

ALTERNATIVE JUSTICE SYSTEMS (AJS) GUIDELINES

For Third Party Annexed AJS Institutions in Community Lands.

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ACRONYMS

PT	Pamoja Trust
AJS	Alternative Justice System
ADR	Alternative Dispute Resolution
CLA	Community Land Act-2016
CLMC	Community Land Management Committees.
ELC	Environmental and Land court.
CSO	Civil Society Organization.
TDR	Traditional Dispute Resolution.

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Executive Summary

Third-Party Alternative Justice System Institutions, AJS Institutions such as village elders, chair of Nyumba Kumi groupings; Community Land Management Committees; National Land Commission play a critical role in ensuring access to justice for all in matters land and natural resource management. With Constitutional recognition and protection, AJS holds the key to unlocking the backlog of land cases in the Environment and Land Court and ensuring that communities enjoy the benefits of landbased resources devoid of prolonged dispute resolution processes. Alternative Justice Systems have huge potential for enhancing access to justice, strengthening the rule of law and bringing about development among communities living on community land. These guidelines provide a basis for reference for third party AJS institutions working in community lands in Kenya.

These guidelines acknowledge citizens autonomy and make reference to the Constitution as the supreme law of the nation, successive land laws with a specific focus on the community land Act. These guidelines also look at existing AJS practises among communities and provide a basic process to follow in resolving disputes in community land.

Cognisant that disputes affect women and men differently, the guidelines provide basic principles to consider when resolving community land disputes using AJS to ensure inclusivity. The guidelines capture risks, assumptions and mitigation factors when using AJS in community land. To maximize the efficiencies, effectiveness and complementarities of AJS in community land, the guidelines provide set indicators that can be monitored and reported over a period of time to improve the system.

1.0. INTRODUCTION

Land related conflicts in Kenya and the broader Sub-Saharan Africa are constantly on the increase due to duration and intensity of climatic shocks, contests over natural resources such as grazing fields and water points, mega infrastructure projects among others. These disputes have far-reaching negative effects thus the need to resolve or prevent disputes in the most effective and efficient way. To manage land disputes related to access, use and control of land and land-based resources; communities used their own justice systems for many years. AJS refers to initiatives that can be taken to attain equality and equity for all members of a particular cultural, political and social identity. (Judiciary of Kenya, 2020)

In acknowledging existing Alternative Justice systems among communities, the Constitution of Kenya, 2010 mandated the Judiciary to promote traditional methods of dispute resolution while at the same time subjecting these mechanisms to the human rights framework of the Bill of Rights (Article 159 (2c) and 153 (3).

In 2016, Kenya enacted the Community Land Act (CLA), providing for the first time a framework for recognition and registration of customary and indigenous lands. Official figures of community land are contested, but estimates indicate that about 60 percent of all land mass in Kenya is community land. Further, it is estimated that about 10 million people live on community land. 24 out of the 47 counties have community lands as identified by the department of land adjudication and settlements of the Ministry of lands. These figures point out to the fact that community land forms the vast of all lands in Kenya, supporting a significant population. The need to secure tenure rights and ensure access to justice for marginalised communities living on community lands is thus paramount.

1.1. IMPERATIVE OF ENGAGING WITH AJS IN COMMUNITY LAND

The Constitution provides a basis for recognition and promotion of AJS. The Constitution does not establish Alternative Justices Systems, but only recognises their existence and provides the basis for their promotion. The understanding of justice in the AJS paradigm as envisioned in the AJS policy baseline is broad and multi-faceted. It focuses on justice as a process and as an outcome. Different from Alternative Dispute resolution, AJS focus goes beyond resolution of disputes. It focuses also on dispute prevention and ensuring minimal or non-recurrence of disputes. The Alternative Justice Systems (AJS) is the detailed meaning of what the constitution refers to in Article 159 2(c) -Traditional, Informal and Other Mechanisms Used to Access Justice in Kenya;

The 2016 Community Land Act encourages the use of alternative methods of dispute resolution including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land. Alternative Justice Systems have huge potential for enhancing access to justice, strengthening the rule of law and bringing about development among communities, hence their recognition. AJS also promotes and achieves social justice and inclusion, particularly amongst groups that have been excluded from the formal justice system. AJS is founded on the assumption of citizen autonomy. Citizens are presumed to have independent interests and goals that need not to be regulated by the state, but respected within the parameters of existing legal and policy framework. Below is a summary of the different AJS models:

	TYPE	DESCRIPTION
1	Autonomous AJS Institutions	These are institutions fully operated by the community. Actors involved use their own procedures and rules. Such institutions work independent of the state and mostly use customary law.
2	Autonomous Third-party AJS institutions	These can be State-sanctioned institutions such as chiefs, child welfare officers, village elders, Nyumba Kumi groupings, among others. They can also be non-State or related institutions such as church leaders, Imams and Sheikhs among Muslims, as well as other religious leaders and functionaries of social groups such as Chamas, NGOs and CSOs i.e Kituo cha sheria. The main characteristic of this model is that the State and non-State third parties are not part of any State judicial or quasi-judicial mechanisms.
3	Court Annexed AJS institutions	These refer to AJS processes that are used to resolve disputes outside the Court, under the guidance and partial involvement of the Court. They work closely with the Court and Court officers in the resolution of disputes through a referral system between the Court, Court Users' Committees (CUCs), the AJS processes, and other stakeholders such as the DPP, the Probation Office and Children's Office. This method of dispute resolution involves both the community-based mechanisms and the formal justice system. This method has been piloted in law courts, in places like Isiolo, Othaya, Kangema, Karatina, Shanzu, Kericho, Nkubu, Gichugu.

Table 1: Different AJS Models.

¹ Wily, 2018: The Community Land Act in Kenya Opportunities and Challenges for Communities Pg.8

² AJS baseline policy, 2020

The formal justice systems such as courts have complex procedures, are expensive, not expeditious and are located in major towns, therefore not easily accessible by a majority of the people particularly the rural poor. As at January 2020, the Environmental and Land court (ELC) that has the same status as the High Court and has exclusive jurisdiction to hear and determine environment and land related disputes was fully booked until March 2021. As at June 30, 2019, there were 19,020 cases that were pending in the ELC pointing to the heavy backlog of land related cases. The backlog of pending court cases, coupled with the complexity and costs involved, alternative justice systems provide a platform for all, enhancing tenure rights for communities.

PERCENTAGE PENDING CASES BY TYPE OF ELC FY2018/19

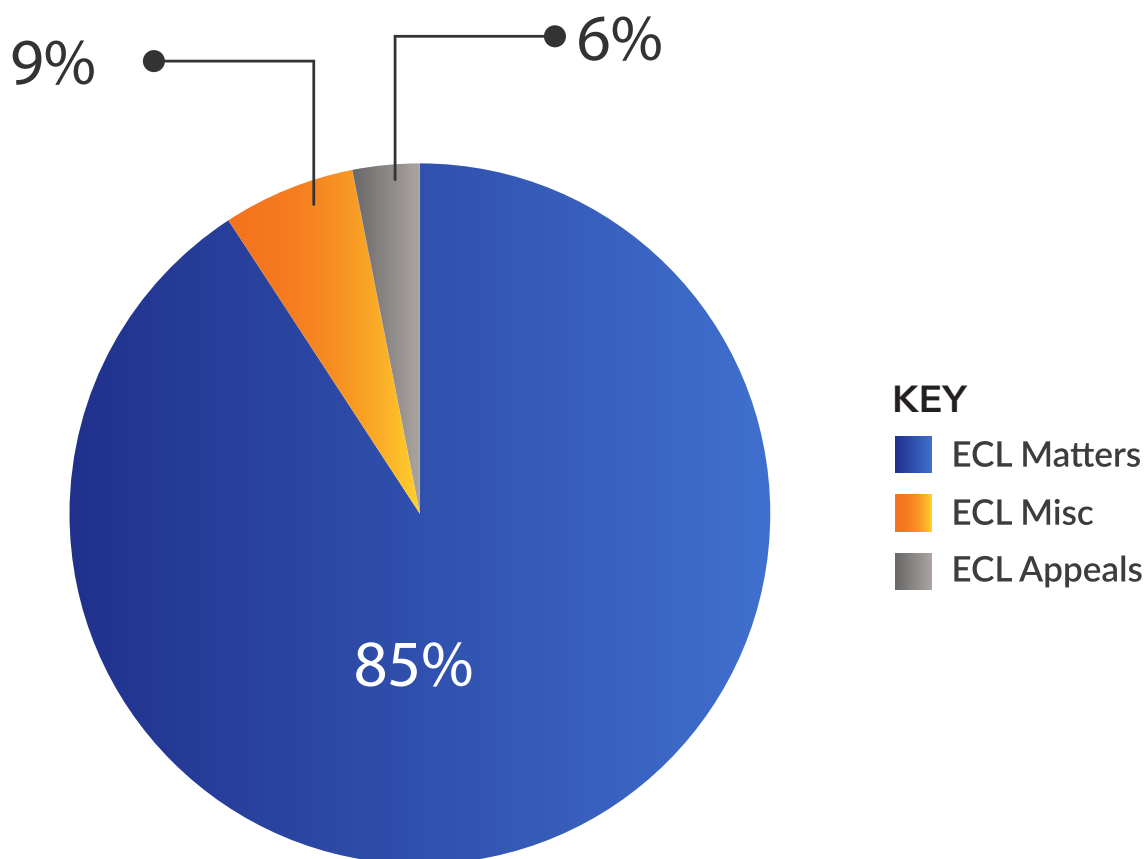


Figure 1: Percentage Pending Cases by Type in ELC, FY 2018/19

³ See Chief Justice David Maraga speech delivered during the launch of the State of the Judiciary and Administration of Justice Report (2018 - 2019)

