the item ranked as agreed was ‘There is need for a Tax Ombudsman to provide a neutral or impartial redress channel for taxpayers that have exhausted the normal KRA complaints mechanism’ (M=4.28, SD =0.847), and the item ranked as neutral was ‘The existing Office of Ombudsman under the Commission on Administrative Justice can investigate any act or omission in public administration by the KRA’ (M=3.38, SD =0.838). The two items under Tax Ombudsman had lower standard deviation ranging from 0.838 to 0.847. This shows the respondents views had high level of agreement on Tax Ombudsman.

**Table 4. 28 Descriptive on Tax Ombudsman**

	Mean	Std. Deviation
The existing Office of Ombudsman under the Commission on Administrative Justice can investigate any act or omission in public administration by the KRA.	3.38	0.838
There is need for a Tax Ombudsman to provide a neutral or impartial redress channel for taxpayers that have exhausted the normal KRA complaints mechanism.	4.28	0.847

#### 4.5.2 4.5.2 Normality Test on Strategies for the Enhancement of the ADR Process

Table 4.29 shows the output of the normality test. Using Skewness and kurtosis statistical tests where normality is positive with the range of -2.0 and + 2.0 for skewness and -5.0 to +5.0 for kurtosis, the output shows the data was normally distributed. The skewness value ranged from -0.644 to 0.462 and kurtosis value ranged from -1.369 to 1.470.

**Table 4. 29 Normality Test on Strategies for the Enhancement of the ADR Process**

	Skewness	Kurtosis
The ADR process is sufficiently embedded into the Tax Procedures Act.	-.280	-.635
ADR settlements can potentially be challenged as unconstitutional as they may not be in line with legislation.	.345	-.675
The Kenyan courts support the ADR and seen as constitutional matter	-.644	1.470
There are clear guidelines in place regarding the ADR Framework in Kenya	-.437	-.784
The ADR guidelines are quickly and easily available to taxpayers who would want to consider engaging in an ADR process in resolving tax disputes.	-.221	-1.265
The KRA has carried out sufficient sensitization of the ADR process to taxpayers involved in tax disputes.	.462	-.310
The ADR Framework under the KRA encourages the use of ADR processes available through legal processes outside the tax appeals procedures.	-.427	-.513
Tax disputes can be resolved through the appointment of an arbitral tribunal under the Arbitration Act.	-.145	-.575
Tax disputes can be heard and determined at the Nairobi Centre for International Arbitration.	-.156	-.375
Tax disputes can be resolved through Court-Annexed Mediation.	-.608	-.061
The existing Office of Ombudsman under the Commission on Administrative Justice can investigate any act or omission in public administration by the KRA.	-.546	.577
There is need for a Tax Ombud to provide a neutral or impartial redress channel for taxpayers that have exhausted the normal KRA complaints mechanism.	-.574	-1.369

### 4.5.3 Chi-square Test on Strategies for the Enhancement of the ADR Process and Demographic Information

The chi-square test was used to determine the association between the demographic information and Strategies for the Enhancement of the ADR process. As part of evaluation of Strategies for the Enhancement of the ADR process, it was important to identify its association with the demographic information. The presentation of the findings based on each of the four constructs were presented as follows;

#### 4.5.3.1 Chi-square Test on Strategies for the Enhancement ADR Process and Demographic Information

Table 4.30, presents the p-value of the chi-square test between Strategies for the Enhancement of ADR process and demographic information; ownership, size of taxation and number of times involved at ADR. There was no item with significant association between the Strategies for the Enhancement ADR process and demographic information. The chi-square test on all the items between Strategies for the Enhancement ADR process and demographic information was not statistically significant with p-value greater than 0.05 ( $p > .05$ ). This shows ownership, size of taxpayer and number of times involved at ADR has no association with the strategies for enhancement of ADR process.

**Table 4. 30 Chi-square Test on Strategies for the Enhancement ADR Process and Demographic Information**

	Ownership p-value	Size of taxpayer p-value	Number of times involved at ADR p-value
The ADR process is sufficiently embedded into the Tax Procedures Act.	0.872	0.152	0.483
ADR settlements can potentially be challenged as unconstitutional as they may not be in line with legislation.	0.129	0.051	0.310
The Kenyan courts support the ADR and seen as constitutional matter	0.973	0.618	0.596

#### 4.5.3.2 Chi-square Test on Wide Publication of Formal Guidelines and Demographic Information

Table 4.31, presents the p-value of the chi-square test between wide publication of formal guidelines of ADR process and demographic information; ownership, size of taxation and number of times involved at ADR. There was no item with significant association between the wide publication of formal guidelines of ADR process and demographic information. The chi-square test on all the items between wide publication of formal guidelines of ADR process and demographic information was not statistically significant with p-value greater than 0.05 ( $p > .05$ ). This shows ownership, size of taxpayer and number of times involved at ADR has no association with the wide publication of formal guidelines of ADR process.

**Table 4. 31 Chi-square Test on Wide Publication of Formal Guidelines and Demographic Information**

	<b>Ownership p-value</b>	<b>Size of taxpayer p-value</b>	<b>Number of times involved at ADR p-value</b>
There are clear guidelines in place regarding the ADR Framework in Kenya.	0.494	0.532	0.343
The ADR guidelines are quickly and easily available to taxpayers who would want to consider engaging in an ADR process in resolving tax disputes.	0.639	0.375	0.070
The KRA has carried out sufficient sensitization of the ADR process to taxpayers involved in tax disputes.	0.592	0.560	0.122

#### 4.5.3.3 Chi-square Test on Convergence with Existing ADR Processes and Demographic Information

Table 4.32, presents the p-value of the chi-square test between convergence with existing ADR processes and demographic information; ownership, size of taxation and number of times involved at ADR. There was no item with significant association between the convergence with existing ADR process and demographic information. The chi-square test on all the items between convergence with existing ADR process and demographic information was not statistically significant with p-value greater than 0.05 ( $p > .05$ ). This

shows ownership, size of taxpayer and number of times involved at ADR has no association with the convergence with existing ADR process.

