



ALTERNATIVE DISPUTE RESOLUTION & ASSET RECOVERY IN KENYA

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EXECUTIVE SUMMARY

Alternative Dispute Resolution (ADR) as a method used to resolve disputes outside of traditional courtroom litigation has increasingly been used to recover illegally acquired assets. While the use of ADR in asset recovery in Kenya is evolving, the growing interest and efforts to promote its use suggest its potential significance in fighting financial crime.

Mandated asset recovery institutions, such as the Ethics and Anti-Corruption Commission (EACC) have embraced the use of ADR in recovering illegally acquired assets and have put in place policies to guide its use while actively promoting ADR. However, its use in Kenya is still in its early stages, with most cases being handled through court litigation processes. This is primarily due to limited awareness on the use of alternative dispute resolution mechanisms among court users, litigants and law enforcement agencies, limited training and resources for ADR practitioners, and perceptions that ADR is less effective than litigation.

In order to reflect on the effectiveness of ADR for asset recovery, this report looks at available information about past cases and makes a comparison with alternative tools used in the recovery of illegally acquired assets. The EACC's efforts have resulted in the recovery of notable and significant amounts of assets through ADR, including both immovable property and cash, within short periods highlighting the potential of this method. However, a lack of comprehensive data and deeper understanding of ADR's benefits and challenges pose difficulties in evaluating its use, efficiency, and effectiveness more broadly.

While the use of ADR potentially signifies a departure from court litigation approaches and towards more collaborative and time- and resource-efficient methods of resolving disputes, particularly in the context of corruption-related cases, they can also remain part of complex resource-intensive judicial proceedings. Questions also arise in the use of ADR, such as to whether foregoing a proportion of one's ill-gotten wealth offers sufficient punishment for corrupt individuals and enough redress to the victims of corruption. With a lower level of judicial oversight, there is also a risk that the ADR process might be more prone to political pressures. Further, there is the perception that the use of ADR in corruption cases does not necessarily prevent power imbalances between suspects and law enforcement agencies. Additionally, the use of ADR in corruption matters does not guarantee the complete closure and conclusion of cases or related cases, which may deter the accused person from opting for ADR.

When considering the use of ADR, this paper therefore suggests that it is important to weigh the balance between efficiency, access to justice, individual rights, public accountability, and societal empowerment. Proper design and consideration of these factors are crucial in determining the appropriate role of ADR within a legal system.

Key considerations in the further use of ADR for asset recovery in Kenya include assessing the legal framework, determining the most suitable ADR method for each case, involving relevant stakeholders, ensuring transparency and accountability, and complying with international standards. Monitoring, evaluation, and public awareness are also crucial in assessing the effectiveness and addressing any misconceptions surrounding ADR.

INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION

The relative success in recovering stolen assets through prosecution has been a challenge for governments around the world. In Kenya, despite efforts and notable progress in the use of conviction and non-conviction-based asset recovery mechanisms, a significant amount of money that has been stolen from the public purse or illegally acquired remains unrecovered, in part due to challenges that are related to investigative and court processes.

This has led to the exploration of alternative dispute resolution mechanisms as a way to recover stolen assets. The Ethics and Anti-Corruption Commission (EACC), for instance, has utilised ADR in a number of asset recovery cases successfully to recover the proceeds of corruption. However, questions remain about the benefits and drawbacks of this mechanism, as well as the cases where the application of alternative dispute resolution could be most beneficial.

WHAT IS ALTERNATIVE DISPUTE RESOLUTION?

Alternative Dispute Resolution (ADR) refers to a set of processes and methods used to resolve disputes outside of traditional courtroom litigation. It provides parties with a more collaborative and flexible approach to finding solutions, including negotiation, mediation, arbitration, and conciliation.¹

Each of these four forms of ADR are designed to help parties reach a mutually agreeable solution to a dispute. They do so, however, in different ways.