⁴ 2018/18 SOJAR Report

⁵ Data from the state of the judiciary and the administration of justice 2018/19

2.0. OBJECTIVE OF THESE GUIDELINES

These guidelines are intended for use by third party AJS institutions, including autonomous AJS institutions in resolving disputes that emanate from community land management, thus promoting access to justice for all. These guidelines seek to enhance viability of the community land through prevention, management and resolution of conflicts by way of early warning, early response and preventive diplomacy aimed at increasing community equity in matters of community land.

Autonomous Third-Party AJS Institutions can be State-sanctioned institutions such as chiefs, the police, probation officers, child welfare officers, village elders under the County government, and the chair of Nyumba Kumi groupings, among others. They can also be non-State or related institutions such as Church leaders, Imams and Sheikhs among Muslims, as well as other religious leaders and functionaries of social groups such as Chamas, NGOs and CSOs. (Judiciary of Kenya, 2020)

2.1. RATIONALE FOR DEVELOPING AJS GUIDELINES FOR THIRD PARTY INSTITUTIONS IN COMMUNITY LANDS.

With the background above on the backlog of land related cases in the judiciary, there is a need to embrace alternative justice systems in resolving land related disputes on community land. The Constitution and Community Land Act provides a basis for the development of guidelines for third party institutions that work in the arena of community land rights. These include, but are not limited to autonomous third party and AJS institutions such as chiefs, CSOs, village elders, adjudication officers, community land registrars, National Land Commission, Community Land Management Committees and the ad hoc committees among others. Additionally, the recently launched Alternative Justice Systems framework policy provides a modus operandi for the development of these guidelines. The guidelines take into account that disputes affect women and men differently, thus access to justice must be gender responsive. Specifically, the guidelines acknowledge:

- a) Access to justice in matters of land and natural resources management and governance is an important right that enables the realisation of other rights and of the rule of law, and ultimately development.
- b) The justice resources within the formal court system only provide access to justice to 4-10% of Kenyans. 90-96% of Kenyans access justice through alternative justice mechanisms. It is therefore imperative that these mechanisms are supported and developed further.
- c) A majority of the alternative justice systems are non-adversarial and reconciliatory, thus a useful tool for the promotion of peace and social cohesion, which are fundamental in community land management.
- d) Alternative Justice Systems are a path to decongest the Environment and Land Court, which has reported a huge number of pending cases. De-clogging the courts leaves them free to focus on important matters that really need judicial adjudication, and to improve their efficiency, which is a key element of justice.

3.0. ALTERNATIVE JUSTICE SYSTEM IN COMMUNITY LAND: AN OVERVIEW

3.1. ANALYSIS OF EXISTING LEGAL AND POLICY FRAMEWORK ON AJS IN COMMUNITY LAND TENURE SYSTEM.

The Constitution of Kenya, 2010 sets out principles of land management in Kenya. Of the principles enshrined in the Constitution is to encourage communities to settle land disputes through recognised local community initiatives consistent with the Constitution. This is affirmed under Article 67(2) (f) which provides that one of the functions of the National Land Commission is to encourage the application of traditional dispute resolution mechanisms in land conflicts. The recognition of ADR and TDR mechanisms under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya.

The spirit of the Constitution is embedded in the Community Land Act with an explicit provision that a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.

The Community by-laws, a requirement before registration of community land must clearly indicate internal mechanisms to resolve disputes between registered community members and a registered community with another. The by-laws are ratified by the community assembly, which is the entire community, giving the by-laws ownership by the community. The prevailing customary law in the area is to be used as long as it is not repugnant to justice and morality and is not inconsistent with the Constitution.

The Community Land Act establishes a Community Land Management Committee (CLMC) elected by the community members. Women and men must all be represented in the committee in line with the two-thirds gender rule. The committee is mandated with the responsibility of running the day-to-day affairs of the community while promoting the co-operation and participation among community members in dealing with matters pertaining to the respective registered community land including any disputes that may arise.

⁶ Article 60(1) (g).

⁷ K. Muigua, "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010,"

⁸ See section 39 (1) of the CLA

⁹ Section 39 (3) of the CLA

Most of the community lands have never been adjudicated. The law envisions the rolling out of a comprehensive adjudication programme. It further provides for mechanisms to resolve disputes that may arise during the adjudication process. The adjudication officer is to advise the community land management committee on the determination of any customary validity of right of occupancy. Where the dispute traverses different registration Units, and the community is unable to resolve the dispute, the claim shall be received and recorded by either of the land adjudication officers in charge of any of the affected registration units and copied to the other.

