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# Applying mediation in customary land tenure disputes

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Lessons from Eswatini



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# Summary

Land tenure in Eswatini is complex and layered due to historical and geographical factors. The three main forms of tenure are Swazi Nation Land (SNL) governed through customary tenure rights; private land which has title deeds and freehold rights; and Crown land which is State and Government controlled land. Whereas statutory tenure occupies a significant place in defining control, access and use of land, it is customary tenure which carries widespread legitimacy in communities. When disputes occur, they are addressed through community institutions. The centrality of community-based approaches to dispute resolution was underscored during the implementation of a capacity development project in conflict resolution through mediation of disputes affecting customary tenure in Eswatini. The project was implemented by the Conciliation, Mediation, and Arbitration Commission (CMAC) under the Food and Agriculture Organization (FAO) and with funding from the European Union Land Governance Programme (EULGP). Working closely with traditional authorities, CMAC developed the capacity of community leaders responsible for land administration, land governance and conflict resolution to resolve disputes through approaches that are non-adversarial.

The responsible governance of land, which is under customary tenure, and the minimization of disputes are important for the eradication of hunger, food insecurity and malnutrition. Considering that land is governed under a plurality of regimes, some being statutory and promoting formal land titling programmes while others have varying forms of customary or authority systems of tenure, the invocation of different approaches in the management of disputes is necessary. The inflexible, formal and legal approach may not be the proper path when dealing with claims on land determined by customary tenure as this may be viewed as adversarial and creates a 'winner-loser' scenario which can lead to community tensions, disruption and disharmony.

However, Alternative Dispute Resolution (ADR) mechanisms can sustain harmony and preserve long-term relationship between claimants because they are based on trust and interests anchored on a 'win-win' framing of issues with the concerned parties, working alongside an agreed mediator as facilitator, playing a central role of guiding the parties. The ADR processes circumvent the legal procedural complexities, are malleable and flexible in locating viable solutions, and follow a path in which the parties and their mediator consider the best for settling the dispute. Mediated settlement of disputes over customary tenure advance sustainable development because human beings tend to adhere to decisions in which they participated and in which their dignity is preserved.

While the adversarial approach appears 'foreign' when arbitrating customary tenure issues, mediation is localized and utilizes community institutions and platforms that carry legitimacy and resonate with the value system embedded in the culture, respects social harmony and invokes community idioms, histories and memories. It is inexpensive, brings peace and healing and preserves future relationships. The parties in dispute control the process of mediation and actively participate in verbal and non-verbal communication to make the process acceptable, effective, and efficacious.

The platforms used to mediate customary tenure are not perfect, especially in view of patriarchy, over dependence on memory and non-documentation of land use practices. However, by working with governance institutions to identify the gaps, mainstreaming ADR mechanisms in national and local processes, and by resolving disputes through mediation whenever possible, communities can participate in land reforms, modernize customary land administration and management, improve land use, and promote agricultural outcomes. In situations of customary land tenure disputes, structural changes might be necessary for more “efficient” land dispute management process. Such changes would include standardization of selected rules and procedures of customary land dispute management; improved communication to the public about these rules and procedures; and improved communication within and between responsible government agencies about land dispute management procedures.

Finally, the dispute resolution mechanisms would have to address the challenges of patriarchy and include more women in decision making institutions. Gender relations are culture and context specific, and dynamic. Land governance institutions in communities can, therefore, be engaged to bring in more equity in tenure rights and the mediation of those rights.



# Acronyms

<b>ADR</b>	Alternative Dispute Resolution
<b>CMAC</b>	Conciliation, Mediation and Arbitration Commission
<b>TDRMs</b>	Traditional Dispute Resolution Mechanisms
<b>SDGs</b>	Sustainable Development Goals
<b>SLAM</b>	Sustainable Land Administration and Management
<b>SNL</b>	Swazi Nation Land
<b>TDL</b>	Title Deed Land
<b>VGGT</b>	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security



# Introduction

In most of sub-Saharan Africa, land is governed under a plurality of regimes, some being statutory and promoting formal land titling programmes, while others have varying forms of customary or authority systems of tenure, often not recognized by the State. This non-recognition of the diversity of customary land governance processes promotes insecurity of land tenure. It is in this context that the African Union's *Framework and Guidelines on Land Policy in Africa* (2009) argues for the recognition of customary tenure in land governance. Similarly, the *Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (VGGT) (2012) urge States to recognize and respect all legitimate tenure right holders and their rights and to provide effective and accessible means to justice – judicial authorities or other approaches – to deal with infringements of legitimate tenure rights or to resolve disputes over tenure rights. The VGGT also support the legal recognition of tenure rights of indigenous peoples and other communities with customary tenure systems, as well as of informal tenure rights.