- » **Negotiation** is a process in which the parties themselves discuss their dispute and try to reach a mutually agreeable solution. There is no third party involved in negotiation.
- » **Mediation** is a process in which a neutral third party, called a mediator, helps the parties to reach a mutually agreeable solution. The mediator does not have the power to decide the dispute, but they can help the parties to communicate effectively and to identify areas of common ground.
- » **Conciliation** is a process that is similar to mediation, but the conciliator has a slightly more active role. The conciliator can help the parties develop a settlement agreement, but they do not have the power to force the parties to agree to anything.
- » **Arbitration** is a process in which the parties agree to have a neutral third party, called an arbitrator, decide their dispute. The arbitrator has the power to make a binding decision, which is enforceable in court.²

CHARACTERISTICS OF ADR APPROACHES

ADR processes possess common elements that distinguish them from formal judicial systems.³ These elements enable them to address disputes in a unique way.

Firstly, ADR processes are less formal than traditional legal proceedings, offering flexibility in rules, documentation, and evidence. This informality then encourages greater accessibility to justice via a reduction of time and costs needed to settle disputes. However, settlements reached through ADR will be legally binding, which ensures the legitimacy of the process, with the courts serving as a fallback mechanism in case of default by either party. This means that if one party fails to comply with the terms of the ADR agreement, the other party can enforce the agreement through the courts.⁴

ADR also emphasizes the application of equity – or fairness – rather than strict adherence to legal standards. Decisions have greater latitude to be based on case-specific circumstances, rather than strict adherence to the laws. While this may sacrifice consistent justice, as an alternative approach, ADR can provide underserved populations the support and assistance that conventional legal avenues might fail to offer. This is because it considers important factors such as asset acquisition, roles of parties involved, expenses incurred, and third-party rights.⁵

ADR also encourages direct participation, communication, and reconciliation among disputing parties, allowing for creative settlements and maintaining confidentiality. The impact of these characteristics is not fully researched, but higher compliance and satisfaction rates have been observed compared to court-ordered decisions.⁶ ADR can though also be court mandated in three situations:

1. Courts enforcing contractual agreements that stipulate ADR procedures.
2. Judicial initiatives, either initiated by the court or in response to requests, to encourage extrajudicial settlements.
3. Directing cases to alternative forums and channels established by different statutes to address initial complaints.

THE USE OF ADR IN CORRUPTION CASES

As discussed above, alternative dispute resolution refers to a set of processes and methods used to resolve disputes outside of traditional courtroom litigation. It provides parties with a more collaborative and flexible approach to finding solutions.⁷ This differs from amnesties or reconciliation agreements, which have more traditionally been used in corruption cases.

An **amnesty** is a legal mechanism whereby the relevant authority determines that a particular designated category of offence and/or offender will be exempted from prosecution.⁸ Amnesties must be defined cautiously by legislatures to align with policy objectives, as broad amnesties undermine deterrence and the rule of law.⁹ The United Nations Office on Drugs and Crime (UNODC) in the United Nations Anti-Corruption Toolkit, 2nd edition, outlines that amnesty provisions should be limited, with time constraints and no future wrongdoing covered. Continued corruption after the amnesty period should result in liability for earlier acts. Exclusion or discretionary prosecution may be considered for severe offences. Compliance with Article 44, paragraph 11 of United Nations Convention Against Corruption (UNCAC) is crucial, ensuring extradition or prosecution of offenders. Failure to extradite or prosecute may breach treaty obligations when amnesty impedes justice.¹⁰

Reconciliation agreements grant immunity to an individual from prosecution for crimes and corruption in exchange for the return of an agreed upon amount of money by the person suspected of corruption. These deals allow suspects to return without facing criminal or civil charges if they fled the country. If they are still in the country, some or all charges may be dropped. Reconciliation agreements typically operate outside the judicial system, differing from traditional non-prosecution arrangements like settlements as they lack judicial or prosecutorial oversight.¹¹

In asset recovery the three approaches each have distinct characteristics and implications. Common amongst them though is that they all focus on recovering stolen assets over punitive actions against the person(s) suspected of corruption.