**Table 4. 32 Chi-square Test on Convergence with Existing ADR Processes and Demographic Information**

	Ownership	Size of taxpayer	Number of times involved at ADR
	p-value	p-value	p-value
The ADR Framework under the KRA encourages the use of ADR processes available through legal processes outside the tax appeals procedures.	0.544	0.298	0.133
Tax disputes can be resolved through the appointment of an arbitral tribunal under the Arbitration Act.	0.516	0.404	0.588
Tax disputes can be heard and determined at the Nairobi Centre for International Arbitration.	0.357	0.450	0.317
Tax disputes can be resolved through Court-Annexed Mediation.	0.336	0.385	0.561

#### 4.5.3.4 Chi-square Test on Tax Ombudsman and Demographic Information

Table 4.33, presents the p-value of the chi-square test between Tax Ombudsman and demographic information; ownership, size of taxation and number of times involved at ADR. There was no item with significant association between the Tax Ombudsman and demographic information. The chi-square test on all the items between Tax Ombudsman and demographic information was not statistically significant with p-value greater than 0.05 ( $p > .05$ ). This shows ownership, size of taxpayer and number of times involved at ADR has no association with the Tax Ombudsman.

**Table 4. 33 Chi-square Test on Tax Ombudsman and Demographic Information**

	Ownership	Size of taxpayer	Number of times involved at ADR
	p-value	p-value	p-value
The ADR Framework under the KRA encourages the use of ADR processes available through legal processes outside the tax appeals procedures.	0.389	0.326	0.877
Tax disputes can be resolved through the appointment of an arbitral tribunal under the Arbitration Act.	0.531	0.666	0.784

#### 4.5.4 ANOVA on Strategies for the Enhancement of the ADR Process and Demographic Information

The ANOVA test, was performed to test the group statistical difference of on Strategies for the Enhancement of the ADR Process and the demographic information. The one-way ANOVA analysis was used.

##### 4.5.4.1 ANOVA on Strategies for the Enhancement of the ADR Process on Ownership

The first demographic information was ownership of the organization. Table 4.34 indicates all the Strategies for the Enhancement of the ADR Process had no statistical difference based on the ownership of the organization. For ‘Embedding ADR into tax administration laws’,  $F(3, 39) = 0.213, p > 0.05$ ; ‘Wide publication of formal guidelines’  $F(3, 39) = 0.598, p > 0.05$ ; ‘Convergence with existing ADR processes’  $F(3, 39) = 0.662, p > 0.05$  and lastly, ‘Tax Ombudsman’  $F(3, 39) = 1.875, p > 0.05$ . This means that ownership of the organization was not a significant determining factor on Strategies for the Enhancement of the ADR Process.

**Table 4. 34 ANOVA of Strategies for the Enhancement of the ADR Process on Ownership**

		Sum of Squares	df	Mean Square	F	Sig.
Embedding ADR into Tax Administration Laws	Between Groups	.088	3	.029	.213	.886
	Within Groups	4.967	36	.138		
	Total	5.056	39			
Wide Publication of Formal Guidelines	Between Groups	1.527	3	.509	.598	.621
	Within Groups	30.670	36	.852		
	Total	32.197	39			
Convergence with existing ADR processes	Between Groups	1.129	3	.376	.662	.581
	Within Groups	20.482	36	.569		
	Total	21.611	39			
Tax Ombudsman	Between Groups	2.537	3	.846	1.875	.151
	Within Groups	16.238	36	.451		
	Total	18.775	39			

#### 4.5.4.2 ANOVA on Strategies for the Enhancement of the ADR Process on Size of Taxation

The second demographic information of interest to the study was size of taxation. Table 4.35 indicates all the Strategies for the Enhancement of the ADR Process had no statistical difference based on the size of taxation. For ‘Embedding ADR into tax administration laws’,  $F(2, 39) = 0.538, p > 0.05$ ; ‘Wide publication of formal guidelines’  $F(2, 39) = 0.213, p > 0.05$ ; ‘Convergence with existing ADR processes’  $F(2, 39) = 0.963, p > 0.05$  and lastly, ‘Tax Ombudsman’  $F(2, 39) = 0.421, p > 0.05$ . This means that size of taxation in an organization was not a significant determining factor on Strategies for the Enhancement of the ADR Process.