The Cabinet Secretary may then appoint an ad hoc committee to hear and determine the dispute. The committee will consist of the Deputy County Commissioner, two representatives from the County Government where the land in question is located, government surveyor and the adjudication officer.

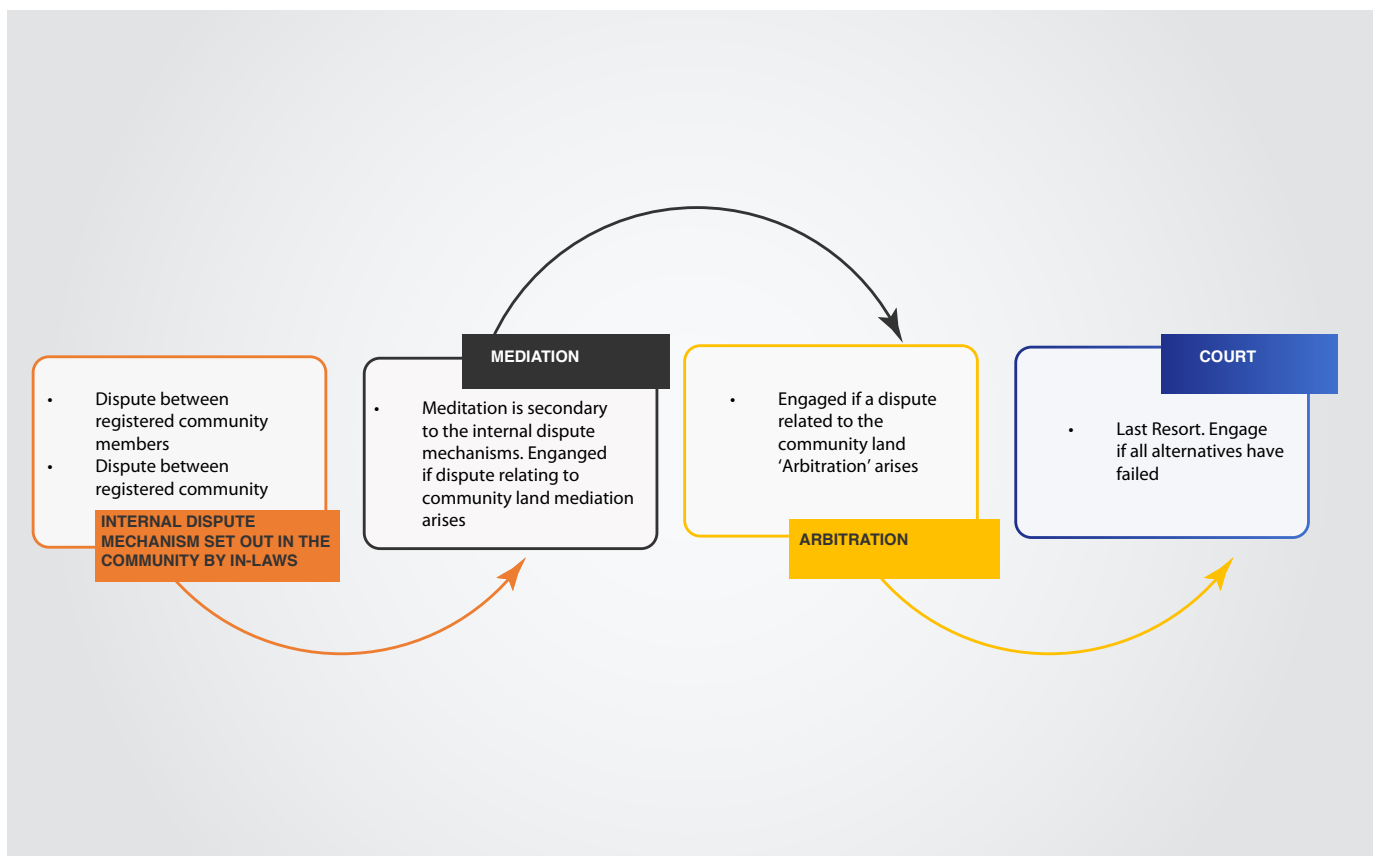


Figure 2: A reflection of dispute resolution in the Community Land Act.

¹⁰ See The Community Land Act Regulations section 25 (3)

3.2. EXISTING AJS PRACTISES IN COMMUNITY LANDS

Numerous Alternative Justice Systems exist as far as resolving disputes under customary and indigenous lands in Kenya. There are many disputes that occur in everyday life relating to land and natural resources, but very few of them are resolved by the formal Courts due to the inaccessibility of the formal Courts. Instead, a majority of them are resolved using Alternative Justice Systems (AJS).