- Primarily focused on resolving disputes and facilitating asset recovery, **ADR** centres around achieving mutually agreeable solutions.¹² Its core objective is to find a solution that is amenable to all sides. In the context of asset recovery, the use of ADR would mean that authorities would negotiate over forgoing criminal prosecution through discussion with individual suspects in exchange for the suspect agreeing to a set of specified actions. This could include return of the money, as well as wider restitution, work for the community, or public admission of guilt, for example.
- In **amnesties**, a specific set of qualifying criteria is established under the terms of the amnesty for the corruption offence. Any individuals involved in or facing charges related to stolen assets may qualify as exempt from prosecution, provided that

they meet the conditions of the amnesty, such as returning funds or cooperating with authorities. The process of an amnesty usually entails a thorough legal review, wherein authorities meticulously assess the level of cooperation and adherence to the predefined conditions before amnesty is granted. Judicial oversight typically plays a role in ensuring that all prerequisites are met.¹³ Amnesties may also specify whether the names of persons benefiting from the amnesty are published or not.

- The utilization of **reconciliation agreements** in the pursuit of asset recovery involves the government's choice to engage in an understanding with individuals implicated in corruption not to prosecute in exchange for a return of the stolen funds or additional measures such as pledges for reform. Typically there is no admission of guilt and agreements and recovered amounts may be kept from the public.¹⁴

Each of these approaches is influenced by the specific goals of asset recovery initiatives, the degree of cooperation from wrongdoers, the gravity of the corruption offence involved, and the broader social and legal context. Each approach comes with its unique set of strengths and limitations, and their applicability may vary depending on the circumstances inherent to individual cases. Developing and implementing effective asset recovery strategies necessitates a thorough and thoughtful examination of these factors to discern the most suitable course of action by mandated anti-corruption and asset recovery agencies.

ADVANTAGES AND DRAWBACKS IN THE USE OF ADR FOR ASSET RECOVERY

ADVANTAGES OF ADR

While ADR programs are not meant to replace the formal judicial system, proponents argue that they can reduce costs, expedite dispute resolution, and improve access to justice.¹⁵ They also emphasise that it is important to design ADR programs according to the unique circumstances of each country. Particular advantages of ADR include:¹⁶

- ADR can be faster than prosecution or civil proceedings and thus **save time**. This is because ADR does not require the same level of legal formality as court proceedings and an outcome can be reached without having to wait for court processes to be completed. In 2019, the EACC highlighted that engaging in lengthy court proceedings often diminished the chances of successful asset recovery. Hence, they saw ADR as a viable approach to resolving complicated asset recovery cases pending in courts.¹⁷
- ADR in most cases will be the **more cost-effective option**, as compared to prosecution or civil proceedings. This is because ADR does not require the same level of legal fees and other expenses that are incurred in bringing a case to court.
- ADR promotes a **less hostile and less confrontational environment** than court litigation or prosecution. This is because ADR is based on the principle of cooperation, rather than the competition found in court litigation or prosecution. In

judicial proceedings, the parties involved often find themselves in an adversarial position, where each side presents arguments to prove their point and win the case and the focus is on defeating the opposing party, rather than on finding a mutually beneficial outcome.

DRAWBACKS OF ADR

Challenges and limitations are also associated with using ADR for asset recovery. Variability in stakeholder cooperation, complexities in property ownership, and the potential for controversial settlements are among the challenges that may arise. Drawbacks in using ADR include:

- The potential for **inconsistencies with the ideas of justice** and the rule of law due to its more private and informal nature.¹⁸ The rule of law is a fundamental principle that holds all individuals, institutions, and entities accountable to publicly promulgated laws. It ensures equal enforcement and independent adjudication, consistent with international human rights standards. Critics of ADR argue that dispute resolution outside of the courts undermines the development of law achieved through public trials and published decisions, which safeguard individual rights.¹⁹
- Transparency concerns with regards to **public accountability** in resolving disputes. Critics highlight the educational function of public dispute resolution through trials is

undermined when persons are not brought to court to answer for their actions.²⁰

- Noteworthy in the evaluation of the use of ADR in asset recovery in Kenya is the **lack of comprehensive data**. The reporting of recovered assets does not currently categorize the means of recovery, making it challenging to track the extent of ADR usage. Furthermore, specific case details are often unavailable, hindering an assessment of ADR's effectiveness in these instances.
- Another challenge is the **novelty** of ADR practices in asset recovery in Kenya and elsewhere. Given the relative newness as a practice within asset recovery, this poses difficulties in convincing stakeholders to adopt ADR, even when it may be the most suitable approach.