**Table 4. 35 ANOVA of Strategies for the Enhancement of the ADR Process on Size of Taxation**

		Sum of Squares	df	Mean Square	F	Sig.
Embedding ADR into Tax Administration Laws	Between Groups	.143	2	.071	.538	.588
	Within Groups	4.913	37	.133		
	Total	5.056	39			
Wide Publication of Formal Guidelines	Between Groups	.366	2	.183	.213	.809
	Within Groups	31.831	37	.860		
	Total	32.197	39			
Convergence with existing ADR processes	Between Groups	1.069	2	.534	.963	.391
	Within Groups	20.542	37	.555		
	Total	21.611	39			
Tax Ombudsman	Between Groups	.418	2	.209	.421	.659
	Within Groups	18.357	37	.496		
	Total	18.775	39			

#### 4.5.4.3 ANOVA on Strategies for the Enhancement of the ADR Process on Number of Times involved in ADR Process

The third demographic information of interest to the study was number of times involved in ADR process. Table 4.36 indicates all the strategies for the enhancement of the ADR Process had no statistical difference based on the number of times involved in ADR process. For ‘Embedding ADR into tax administration laws’,  $F(3, 39) = 0.064, p > 0.05$ ; ‘Wide publication of formal guidelines’  $F(3, 39) = 2.295, p > 0.05$ ; ‘Convergence with existing ADR processes’  $F(3, 39) = 0.251, p > 0.05$  and lastly, ‘Tax Ombudsman’  $F(3, 39) = 0.720, p > 0.05$ . This means that number of times involved in ADR process in an organization was not a significant determining factor on Strategies for the Enhancement of the ADR Process.

**Table 4. 36 ANOVA of Strategies for the Enhancement of the ADR Process on Number of Times involved in ADR Process**

		Sum of Squares	df	Mean Square	F	Sig.
Embedding ADR into Tax Administration Laws	Between Groups	.027	3	.009	.064	.979
	Within Groups	5.029	36	.140		
	Total	5.056	39			
Wide Publication of Formal Guidelines	Between Groups	5.168	3	1.723	2.295	.094
	Within Groups	27.029	36	.751		
	Total	32.197	39			
Convergence with existing ADR processes	Between Groups	.442	3	.147	.251	.860
	Within Groups	21.169	36	.588		
	Total	21.611	39			
Tax Ombudsman	Between Groups	1.063	3	.354	.720	.547
	Within Groups	17.712	36	.492		
	Total	18.775	39			

#### 4.5.5 Friedman Test on Strategies for the Enhancement of the ADR Process

Having reviewed the different factors on strategies for the enhancement of the ADR process, the ranking of the strategies for the enhancement of the ADR process based on the test for several related samples was performed using the Friedman test. The result shows the ranking of the variables based on their mean ranking weight. As indicated on table 4.37, the ranking was significant  $\chi^2 (8, N=40) = 76.295, p < .05$ . On mean weight ascending order, ‘There is need for a Tax Ombudsman to provide a neutral or impartial redress channel for taxpayers that have exhausted the normal KRA complaints mechanism’ was ranked highly based on the agreement while ‘The KRA has carried out sufficient sensitization of the ADR process to taxpayers involved in tax disputes’ was the least on the ranking. Other factors reviewed were ranked as indicated on the following table.

**Table 4. 37 Friedman Rank on Strategies for the Enhancement of the ADR Process**

	Mean Rank
There is need for a Tax Ombudsman to provide a neutral or impartial redress channel for taxpayers that have exhausted the normal KRA complaints mechanism.	7.46
Tax disputes can be resolved through Court-Annexed Mediation.	5.67
The ADR Framework under the KRA encourages the use of ADR processes available through legal processes outside the tax appeals procedures.	5.28
The existing Office of Ombudsman under the Commission on Administrative Justice can investigate any act or omission in public administration by the KRA.	5.27
Tax disputes can be resolved through the appointment of an arbitral tribunal under the Arbitration Act.	5.04
Tax disputes can be heard and determined at the Nairobi Centre for International Arbitration.	4.54
There are clear guidelines in place regarding the ADR Framework in Kenya	4.51
The ADR guidelines are quickly and easily available to taxpayers who would want to consider engaging in an ADR process in resolving tax disputes.	4.21
The KRA has carried out sufficient sensitization of the ADR process to taxpayers involved in tax disputes.	3.03
Test Statistics <sup>a</sup>	
N=40, Chi-square = 76.295, df = 8, Asymp. Sig. =.000	
a. Friedman Test	

#### 4.6 Chapter Summary

This chapter presents the research findings and results in three sections; the response rate, the demographic information and the specific research objectives. On the first objective, the research found out there was no association between ownership, size of taxation or number of times involved in ADR process with ADR process. However, the ‘ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010’ and ‘The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR’ were the two variables ranked highly based mean ranking.

On the second objective, the research found out 62.5% of tax dispute resolution is determined by the efficacy of the ADR process while the efficacy of ADR is determined by efficiency and not effectiveness or fairness. The last objective, the research found out there was no association between ownership, size of taxation or number of times involved in ADR process with strategies for enhancement of ADR process. KRA needs to put in place clear guideline regarding ADR framework, make it accessible to taxpayers and

carry out sensitization on ADR process. Chapter 5 presents the summary, discussion, conclusion and recommendation of the research findings.

## **CHAPTER FIVE**

### **5.0 DISCUSSION, CONCLUSIONS AND RECOMMENDATIONS.**

#### **5.1 Introduction**

The aim of this chapter is to discuss and summarize the findings, conclusions and recommendations of the study based on the research questions of the study.

#### **5.2 Summary of the Study**

The purpose of this study was to critically evaluate the Alternative Dispute Resolution (ADR) mechanism in resolving tax disputes in Kenya, and propose strategies for enhancement of the process. The research questions of this study were: to undertake a critical review of the ADR process; establish the effectiveness and efficiency of the ADR process in solving tax disputes; and to propose strategies for the enhancement of the ADR process in Kenya.