Alongside the thrust for the legal recognition of customary land tenure (Ravn-Christensen, 2021) is the imperative of providing for Alternative Dispute Resolution (ADR) mechanisms such as mediation within communities as well as in national land policies and laws. This document argues that there is an opportunity to apply mediation in customary tenure disputes by learning from experiences in Eswatini. Across Africa, land is best understood through the prism of a wide range of geographical, political, economic, social, demographic and cultural factors. These factors include the colonial experience and legacy, indigenous cultural and normative systems, and socio-economic formations. Collectively or individually, the factors have led to plural and at times competing tenure regimes related to ownership, control, management, access and use of land and its resources, which could result into complex claims and disputes. When disputes over land are not resolved, they can lead to suffering, instability, dislocations and violent conflict.

The emotive nature of competing claims and disputes over land is a consequence of many factors including how land is perceived in Africa. While it serves as means of production and commodity, land is also a social, cultural and spiritual resource. It is family and community property, an asset and a source of identity. Land constructs “social identity, the organization of religious life and the production and reproduction of culture” (AUC-ECA-AfDB Consortium, 2010) providing critical linkages in time, lineages and communities. It is also a site of power and contestation, especially because of the pluralism of tenure rights courtesy of the colonial experience and legacies. Statutory tenure introduced in Africa through colonialism sits alongside customary land tenure, which encompasses the norms and practices which govern how communities allocate, use, access, and transfer land and other natural resources. These norms are legitimate. Because disputes are integral to human existence, communities have evolved ways of addressing them through what has come to be referred to as Traditional Dispute Resolution Mechanisms (TDRMs) as well as the Alternative Dispute Resolution (ADR) processes. These processes, which predate the colonial encounter, are part of indigenous knowledge systems and their accompanying institutions located within communities (Ajayi and Buhari, 2014).

The activation and management of disputes at the onset depend significantly on the extent to which the process is viewed by the involved parties as legitimate, fair, effective and accessible. Ownership of the resolution process entrenches the durability and sustainability of the agreement reached by the disputants. The dependence on Western approaches – as encapsulated in judicial regimes – to resolve land disputes in Africa ignores the complexity of land issues and community values related to trust and relationships. In pre-colonial Africa, ownership of the dispute resolution process was anchored in the *Ubuntu* philosophy which sought to advance reciprocity, fairness, openness, equity and justice and to promote social harmony and healing. This conceptualization has persisted over the centuries. One of the effective approaches to disputes over land and other resources in Africa and which enhances the *Ubuntu* worldview, is mediation – an indigenous mechanism that deploys spiritual, cultural and social tools to minimize tension and build consensus in the community. Despite its simplicity, flexibility, relevance, and compatibility with local context, the approach is often overlooked in favor of formalized and adversarial processes, which are expensive and disruptive of social harmony. The application of mediation in customary tenure disputes will contribute to the achievement of Aspiration 4 of Africa's Agenda 2063 related to a peaceful and secure Africa by utilizing mechanisms which promote dialogue centered approach to conflict prevention and resolution of disputes. It will also contribute to the achievement of the Sustainable Development Goals (SDGs) in a transversal manner. First, it will contribute to SDG 1 on ending poverty in all its forms through inclusive agriculture, food production and off-farm economies, which can create jobs and eliminate hunger in rural areas, giving people a chance to feed their families and live a decent life. The approach will support men and women, in particular the poor and the vulnerable, to have equal rights to economic resources, ownership and control over land and other forms of property, inheritance and natural resources. Second, the application, will contribute to SDG 2 on ending hunger, achieving food security, improving nutrition and promoting sustainable agriculture. When land disputes are resolved, families become more productive and improve on the quality of their lives because they have enough food. This is especially urgent because of current challenges in the availability of arable land, increased soil and biodiversity degradation and the uncertainties of climate change. Notwithstanding the intense relationship with land in African communities and the role of women in agriculture and food production, the system of patriarchy has limited women's ownership and control over land as well as their participation in decision-making institutions. The imbalance in power relations based on gender means that women are minimally represented in the resolution of disputes over land despite the fact that they are the primary users of agricultural land and are most affected when violent conflicts over land occur. By applying mediation in customary tenure, there is an opportunity to contribute to SDG 5 on gender equality as a fundamental human right and strong foundation for a peaceful, prosperous and sustainable world. Systematic engagement of traditional authorities to increase women's participation in mediation will ensure that women's interests and rights are protected.

Finally, while recognizing that not all disputes over land rights end up in violent conflict, they create tensions, which can undermine peace and security and the impact on sustainable development, livelihoods and sustainable management of the environment. Therefore, mediation over land disputes can contribute to SDG 16 by enhancing peace and justice, and building effective, accountable and inclusive land governance institutions in communities (AUC-ECA-AfDB Consortium, 2010). This document addresses itself to customary land tenure disputes and how they can be resolved through mediation, by drawing on experiences and lessons learnt in Eswatini.

# Customary land tenure disputes

## 2.1

### Contextual basis of land tenure relations in Eswatini

To understand the complexity of the land tenure situation in Eswatini (formerly Swaziland), one has to take a journey into history and the state formation process. In this journey, one will locate phases in governance processes, which define the contemporary land tenure relations, the basis of land related disputes, and the value of investing in alternative forms of dispute resolution on matters related to customary tenure.