Overall, the debate surrounding ADR and the rule of law revolves around the balance between efficiency, access to justice, individual rights, public accountability, and societal empowerment. Proper design and consideration of these factors are crucial in determining the appropriate role of ADR within a legal system.

ADR AND ASSET RECOVERY IN KENYA

LEGAL FRAMEWORK FOR ADR

Constitution of Kenya, 2010

Article 159 of the Constitution guides courts and tribunals, promoting alternative dispute resolution methods that respect the Bill of Rights, justice, and morality, and align with the Constitution and laws.²¹

Article 159(2)(c) emphasizes the promotion of alternative dispute resolution, as long as traditional mechanisms do not violate rights, contradict justice and morality, or lead to unjust outcomes, remaining consistent with the Constitution and written law.

Article 252(1)(b) grants commissions and independent office holders' powers for conciliation, mediation, and negotiation, as reflected in the Ethics and Anti-Corruption Commission Act.²²

Anti-Corruption and Economic Crimes Act, 2003

The Anti-Corruption and Economic Crimes Act, Cap 65, includes provisions for settling criminal matters through Alternative Dispute Resolution (ADR). Section 25A(1) and (3) allows the Commission, through consultation with the Minister and Attorney General, to offer an undertaking not to investigate or continue investigations against a suspected offender. Conditions for the undertaking include full disclosure, repayment or deposit of irregularly obtained property, reparation for corrupt conduct, and reimbursement for loss of public property. Additionally, Section 56B(2) provides a procedure for the out-of-court settlement of civil matters, including the recovery of illegally acquired assets, through negotiation and settlements with individuals facing civil claims or applications.²³

Proceeds of crime and Anti-money laundering Act (POCAMLA), 2009

The Proceeds of Crime and Anti-Money Laundering Act (POCAMLA), provides for recovery of proceeds of crime through the use of Kenya's Civil Procedure Rules, which provides for access to ADR.

Civil Procedure Act and Rules, 2010

The Civil Procedure Act and Rules, particularly Order 46, allows for arbitration and other dispute resolution methods. Rule 20 clarifies that the court can adopt various means, including mediation, to achieve the Act's objective of fair, prompt, proportional, and affordable resolution of civil disputes. If court-mandated mediation is unsuccessful, the matter will proceed to a hearing.²⁴

ADR PRACTICE IN ASSET RECOVERY

The use of ADR to recover illegally acquired assets is a promising development, albeit also with important considerations on its use.

While its widespread adoption for asset recovery on a global scale is yet to be realized, Kenya has made significant strides in asset recovery through the utilization of ADR. In Kenya, the common type of ADR practice used in the past has been mediation. While ADR has been employed in resolving civil matters, its application in the larger anti-corruption sphere is relatively new, with the Ethics and Anti-Corruption Commission (EACC) setting a precedent for asset recovery.

The EACC in its utilisation of ADR is informed by an institutional ADR policy.²⁵ Developed in 2017, the policy contains several criteria that guide the prioritisation of cases to be pursued via

the ADR mechanism. The criteria include considerations of public interest of a particular corruption case, the size of the case (the larger the sum of money involved, the more likely for the case to be prioritised), and also whether the accused has committed an offence in the past or not. A final decision on whether ADR should be pursued is undertaken by an enforcement committee. Regarding the type of ADR practices used, the EACC pursues ADR in the form of negotiations only, and does not engage in mediation, conciliation or arbitration.²⁶