A non-probability judgmental sampling design was applied in the study to select the sample. This sampling method enabled the researcher to use expert judgment to select cases that will assist in the answering of the research questions is considered most appropriate. The study applied descriptive and inferential statistics to analyze the study variables. The population of the study was on companies within the large taxpayer list that have resolved their tax matters with the KRA through the ADR mechanism. The questionnaire was distributed to a group of tax professionals in the taxpayer list working in various multinational and local organisations. There were 42 participants who contributed to the study, however, 2 were incomplete questionnaires and were dropped. As a consequence, 40 questionnaires were used in the analysis.

The study concluded that taxpayers are neutral in their views regarding the effectiveness of the ADR process. In particular, they are neutral in their perception regarding whether the ADR process is simple to use and easy to access; whether the parties were provided with the skills, motivations and resources they needed to use interest based negotiation procedures such as mediation; and the ADR process having many options or access points for resolution of disputes, including the option to loop forward or backwards between

interest based and rights based options. However, taxpayers were agreed that that the use of an external mediator unconnected to the KRA would have resulted in a better outcome.

Taxpayers were conversant with the fact that the ADR process is enshrined in the Kenyan Constitution, and that the Tax Procedures Act is the main law providing for the resolution of tax disputes through ADR. However, they were neutral in their perception regarding the fact that the ADR conversations were conducted before a team of tax officers not directly involved in the audit process, and also neutral in their view point regarding whether the KRA had issued clear ADR rules.

The taxpayers disagreed with the view that there were clear timelines for resolution of tax disputes through ADR in Kenya, and were neutral in their view as to whether the KRA commits to taxpayers and representatives to identify opportunities for ADR, and in their perception as to whether the KRA staff involved in tax disputes consider if it is appropriate to participate in some form of ADR.

Taxpayers agreed that the ADR process helps to bring certainty in tax disputes earlier, allowing provisions to be released and tax repayments to be freed up, and that there are significant cost savings in resolving disputes through the ADR process. They also believe that the ADR process can help improve the efficiency of subsequent litigation, through clarifying facts and narrowing the disputed areas before the Tax Appeals Tribunal.

Taxpayers also believe that ADR proceedings they have been involved in have been conducted in a confidential and without prejudice basis, and that their rights of review and appeal were not affected through participation in the ADR. The taxpayers indicated that they would recommend the ADR process to other taxpayers. However, they were neutral in their views regarding the objectivity of the ADR proceedings, and the neutrality displayed by the mediators in ensuring a level playing field during deliberations.

Taxpayers strongly feel that there is need for a Tax Ombudsman to provide a neutral or impartial redress channel for taxpayers that have exhausted the normal KRA complaints mechanism. They also agree that the Kenyan courts support the ADR process from a Constitutional view point. However, they are neutral in their perception regarding whether the ADR process is sufficiently embedded into the Tax Procedures Act, and also with respect to whether settlements can potentially be challenged as unconstitutional.

Taxpayers are however of the view that the KRA has not done sufficient sensitization of the ADR process to taxpayers involved in tax disputes.

With respect to alternative dispute resolution channels, taxpayers are aware that tax disputes can be resolved through Court Annexed Mediation, but are neutral as to whether the ADR framework under the KRA encourages the use of ADR processes available through legal processes outside the tax appeals procedures, and likewise appear neutral as to the resolution of tax disputes through the appointment of an arbitral tribunal under the Arbitration Act, or through the Nairobi Centre for International Arbitration.

### **5.3 Discussion of the Results**

#### **5.3.1 A Critical Review of the Alternative Dispute Resolution Process**

The study concluded that taxpayers are neutral in their views regarding the effectiveness of the Kenya ADR process. In particular, they are neutral in their perception regarding whether the ADR process is simple to use and easy to access; whether the parties were provided with the skills, motivations and resources they needed to use interest based negotiation procedures such as mediation; and the ADR process having many options or access points for resolution of disputes, including the option to loop forward or backwards between interest based and rights based options.

This runs contrary to the expected basic principles of dispute system design according to Ury, Brett and Goldberg (1988), namely focusing on reconciling interests by designing negotiation procedures and giving parties the skills and resources needed to use those procedures; building in procedures that allow parties to 'loop back' to interest-based negotiation from rights or power approaches; include low cost rights and power backups in case interest-based negotiations fail; building in procedures for consultation before potential disputes, and for feedback after disputes; arranging dispute resolution procedures from low to high cost to assure that high cost methods are only used after lower cost methods are exhausted; and providing people with the skills, motivation and resources they need to use interest-based negotiation procedures.

From the responses, taxpayers were conversant with the fact that the ADR process is enshrined in the Kenyan Constitution, and that the Tax Procedures Act is the main law providing for the resolution of tax disputes through ADR. However, they were neutral in

their perception regarding the fact that the ADR conversations were conducted before a team of tax officers not directly involved in the audit process, and also neutral in their view point regarding whether the KRA had issued clear ADR rules. This would suggest that although taxpayers understand and appreciate the legal framework governing the ADR process, they are not clear on the rules governing the Kenya ADR framework, and also do not appear to view the process as an independent and fair process.

The taxpayers disagreed with the view that there were clear timelines for resolution of tax disputes through ADR in Kenya. There is an opportunity for the KRA to provide greater clarity to taxpayers at the onset of proceedings regarding the timelines for resolution of ADR processes. For example, the South African Revenue Service (SARS) has issued dispute resolution rules under the Tax Administration Act 2011, under which once an ADR process is convened the facilitator is required to convene ADR proceedings within 20 days of their appointment, and if no facilitator has been appointed, the parties themselves must convene such proceedings within 30 days. Likewise the ADR process must be concluded within 90 days after the commencement of the proceedings (SARS, 2014). Clarity regarding the ADR timelines would motivate more taxpayers to embrace ADR proceedings to resolve disputes.