The 'Wazees' or elders is a common mechanism that has been used in resolving land disputes in many areas in Kenya. The wazees is a common institution in almost all communities in Kenya and is mostly the first point of call when any dispute arises in a community and since most Kenyans' lives are closely linked to environmental resources; it is not surprising that most of the issues the elders deal with touch on the environment. Among the Pokot and Marakwet the council of elders is referred to as Kokwo and is the highest institution of conflict management and socio-political organization. It is composed of respected, wise old men who are knowledgeable in the affairs and history of the community. The council of elders among the Agikuyu community was referred to as the "Kiama," and it acted as an arbitral forum or mediator in land related dispute resolution. These elders were accessible to the populace and their decisions were respected. The institution of the council of elders has been used to resolve community disputes involving use and access to natural resources. Similar to the process documented in the Community land Act, the figure 3 below is a replica of the same in autonomous AJS institutions dealing with community land.

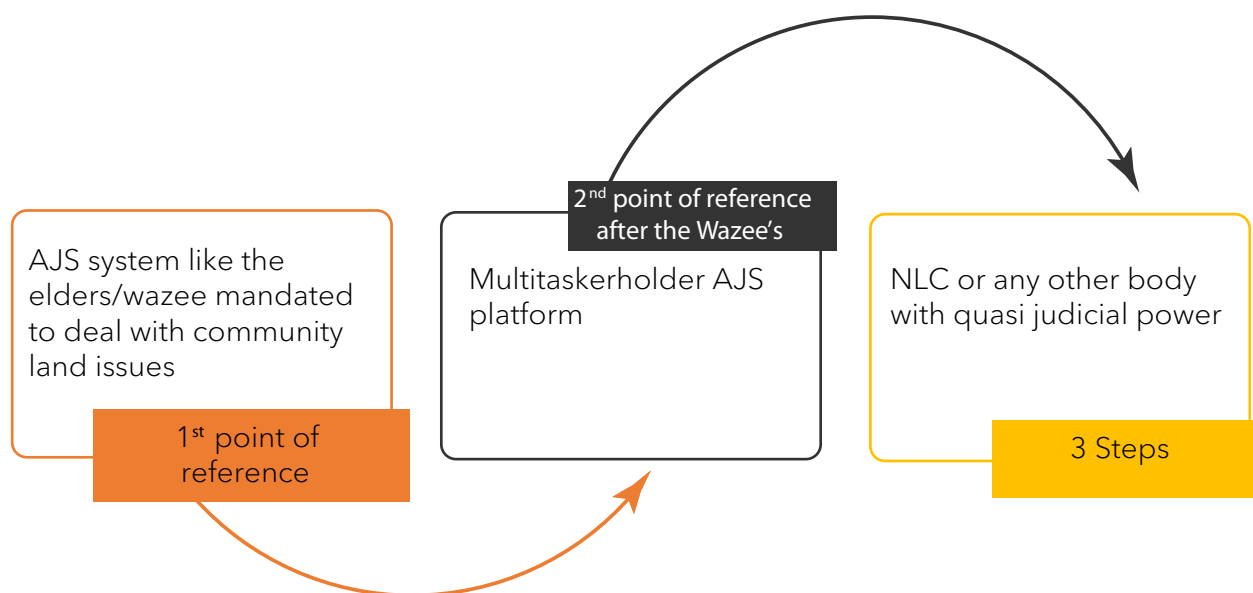


Figure. 3: AJS in Community land in Autonomous AJS institutions

A number of processes could be followed based on the set protocol for the alternative justice system embraced. It is important to note that these may not be uniform in all instances.

¹¹ Patricia Kameri-Mbote, "Towards Greater Access to Justice in Environmental Conflicts in Kenya: Opportunities for Intervention," IELRC Working Paper 2005-1, p. 3, available at <http://www.ielrc.org> (accessed on 30/08/2012). p. 8.

¹² See generally, a Report by Ruto. P, Mohamud. A, & Isabella .M (eds. Betty Rabar & Martin Karimi) Indigenous Democracy: Traditional Conflict Resolution Mechanisms. The Case of Pokot, Turkana, Samburu and Marakwet Communities, (ITDG, Nairobi, 2004)

Below is an example of a process that could be followed to ensure inclusivity of the process for all:

3.2.1 EXISTING AJS PRACTISES IN COMMUNITY LANDS

(**excerpt adopted from the sustainable development institute's community guide and further tailored to ensure gender responsiveness in land dispute resolution)

Go to the physical site of the Community land dispute.

Do not discuss it theoretically. Some communities get good results when they take the discussion right where the dispute is. In this case, all parties involved, women and men should be present. All efforts must be made to ensure a safe and conducive environment for women and men. Depending on context, the area should be accessible to both parties and open to encourage transparency.