ADR in anti-corruption and economic crime cases

In practice, the use of ADR by the EACC in settling anti-corruption cases follows certain key steps, and there are key factors considered in terms of what cases are selected to undergo the process. Cases pursued by EACC for recovery include;²⁷

- i. Unlawful and fraudulently acquired public assets
- ii. iProceeds of corruption, economic crime and forfeiture of unexplained assets
- iii. Ethical breaches
- iv. Contracts the commission is a party to
- v. Matters involving the commission that become subject to ADR
- vi. Disputes involving the commission and its strategic partners

Cases that will not be considered for settlement through ADR include;²⁸

- i. Criminal matters where an individual is a repeat offender

- ii. Where an individual who would benefit from the ADR process withholds information relevant to the process
- iii. Where the outcome of the settlement contradicts the constitution or the law or there is a need to have judicial clarification
- iv. Where the outcome of the settlement will have an effect on non-parties

ADR processes follow several steps:

1. The initiation of ADR processes, which can be requested by the EACC, the individual under investigation, or persons/bodies to whom the commission has a claim or the inverse, any party to a transaction that the commission is involved in, and/or through a court order.²⁹ Any party desiring to go through the ADR process must communicate it in writing. The request is then considered by the enforcement committee of the commission.
2. When approved, the CEO of the commission shall constitute an ad hoc ADR committee consisting of three members, one of whom is the officer dealing with the matter in question. Among other requirements is that the proceedings are to be concluded within 90 days, with the committee able to request an extension. Additionally, the committee is required to identify the stakeholders necessary to participate in the ADR process.³⁰

3. Once the proceedings have been finalised a report shall be prepared by the committee with recommendations for the enforcement committee. If approved by the enforcement committee, it will be forwarded to the commission for a final decision and is followed by the communication of the committee's decision in writing and the agreement executed by the CEO of the commission. The settlement agreement is then registered in court in accordance with the law within 21 days. Noteworthy, the ADR proceedings may be terminated if there is sufficient cause such as lack of interest or cooperation by partes and/or consent.³¹

Assets recovered through ADR

In July 2019, the EACC reported that the proceeds of corruption amounting to 2.7 billion shillings had been recovered in less than four months, primarily facilitated by the use of alternative dispute resolution. This achievement was seen as a significant step forward, considering that the previous five years had only yielded a combined 1.5 billion shillings in recovered assets.³²

From 2018 to 2022, the Ethics and Anti-Corruption Commission recovered various immovable and movable assets through ADR mechanisms and criminal and civil litigation.

Physical properties, with an estimated value of more than Kshs. 780 million recovered through ADR by the EACC include:³³

PROPERTY RECOVERY	ESTIMATED VALUE (KSHS.)	DESCRIPTION/CONTEXT
140 acres of Naivasha Municipality land	490 million	Recovered and allocated for re-search purposes
Two blocks of land belonging to Nakuru Municipality	116.2 million	Undisclosed
27 public officers' residences and two parcels of land	Undisclosed	Reserved for a survey camp for the Department of Survey in Nakuru
Two blocks of land reserved for a stadium in Sotik township in Bomet	4.2 million	Intended for stadium construction in Sotik township
Postal Corporation land in Nakuru town along Kenyatta Avenue	150 million	Disrupted during irregular alienation process

Table 1: Selected cases of property recovered through the use of Alternative Dispute Resolution.

The cases highlight the tangible outcomes achievable through the strategic employment of ADR in the context of the recovery of land and immovable property. The recovered properties, most of which had been unlawfully taken from the public domain with the complicity of public officers, emphasize the practical successes achieved through ADR interventions.

This demonstrates the capacity of ADR to serve as an instrumental tool in rectifying instances of public resource mismanagement, where traditional litigation may be, for example, arduous due to a backlog of cases, due to the age of the case, or where the suspects approach the commission for settlement. This is highlighted in a statement by the Commission head alluding to the fact that one of the recovered assets handed back had previously been 11 years in court.³⁴

The underlying factors that likely contribute to the success of ADR in land and immovable property asset recovery cases are multifaceted and not yet well understood. One notable factor could be the distinct nature of public land

ownership and registration. The systematic documentation of land ownership enables a streamlined tracing and identification process, which considerably enhances the feasibility of recovering unlawfully acquired properties. This streamlined documentation, combined with the collaborative and flexible nature of ADR, may create an optimal environment for reaching agreements and effectuating the return of assets, while not having to prove the underlying criminal conviction.