Taxpayers were neutral in their view as to whether the KRA commits to taxpayers and representatives to identify opportunities for ADR, and in their perception as to whether the KRA staff involved in tax disputes consider if it is appropriate to participate in some form of ADR. This suggests that more should be done by the KRA in articulating to its officers the need to identify opportunities for ADR, similar to the Australian Tax Office (ATO) which provides explicit guidelines to its officers requiring them to consider whether it would be appropriate to participate in some form of ADR. The ATO commits to taxpayers and their representatives to identify opportunities for ADR, consider and respond to requests for ADR, suggest ADR where appropriate, and speak with and write to the taxpayer before ADR to explain the process and what they can expect from it (ATO, 2013).

### **5.3.2 Efficacy of Alternative Dispute Resolution in Solving Tax Disputes**

The study concluded that taxpayers are neutral in their views regarding the effectiveness of the ADR process. In particular, they are neutral in their perception regarding whether the ADR process is simple to use and easy to access; whether the parties were provided with the skills, motivations and resources they needed to use interest based negotiation procedures such as mediation; and on the ADR process having many options or access points for resolution of disputes, including the option to loop forward or backwards between interest based and rights based options.

Costantino and Merchant (1996) emphasise the need to create ADR systems that are simple to use and easy to access to help solve disputes early, and to ensure that disputants have the necessary knowledge and skill to choose and use ADR. Ury, Brett and Goldberg (1988) also advocate for the building in of procedures that allow parties to ‘loop back’ to interest-based negotiation from rights or power approaches – these include advisory arbitration and cooling off periods. The study suggests that taxpayers believe that the KRA can do more in making the ADR process more effective.

However, taxpayers were of the view that that the use of an external mediator unconnected to the KRA would have resulted in a better outcome. This runs contrary to the findings of the HMRC pilot studies under which it was initially expected that mediation using an external mediator, unconnected with either HMRC or the customer, was preferable, but ultimately it was found that in most cases using mediation-trained HMRC people who had no previous involvement in the case to facilitate structured discussions led to resolution (HMRC, 2013b). It was also found that a key factor enabling ADR to help resolve dispute was the mediator/facilitator being accepted as a neutral party that could robustly challenge each side’s position. The findings of the current study suggest that the facilitator in the KRA ADR process is not viewed by taxpayers as being a neutral party.

Taxpayers agreed that the ADR process helps to bring certainty in tax disputes earlier, allowing provisions to be released and tax repayments to be freed up, and that there are significant cost savings in resolving disputes through the ADR process. They also believe that the ADR process can help improve the efficiency of subsequent litigation, through clarifying facts and narrowing the disputed areas before the Tax Appeals Tribunal. This

finding is in agreement with the HMRC pilot studies on ADR. The SME pilot study noted that 64% of the disputes were resolved in whole and were resolved on average in 28 days (Walton, 2011). Likewise, it was found that by engaging in the process, both parties looked afresh at the facts and arguments in the dispute, and issues could be ‘unpacked’ to understand the issues better. The process could also allow for an issue to remain unresolved but the possible outcomes to be explored, thus helping to identify an acceptable method to resolve the case as a whole. (HMRC, 2013b)

The study concluded that taxpayers believe the ADR proceedings they have been involved in have been conducted in a confidential and without prejudice basis, and that their rights of review and appeal were not affected through participation in the ADR. This is in line with the HMRC pilot study findings which concluded that successful mediations and facilitations had ensured that the right amount of tax had been identified and secured with less delay and cost for both parties. In addition, a better understanding of disputes had been gained and resource savings identified (HMRC, 2013).

However, taxpayers in the current study were neutral in their views regarding the objectivity of the ADR proceedings, and the neutrality displayed by the mediators in ensuring a level playing field during deliberations. This is in line with the earlier finding in the current study that the use of an external mediator unconnected to the KRA would have resulted in a better outcome.

Despite this however, the taxpayers indicated that they would recommend the ADR process to other taxpayers. Jone notes, that dispute systems must be fair and must be perceived to be fair, and that it must foster a culture that welcomes good faith dissent (Jone, 2016). Hence despite the various short comings of the Kenya ADR process, taxpayers still perceive it as a worthwhile avenue for the resolution of tax disputes, outside the formal dispute resolution channel.

### **5.3.3 Strategies for Enhancing Tax Dispute Resolution through ADR in Kenya**

The study noted that taxpayers are of the view that the Kenyan courts support the ADR process from a Constitutional view point. However, they are neutral in their perception regarding whether the ADR process is sufficiently embedded into the Tax Procedures Act, and also with respect to whether settlements can potentially be challenged as

unconstitutional. This suggests that there is a potential risk of future conflict between the KRA and taxpayers on ADR settlements, if either party is subsequently aggrieved and seeks to have an ADR settlement set aside. Kashindi (2017) concludes that Article 210 of the Kenyan Constitution could be invoked to challenge the settlement as being unconstitutional in the context of tax disputes. To forestall this, he proposes that the Kenyan Parliament should take legislative steps to overcome this through amending the Tax Procedures Act and through rule-making, similar to the legislation in countries such as South Africa.

The study revealed that taxpayers are of the view that the KRA has not done sufficient sensitization of the ADR process to taxpayers involved in tax disputes. They were however neutral as to whether there are clear guidelines in place regarding the ADR framework in Kenya that were quickly and easily available to taxpayers. According to Jone (2016), an effective ADR process must provide training and education for stakeholders. This should extend to training stakeholders in conflict management as well as education about the dispute system and how to access it. As previously highlighted, although the KRA has carried out sensitization workshops, (eg KRA, 2017), these are for a targeted audience and there is more that can be done in formally documenting and cascading the ADR framework so that it is more accessible to taxpayers.