Embrace the Alternative Justice system with reference to the law.

For example, you could convene traditional leaders, but consult what the Constitution and the Community land Act says to help inform your decisions.

Where the local dispute mechanism fails, embrace mediation.

To ensure that the outcome will create a lasting peace and resolution, mediation may be a good dispute resolution strategy. Mediation is a process where both sides talk through their dispute with the help of a third person who does not favour either side. This person is a mediator. During mediation, where possible women should be allowed to select another person to accompany her, preferably a woman. Studies show that a majority of women fail to pursue land dispute resolution processes due to the intensity of the process, stigma associated with the process for women and intimidation.

Focus only on the area that is in dispute.

Be clear from the beginning about which part of your neighbours' land areas you recognize as theirs and do not dispute in any way. All future negotiations and compromises should focus only on the area that is in dispute. Document the case: The dispute should be documented capturing the following details:

- Gender
- Age
- Type/Nature of dispute
- Location of dispute
- Date
- Names of witness
- Summary of the case

Communicate the decision:

The decision should be communicated within the shortest time possible to both parties. Gender-sensitive communication mediums should be used to ensure that both women and men receive the information. An appeal process should be provided in case any party is unhappy with the verdict.

3.3. BASIC PRINCIPLES TO CONSIDER BEFORE OPTING FOR AJS IN RESOLVING COMMUNITY LAND RELATED CONFLICTS.

When deciding if an AJS process will assist in the resolving a dispute or conflict related to community land management, it is advised that the following consideration are taken into account:

- Capacity of the parties/communities to participate effectively
- Context of the application including the history of past applications by the community
- Any identified need for urgency
- Number of communities involved in the application
- Complexity of the issues in dispute
- Cultural factors
- The safety of the community members
- Attitudes of the parties
- Costs involves

3.4. CREATING A LASTING SOLUTION: A PATH TO CHANGE.

These guidelines will help to support third party institutions that work in the arena of community land dispute resolution to develop and adopt strategies and Action Plan for Alternative Justice System in line with CLA, AJS policy framework as well as all norms and standards promoted by the Kenya Constitution-2010.

A team of consultants and key stakeholders ensured a participatory approach in the development of these guidelines thus ensuring that this is an inclusive process that will translate to ownership and replicability. To achieve this, a dedicated faculty of experts derived from different key stakeholders in the area of AJS practice, associates and resources, what will be needed to support the effective dissemination and operationalization of these guidelines. The diagram below shows the impact chain;