The case of the 140 acres of Naivasha Municipality land, with an estimated value of Kes. 490 million exemplifies the potential for ADR to restore misappropriated resources. This recovery, earmarked for research purposes, underscores the potential for ADR to not only rectify past wrongs but also allocate assets for constructive and beneficial, social reuse purposes that serve the public interest.

In addition to the land and immovable cases, there have also been several successful cases of cash recovery by the EACC through the deployment of ADR. Some notable examples are included in Table 2 below:³⁵

CASH RECOVERY TO:	AMOUNT RECOVERED (KSHS.)	CASE NUMBER	PARTIES INVOLVED
Kenya Pipeline Company	2.9 million	Anti-Corruption Case No. 2 of 2017	EACC vs Josphat Kipkoech Sirma
Kenya Revenue Authority	60 million	Anti-Corruption Misc. Case No. 67 of 2017	EACC vs Evanson Thuo Waweru & 2 Others
Ministry of Tourism	5.5 million	Anti-Corruption Misc. Case No. 7 of 2017	EACC vs Charles Kiai Gacheru & Another
County Government of Muranga	6.6 million	n/a	Irregular expenditure by County officers during foreign trip

Table 2: Selected cases of cash recovered through the use of Alternative Dispute Resolution.

The utilization of ADR in the context of the case of *HC ACEC Civil Suit No. 2 of 2017 Ethics and Anti-Corruption Commission vs Josphat Kipkoech Sirma & 4 Others*, for instance, as presented in ACEC PETITION NO. E007 OF 2021, offers an intricate look at the complexities in the deployment of ADR mechanisms within the realm of asset recovery and legal proceedings.³⁶

The case revolved around a sequence of legal actions initiated by the EACC. In 2017, a civil asset recovery suit was filed, HC ACEC Civil Suit No. 2 of 2017, which was later withdrawn. This withdrawal was predicated on a mutual agreement or consent for the refund of the funds in question by one of the parties to the case, in this instance a company. However, the EACC subsequently filed criminal proceedings against the rest of the petitioners who were not party to the settlement under ACC No. 17 of 2020 and who had been more directly involved in the case. In response these parties filed the ACEC PETITION NO. E007 OF 2021 to challenge the criminal proceedings, citing that they had adhered to the settlement terms agreed upon by EACC.

The case points out first to the fact that just because a settlement is reached using ADR around some assets by one of the parties, this does not automatically mean that law enforcement cannot pursue criminal charges in relation to the case in the absence of an agreement with all parties not to do so. It does nevertheless show that there may be an expectation that this is the case.

It also demonstrates that importance of well-defined policies when utilizing ADR in the context of asset recovery cases. The withdrawal of a civil asset recovery suit and the subsequent criminal proceedings underscores the intricate interplay between civil and criminal aspects, warranting comprehensive legal mechanisms to ensure fairness and adherence to due process.



CONCLUSIONS

The prevailing landscape of ADR to resolve cases of corruption and related crimes in Kenya is mainly anchored in negotiation. The utilization of ADR is currently in its initial stages, with the EACC setting a noteworthy precedent by utilizing ADR for asset recovery in corruption cases.

The EACC's endorsement of ADR as an alternative to lengthy litigation signifies a pragmatic perspective, focussing on the need for swift and effective asset recovery in cases where traditional legal proceedings might be protracted and less successful. The tangible successes of ADR in land and immovable property asset recovery cases are evident. The recovery of properties worth over 780 million shillings, including public land unlawfully acquired with the complicity of public officers, highlights ADR's capacity to rectify instances of resource mismanagement. These successes validate ADR's ability to serve as a potent tool for addressing financial crime.