The study found that taxpayers are aware that tax disputes can be resolved through Court Annexed Mediation, but that they are neutral as to whether the ADR framework under the KRA encourages the use of ADR processes available through legal processes outside the tax appeals procedures, and likewise appear neutral as to the resolution of tax disputes through the appointment of an arbitral tribunal under the Arbitration Act, or through the Nairobi Centre for International Arbitration.

Although the ADR mechanism for tax disputes dates back only to 2015, the concept of ADR has a reasonably long history in Kenya, with various steps having been taken to entrench aspects of ADR into the legal dispute resolution framework. The framework of the Arbitration Act, the Nairobi Centre for International Arbitration and the Court-Annexed Mediation processes are existing processes available for resolution for disputes, but do not appear to have so far been aligned to the ADR process as currently promoted by the KRA. As parties to an ADR process must mutually agree to participate in it, it is perhaps for the KRA to formally open up the avenue for tax disputes to be taken forward

through all pre-existing ADR processes, though addressing this point in the ADR guidelines that will be issued. In addition, there is an opportunity for the KRA to consider whether the ADR process, as currently undertaken by KRA officials and carried out in KRA premises (KRA, 2015), would be more effectively carried out using independent mediators.

The study noted that taxpayers strongly felt that there is need for a Tax Ombudsman to provide a neutral or impartial redress channel for taxpayers that have exhausted the normal KRA complaints mechanism. They were neutral on the ability of the existing Office of the Ombudsman under the Commission on Administrative Justice's capacity to investigate any act or omission in public administration by the KRA. This suggests that there is an opportunity to explore the ideal model for a proposed Tax Ombud in Kenya. Mthimunya (2013) has conducted an extensive review of the various Tax Ombud models available in other jurisdictions, including Australia, Botswana, Canada, New Zealand, Sweden, the United Kingdom and the United States of America, and the research would be instructive. However, it should be borne in mind that other than in Sweden, the recommendations of the Tax Ombud are not binding, which may limit the effectiveness of the role.

## **5.4 Conclusions**

This section presents the conclusions of the key findings of the study based on the already reported research objectives.

### **5.4.1 Critical Review of the Alternative Dispute Resolution Process**

The study noted that ADR has a long history going back through millennia. It has a long history in resolving commercial disputes, with commercial arbitration widely used by merchants by 11 A.D, but has also been used to resolve labour disputes and even wars. Closer home it is well acknowledged as critical into traditional dispute resolution, and is also embedded in the 2010 Kenyan Constitution.

There are 6 basic principles of Dispute System Design (DSD): designing negotiation procedures and giving parties the skills and resources needed to use those procedures; building in procedures that allow parties to 'loop back' to interest-based negotiation from rights or power approaches; including low cost rights and power backups in case interest-

based negotiations fail; building in procedures for consultation before potential disputes and for feedback after disputes; arranging dispute resolution procedures from low to high cost; and providing people with the skills, motivation and resources they need to use interest-based negotiation procedures. However, DSD has not been extensively considered in the context of tax dispute resolution as in a tax dispute there is a power imbalance between the taxpayer and the revenue authority which limits the application of an interests-oriented system.

Since 2015 the KRA has sought to embed ADR as an alternative to the formal tax dispute resolution process through the Tax Tribunal and the Courts. This is in line with international best practice, with tax authorities in countries such as Australia, South Africa and the United Kingdom having taken positive steps to embrace ADR.

The study however notes that Kenyan taxpayers appear to be lukewarm in their attitude towards the Kenyan approach to ADR, being neutral in their assessment of the simplicity and ease of access of the ADR process; and similarly holding a neutral view regarding whether they have been provided with the skills, motivation and resources they need to use ADR. Similarly they do not appear convinced that the ADR conversations are conducted in a neutral environment. In particular they do not believe there are clear timelines for resolution of tax disputes through ADR.

This suggests that the KRA should invest in sensitizing taxpayers regarding the ADR process, and in embedding the requisite skills, motivation and resources in them to use the ADR process effectively.

#### **5.4.2 Efficacy of Alternative Dispute Resolution in Solving Tax Disputes**

Studies by the HMRC have generally been positive in their outlook regarding the effectiveness, efficiency and fairness of ADR outcomes, with a high approval rating in the pilot phases of the roll out of ADR in the United Kingdom. However, the study found mixed views on the ADR process on the part of Kenyan taxpayers. Taxpayers believe that the process is efficient, in that it helps to bring certainty in disputes earlier, and helping to improve the efficiency of subsequent litigation by clarifying facts and narrowing the dispute to key issues. They also believe that ADR results in significant cost saves for both the taxpayer and the KRA. They agree that the deliberations as being conducted in a

confidential and without prejudice basis, and that their rights of subsequent appeal are left intact. As a consequence they would recommend the ADR process to other taxpayers.

On the other hand, the taxpayers are neutral in their perception on the objectivity of mediators in the ADR proceedings, and their ability to facilitate disputes in tax regimes different to their training and experience. They believe that the use of an external mediator, unconnected to the KRA, would result in a better outcome.