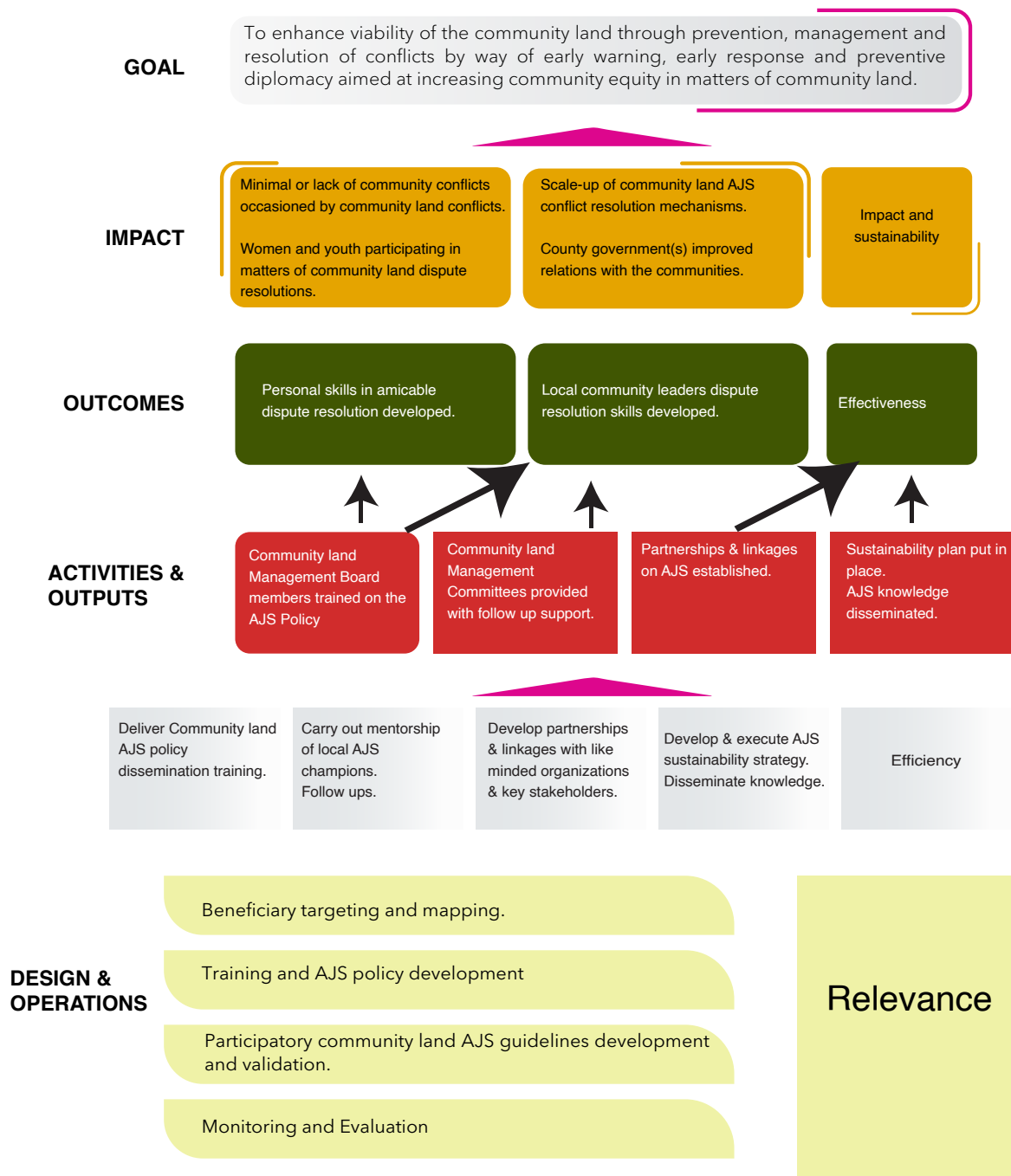


Figure 4: Path to Change

4.0.AJS GUIDELINES SUPPORTIVE STRUCTURES AND SYSTEMS

The AJS process, like any other process, is more likely to achieve the objectives when it operates within a hospitable context. The particular background conditions (i.e., conditions independent of the specifics of AJS guidelines design) that are especially relevant to AJS include: adequate political support, supportive institutional and cultural norms, adequate human resources, adequate financial resources, and rough parity in the power of disputants. The table clearly highlights the different types of resources that are necessary and imperative in ensuring the success of implementation of the AJS guidelines.

STRUCTURE	WHAT DOES AJS IN COMMUNITY LAND NEED TO THRIVE?
Adequate Political Support	<ul style="list-style-type: none"> • Securing financial support. • Building popular acceptance and use. • Overcoming opposition of vested interests. • Local community leaders (most critical for success). • National and county governments. • Civil Society organisations working on access to justice • Advocates and representatives of user groups • Foreign donor nation/foundation(s).
Supportive Cultural Norms	<ul style="list-style-type: none"> • User acceptance of informal processes. • Appropriate standards for settlements. • Enforcement through community customs and sanctions <p>Important elements of cultural norms:</p> <ul style="list-style-type: none"> • Traditional usage of informal, community-based dispute resolution • Shared, reasonable standards of fairness and equity. • An absence of generally accepted and strong discrimination or bias, at least regarding potential users of AJS processes. • An absence of generally accepted or expected corruption, at least at a community level, or traditional mechanisms for dealing with corruption. • Values of honour or honesty which promote compliance
Adequate Human Resources	<ul style="list-style-type: none"> • A sufficient pool of skilled and respected AJS practitioners to manage community land caseload efficiently and effectively. <p>Important elements of human resources</p> <ul style="list-style-type: none"> • Community members and leaders who have the respect of the community. • Honesty and a sense of community service among potential AJS practitioners. • Resources and skills necessary to prepare an adequate AJS process in resolving community land related disputes.
Financial Resources	<p>Costs of administration, third party personnel, evaluation, and outreach.</p> <p>Important elements of financial Support.</p> <ul style="list-style-type: none"> • Sustainability. • Sufficient to avoid corruption or overwork for third parties or others implementing the AJS guidelines.
Parity in the Power of Disputants	<ul style="list-style-type: none"> • To avoid coercive results. • To persuade participants to use the process. Important elements of parity: • Balanced legal rights for disputants as a context for AJS. • Parity between individual disputants in specific cases. • Procedural protection for those in weaker positions.

Table 2: AJS guidelines supportive systems and structures

4.1. AJS GUIDELINES ON PARTNERSHIPS AND COLLABORATION

The operationalization of these guidelines will be anchored on Pamoja Trust, Partners and other key stakeholders in the Community Land sector. Others to collaborate with may include elected and appointed Government officials at National and County levels, security providers and the Judiciary etc. Upon being successful, partnership(s) may be extended to other mapped out key stakeholders either within the country or in other countries through Memorandum of understanding.