ADR cases can, however, also take time and questions also remain over its use in principle. This includes importantly whether foregoing a proportion of one's ill-gotten wealth offers sufficient punishment for individuals for their crimes and enough redress for the victims of that crime. Moreover, with a lower level of judicial oversight, the risk is that the ADR process might be more prone to political pressures.

While there have been instances of success, the majority of cases still follow the traditional litigation process. Several factors are likely to contribute to this, including stakeholders' limited awareness of ADR, insufficient training and resources for ADR practitioners, and a perception that ADR is less effective than litigation.

It is premature to determine whether ADR will become the preferred method for asset recovery in Kenya. Further research, evaluation, and collaboration among stakeholders is needed to fully understand and maximize the benefits of ADR in recovering stolen assets. However, increasing interest in ADR and ongoing efforts to encourage its utilization suggest that ADR holds the potential for significantly contributing to asset recovery practices in Kenya in the future.

CONSIDERATIONS IN THE USE OF ADR

When considering the use of ADR for asset recovery in Kenya, several important considerations should be taken into account:

Policy Framework

- Existing legislation should have provisions allowing for ADR as a tool for the recovery of assets.

POCAMLA for instance, as a stand-alone law, does not allow explicitly for ADR and the latter can only be instituted under the Civil Procedure Rules. The development of process guidelines for the use of ADR in asset recovery cases would aid authorities in knowing when and how to involve other stakeholders in the process, as well as promoting transparency while respecting the rights of the parties involved.

- Institutions tasked with asset recovery should consider the development of comprehensive institutional policies that provide clear guidance on the utilization of ADR mechanisms.

Where these policies already exist, such as the EACC's policies, they should be regularly reviewed and updated to ensure they effectively tackle the challenges the use of ADR might bring.

Such policies should encompass protocols, ethical considerations, and procedural steps aimed at facilitating a fair and just resolution process, ultimately ensuring a recovery process that is characterized by transparency, accountability, and integrity in the retrieval of misappropriated assets.

By establishing and adhering to these policies, institutions can bolster public trust and confidence in the asset recovery process, demonstrating a steadfast commitment to upholding the principles of justice and ethical conduct in the pursuit of restitution for the victims of financial crimes.

Transparency and Accountability

- Institutions should promote transparency and accountability throughout the ADR process.

Clear guidelines on how the process will be conducted for the recovery of assets should be set out and how this relates to other, formal judicial processes, to ensure that information is readily available to all parties. Mechanisms should be established or identified for oversight and monitoring to prevent abuses or undue influence. This should seek to address the challenges highlighted in relation to availability of information on assets recovered through ADR and reduce the possibility of abuse of such alternative measures utilised in asset recovery.

Protection of Rights and Due Process

- Asset recovery institutions should safeguard the rights of all parties involved in the ADR process, including the right to a fair hearing, access to legal representation, and protection against coercion or undue pressure.

ADR should not be used as a means to bypass fundamental legal principles or deny justice. Essentially, to the extent possible,

ADR should abide by the provisions of the Kenya Civil Procedure rules and international best practice around ADR and due process.

Compliance with International Standards

- Institutions should ensure that the use of ADR for asset recovery aligns with international standards and obligations, such as those outlined in the United Nations Convention against Corruption (UNCAC). These standards emphasize the importance of effective asset recovery, accountability, and the prevention of corruption.

Public Perception and Awareness

- Institutions should promote public awareness and understanding of the benefits and limitations of ADR for asset recovery.

This should include addressing any negative perceptions or misconceptions by highlighting successful asset recovery cases, demonstrating the fairness and integrity of the process, and emphasizing its contribution to combating corruption in Kenya and promoting accountability. It should also include providing understandings of the role and limitations of ADR and how it interacts with other judicial processes.

Collaboration and Cooperation

- Institutions should foster collaboration and cooperation among relevant stakeholders, including government agencies, law enforcement bodies, civil society organizations, and international partners. Working together can enhance the effectiveness of ADR for asset recovery, facilitate information-sharing, and leverage resources and expertise.

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