### **5.4.3 Strategies for Enhancing Tax Dispute Resolution through ADR in Kenya**

The study explored various strategies for enhancing ADR processes in Kenya, in particular the embedding of ADR into Tax administration laws, the wider publication of formal ADR guidelines, and the convergence of the KRA-led ADR process with the existing ADR frameworks under the Arbitration Act, the Nairobi Centre for International Arbitration, and the Court-Annexed Mediation. It also considered the prospects of a Tax Ombud being appointed to provide a neutral redress channel where taxpayers exhaust the normal KRA complaints mechanism.

The study found that taxpayers believe that the Kenyan courts support the ADR process. They also believe that tax disputes can be resolved through Court-Annexed Mediation, and that there is need for a Tax Ombud. However, they are neutral in their view regarding arbitration under the Arbitration Act or under the Nairobi Centre for International Arbitration. They also appear to have mixed views as to the ADR process being sufficiently embedded into existing tax legislation, and as to whether the ADR settlements can be challenged as unconstitutional. Similarly, they have mixed views on the availability of ADR guidelines for Tax disputes in Kenya. They are of the view that the KRA has not carried out sufficient sensitization of the ADR process to taxpayers involved in tax disputes.

## **5.5 Recommendations**

### **5.5.1 Suggestions for Improvement**

A key recommendation by taxpayers is that the KRA should invest in sensitizing taxpayers regarding the ADR process, and in embedding the requisite skills, motivation and resources in them to use the ADR process effectively. Further to this, to address concerns regarding the independence of mediators under the KRA-led ADR process, the

KRA may wish to consider permitting the use of external mediators, unconnected to the KRA, if the parties deem it fit to do so.

In order to address the risk of the ADR process being challenged as unconstitutional, the ADR process ought to be sufficiently embedded into existing tax legislation. The ADR guidelines need to be widely publicized so that all taxpayers can be clear as to the requirements of the process. This will address the broad concern that the KRA has not carried out sufficient sensitization of the ADR process to taxpayers involved in tax disputes. The KRA can also shed more clarity on the availability of the other ADR processes enshrined in law, namely through the Arbitration Act, the National Centre for International Arbitration Act and the Court-Annexed Mediation, so that taxpayers are clear on the available channels, ranked from low cost to high cost ADR channels.

The appointment of a Tax Ombudman would also be well received by taxpayers; however, for the Ombudman to be effective it would be essential for his/her guidance to be accepted and acted upon by the KRA.

### **5.5.2 Suggestions for Further Research**

The use of the ADR process in resolving tax disputes was only launched in Kenya in 2015, and its use is on the increase. Hence as are limited cases that have been handled under ADR so far, taxpayers may not yet have fully appreciated what the ADR process has to offer to them. Therefore, it is envisaged that this study will lay some ground work for future research as more taxpayers engage in it as a means of resolving tax disputes.

In January 2019 the KRA issued its 7th Corporate Strategic Plan, titled “Revenue Mobilisation Through Transformation”, which will run from 2018/2019 to 2020/2021 (KRA, 2019). One of the key pillars of the plan is to ensure greater effectiveness of the Alternative Dispute Resolution programme. More research will be required to determine whether the KRA’s plans to enhance the ADR process bear fruit.

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## **APPENDIX I: INTRODUCTION LETTER SENT TO RESPONDENTS**

PO Box 19137

00100 Nairobi GPO

Email: [nmucheru@gmail.com](mailto:nmucheru@gmail.com)

Date

Dear Sir/Madam

I am a student at the United States International University, Africa, pursuing a Masters of Business Administration (MBA) Degree in Strategic Management.

In partial fulfillment of the requirements for the award of the degree, I am currently undertaking a research project on the Adoption of the Alternative Dispute Resolution process in resolving Large Taxpayers' Tax Disputes in Kenya. Your organization has been identified as one which has participated in an Alternative Dispute Resolution process.

The attached questionnaire is aimed at eliciting information which will be useful in the above-mentioned research area as part of the MBA degree requirements.

I should therefore be grateful if you would complete all the sections of the questionnaire, and return the same to me, either via email, or through the address provided above.

Please note that the information supplied will be used strictly for academic purposes only, and will be treated with utmost confidentiality.

Your cooperation will be highly appreciated.

Yours sincerely,

Ndegwa Mucheru

## APPENDIX II: QUESTIONNAIRE

RESEARCH QUESTIONNAIRE	
	<b>PART A: GENERAL INFORMATION</b>
	Kindly answer all questions either by ticking in the boxes or writing in the spaces provided
1	What is your position in the company?  Top Mgt <span style="float: right;">[ ]</span>  Mid-level Mgt <span style="float: right;">[ ]</span>  Employee <span style="float: right;">[ ]</span>
2	How would you describe the ownership of the organization you work for?  Local (Kenyan) <span style="float: right;">[ ]</span>  Branch/subsidiary of Foreign Company <span style="float: right;">[ ]</span>  Non incorporated entity <span style="float: right;">[ ]</span>  Other <span style="float: right;">[ ]</span>
3	What size of taxpayer is your organization from a KRA perspective?  Large Taxpayer <span style="float: right;">[ ]</span> Medium Taxpayer <span style="float: right;">[ ]</span> Small Taxpayer <span style="float: right;">[ ]</span>
4	Have you been involved in ADR process on taxation in Kenya?  Yes <span style="float: right;">[ ]</span> No <span style="float: right;">[ ]</span>
5	How many times have you been involved in ADR process in Kenya?  1-2 <span style="float: right;">[ ]</span> 3-4 <span style="float: right;">[ ]</span> 5 or more <span style="float: right;">[ ]</span> None <span style="float: right;">[ ]</span>