4.2. INTERACTIVE FRAMEWORK BETWEEN AJS IN COMMUNITY LAND AND THE JUDICIARY

A number of frameworks or platforms currently exist for AJS in community land to interact with the judiciary. They include, but not limited to:

Deference

This is where the court reviews previous AJS proceedings and awards for procedural propriety and proportionality only. In this case, the court focuses on the procedure taken by the village elders to resolve a dispute on community land.

Recognition and enforcement:

In this case, where a council of elders have passed a judgement concerning a dispute of community land, the court then recognises their decision and ensures that the decision is enforced. The court can only quash a decision of an AJS institution if it goes against set laws and policies of the land.

Facilitative Interaction:

In this model, the court accepts evidence from a seating of elders (or any other AJS institution) that converged to resolve a dispute. The evidence is then used by the court to determine its own verdict concerning the filed case. This could be a case heard through an AJS system, and the parties involved were unsatisfied by the decision issued. They then proceeded to file the case in court.

Convergence:

This is where the court opts to defer or send back a case filed in court to be heard and determined using an AJS system. This applies when the parties involved agree to do so.

5.0 RISKS AND ASSUMPTIONS

Risks that may undermine the guidelines implementation if they materialise include:

RISK	MITIGATION MEASURES
Over-formalisation of the AJS in community land guidelines which will undermine its utility as more flexible, faster, informal mechanisms for justice.	Upholding citizen autonomy in the matters of AJS. Ensuring that there is a complementary approach between the judicial system and the process of AJS in settling Community Land disputes.
Resistance to change by stakeholders and users of AJS	Involve the key stakeholders in the key roll out/implementation process of the AJS guidelines to ensure ownership of the guidelines.
Inadequate resources to implement the guidelines.	Put in place a resource mobilization strategy. Leverage on available community resources.
Competition between formal and AJS mechanisms and legal and non-legal practitioners	Integrate a collaborative approach/strategy between the formal and AJS mechanisms to ensure seamless working relations.
Corruption	Encourage transparency in the Community Land AJS processes. Strengthen local governance structures on measures of mitigating corruption.

Table 3: Risk and Mitigation Measures.

ASSUMPTIONS ;

- Resources will be available for the implementation of the AJS guidelines.
- Stakeholders will maintain the momentum for the AJS reform agenda that is outlined in these guidelines.

6.0.SUSTAINABILITY AND SCALING UP

Dispute resolution and conflict management projects are more sensitive to local norms and culture than many other development projects. When choosing local partners for AJS program design and implementation, the normal considerations of sustainability, effective and honest management, and local acceptability are paramount. In addition, those implementing AJS programs must be carefully tuned to the political and social culture of the communities in which they operate. This suggests that a good design should identify a local organization, NGO, FBOs or government department that is well managed, financially stable, broadly reflective of the diversity in the country or community, and sensitive to the cultural norms around conflict resolution. While filling all of these qualifications may be difficult, the most important consideration may be the enthusiasm, energy, talent and commitment of the key staff and their sensitivity to and ability to operate within the local communities.¹⁴

7.0.RESOURCING

A proposition is made for resourcing towards the successful implementation of the community land AJS guidelines through the following strategies;

- a) Development Partners - Collaborate with development partners for technical and financial support towards the implementation of these guidelines.
- b) Voluntary Organizations - Leveraging on the resources of voluntary organizations including NGOs, CBOs, FBOs, foundations to strengthen and support the implementation of these guidelines.
- c) County government's budgetary allocations - Lobbying for annual budgetary allocation of the individual County Integrated Development Plans (CIDPs) by sensitizing community leaders at the county level on the importance of Community participation in the matters of budgeting.

¹⁴ <https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf>

8.0. MONITORING AND EVALUATION

To maximize the efficiencies, effectiveness and complementarities of AJS with the official judicial process, a Systematic, Results Based Monitoring and Evaluation process should be established. This includes measuring key qualitative and quantitative data that would then lead to adjustments in the scope and focus of AJS efforts. Indicators include AJS usage, percentage of cases filed and processed through AJS vs. Court litigation, to what extent has AJS prevented occurrence of disputes, the rate of dispute(s) non-recurrence, the average time spent on a case, the number of successful AJS settlements with agreements reached, the number of qualified AJS practitioners and trainers, the number of AJS institutions and services in the country, community acceptance and level of service satisfaction by disputants and practitioners.

The path to change as developed strives to show all the components of the AJS guidelines, and the team responsible for the overseeing of the dissemination process, in a participatory approach, develop the results framework where the targets and the indicators will be developed from. The data collection tools will be developed and revised in a participatory approach with the consideration of all the input from the key stakeholders. For more efficiency and effectiveness of data management, there will be a need to ensure there is digitization of data collection and management processes thus ensuring the accuracy and better quality of the data.

*(*The ultimate test of an AJS system will be how much it affects a country's conflict vulnerability and mitigation capability.)*

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