PART B: CRITICAL REVIEW OF ALTERNATIVE DISPUTE RESOLUTION IN TAX DISPUTES						
<i>Please indicate to what extent you agree or disagree with the following comments regarding Alternative Dispute Resolution in the tax dispute resolution process.</i>						
		Strongly disagree	Disagree	Neutral	Agree	Strongly agree
<b>3.1</b>	<b>Review based on Effective ADR process</b>					
	The ADR process is simple to use and easy to access.					
	The ADR process has many options/access points for resolution of disputes with options to loop forward or backwards between interest based and rights based options.					
	The ADR procedures have been arranged from low cost to high cost, to ensure high cost methods eg litigation are only used after lower cost methods are exhausted.					
	During the ADR, parties are provided with the skills, motivation and resources they need to use interest based negotiation procedures such as mediation.					
<b>3.2</b>	<b>Kenyan approach to ADR.</b>					
	ADR as a dispute resolution process is enshrined in the Constitution of Kenya, 2010					
	ADR conversations are conducted before a tax team of officers not directly involved in the audit process, giving a measure of independence to the process.					
	The Tax Procedures Act is the main law that provides for the resolution of taxpayer disputes through ADR.					
	The Kenya Revenue Authority has issued clear ADR rules.					
<b>3.3</b>	<b>Benchmarking the Kenyan approach to ADR to international best practice</b>					
	The Kenya Revenue Authority commits to taxpayers and representatives to identify opportunities for ADR and suggest					

	instances where ADR may be appropriate.					
	There are clear time lines for resolution of tax disputes through the ADR.					
	KRA has staff with a role of management of tax disputes; they consider whether it would be appropriate to participate in some form of ADR.					
	Give any feedback or comments on review of ADR process in Kenya..... ..... .....					
	<b>PART C: THE EFFICACY OF ADR PROCESSES</b>					
	<i>Please highlight the extent you agree or disagree with the statements below regarding your experience in the Kenyan processes for tax dispute resolution.</i>					
		<b>Strongly disagree</b>	<b>Disagree</b>	<b>Neutral</b>	<b>Agree</b>	<b>Strongly agree</b>
<b>4.1</b>	<b>Effectiveness of the Kenya ADR process</b>					
	Mediator/facilitator was accepted as a neutral party that could robustly challenge each side's position.					
	Facilitators were able to facilitate disputes in tax regimes different to their training and experience					
	By engaging in the process, both parties looked afresh at the facts and arguments in the dispute, and issues could be 'unpacked' and areas of differences more clearly identified for resolution.					
	The use of an external mediator, unconnected to the KRA, would have resulted in a better outcome.					
<b>4.2</b>	<b>Efficiency of the Kenya ADR process.</b>					
	The ADR process helps to bring certainty earlier, allowing provisions to be released and tax repayments to be freed up.					
	Even where the parties in are unable to reach an agreed resolution the ADR process can help to improve the efficiency of any subsequent litigation, by clarifying the facts and narrowing the dispute to the key issues needed to be tested at the					

	Tribunal					
	There were significant cost savings in resolving disputes through the ADR process for both the KRA and the customer.					
<b>4.3</b>	<b>Fairness of the Kenya ADR process</b>					
	The ADR proceedings were conducted in a confidential and 'without prejudice' basis.					
	The taxpayer's review and appeal rights were not affected by participating in the ADR.					
	The ADR proceedings conducted objectively, with the mediators ensuring a level playing field during the deliberations.					
	Having been involved in an ADR process, I would recommend it to other taxpayers.					
	Give any feedback or comments on the efficacy of ADR process in Kenya ..... ..... .....					
	<b>PART D: EVALUATION OF STRATEGIES TO ENHANCE ADR PROCESSES</b>					
	<i>Please highlight the extent you agree or disagree with the statements below regarding your experience in the Kenyan processes for tax dispute resolution.</i>					
		<b>Strongly disagree</b>	<b>Disagree</b>	<b>Neutral</b>	<b>Agree</b>	<b>Strongly agree</b>
<b>5.1</b>	<b>Embedding ADR into Tax Administration Laws</b>					
	The ADR process is sufficiently embedded into the Tax Procedures Act.					
	ADR settlements can potentially be challenged as unconstitutional as they may not be in line with legislation.					
	The Kenyan courts support the ADR and seen as constitutional matter					
<b>5.2</b>	<b>Wide Publication of Formal Guidelines</b>					
	There are clear guidelines in place regarding the ADR Framework in Kenya.					
	The ADR guidelines are quickly and easily available to taxpayers who would want to consider engaging in an ADR process in resolving tax disputes.					

	The KRA has carried out sufficient sensitization of the ADR process to taxpayers involved in tax disputes.					
<b>5.3</b>	<b>Convergence with existing ADR processes</b>					
	The ADR Framework under the KRA encourages the use of ADR processes available through legal processes outside the tax appeals procedures.					
	Tax disputes can be resolved through the appointment of an arbitral tribunal under the Arbitration Act.					
	Tax disputes can be heard and determined at the Nairobi Centre for International Arbitration.					
	Tax disputes can be resolved through Court-Annexed Mediation.					
<b>5.4</b>	<b>Tax Ombudsman</b>					
	The existing Office of Ombudsman under the Commission on Administrative Justice can investigate any act or omission in public administration by the KRA.					
	There is need for a Tax Ombud to provide a neutral or impartial redress channel for taxpayers that have exhausted the normal KRA complaints mechanism.					
	Give any feedback or comments on strategies to enhance the ADR process in Kenya ..... ..... .....					

**Thank you for your Participation.**