The foundation of customary rights in Eswatini lies in the pre-1839 period when, under the leadership of King Ngwane III, Nguni speaking people who were fleeing from Bantu communities and European armies settled in present day Eswatini. Later, when Ngwane III's grandson, Sobhuza I (died in 1839) took over, he facilitated the consolidation of clans under the dominance of the Dlamini clan and started the stabilization and centralization of the Swazi state. The systematization of customary land rights was consolidated and institutions that would oversee resolution of disputes established. Soon after, under King Mbandzeni (1875–1889), the new entrants – Boers and British – were given concessionaries of large tracts of land for grazing and mining, for which they paid revenues. The concessionaries created difficulties because tracks of land were given to chartered trading companies to exploit resources and develop large scale industrial plantations while local populations were required to provide labour and other services. This system opened the way for mineral extraction and large-scale industrial plantations. It led to community concerns about denigration of customary land tenure and traditional institutions and was broadly opposed by the people. When Sobhuza II took over as King, he sought to regain the land which the Swazi felt was expropriated from them, again underscoring customary land rights. He was, however, not successful.

It is in the third phase of land governance changes that the High Commissioner's Partition Proclamation of 1907 gave formal recognition by the British administration to the concessionaries' claims of the Boers and British farmers and miners. The administration, in addition, reserved one third of the territory to the Swazi people. Additionally, a system was put in place for legislation to address the many competing and conflicting land rights. Under the new land governance regime three types of tenure emerged: private land tenure held by freehold title or concession; Crown land held by government and the King; and Swazi Nation Land (SNL) which consists of areas reserved under colonial rule for the Eswatini people and referred to as Swazi Area.<sup>1</sup>

<sup>1</sup> According to the Natural Resources Act 71/1951, the Swazi Area is "any land set apart for the sole and exclusive use and occupation of Africans under the concession partition No 28 of 1907 and land set aside for African land settlement in terms of the Swazi Land Settlement Act No 2 of 1946 and shall include any land registered in the name of Ngwenyama in Trust for the Swazi Nation."

But emaSwati did not recognize the legitimacy of the imposed statutory land regime and the legislation by the British over their customary land and therefore built-up alternative systems which could serve them better when used. The fourth period is the independence (1968) era in which buy-back initiatives were initiated and customary land rights gained fresh impetus.

Beyond the historical experiences sketched above, there are also geographical factors which provide a context for customary land tenure. Eswatini is a small landlocked country in southern Africa of 17 264 sq. km and borders South Africa on three sides and Mozambique on the fourth. Its geographical features have an impact on population and land use patterns. These in turn have a bearing on land disputes. The Middleveld, for example, is home to nearly half of the Eswatini who live in rural homesteads under densely populated settlements near employment centres. Although the employment centres and rich soils provide livelihood opportunities, the concentrated high population density reduce availability of unused land and land-based resources. As a result, disputes arise over land allocations of residential and agricultural use by family and Chief's Councils. Other disputes arise around these centres over boundaries, fencing, cattle transit paths, irrigation rights and use of trees and other scarce national resources.

## 2.2

### Customary land tenure

Customary land tenure refers to rules, norms, customs, and practices which govern how communities allocate, use, access, and transfer land and other natural resources. This is different from statutory tenure which was introduced in Africa during the colonial era. It is a complex system but has inbuilt flexibility which allows it to address community demands with a sensitivity to context and human relations. Customary tenure represents a holistic view of community life and reflects the economic, environmental, social and cultural values that the community has vis-à-vis land based resources. While the rules are generally unwritten and passed on through inter-generational discourse, they can be enforced by formal judicial system although their legitimacy does not depend on it. The legitimacy of customary tenure is derived from the trust and confidence the community has in the fairness of its cultural institutions.

The Constitution of Eswatini provides the legal framework for tenure governance in Eswatini. It recognises women's rights to land and the equality of women and men with regard to land. It further prohibits discrimination against women on the basis of gender. Art. 211 (1) of the Constitution provides that "from the date of commencement of the Constitution, all land (including any existing concessions) in Swaziland, save privately held title-deed land, shall continue to vest in iNgwenyama in trust for the Swazi Nation as it vested on the 12th April, 1973. Clause 2 provides that 'Save as may be required by the exigencies of any particular situation, a citizen of Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes; and clause 3 also provides that 'A person shall not be deprived of land without due process of law and where a person is deprived, that person shall be entitled to prompt and adequate compensation for any improvement on that land or loss consequent upon that deprivation unless otherwise provided by law'".

The three main forms of tenure in Eswatini are Swazi Nation Land (SNL) governed through customary tenure rights; private land which has title deeds and freehold

rights; and Crown land which is state and Government controlled land. The SNL includes native areas as defined by Concession Partition Act of 1907; Concessions not converted to title deed land in accordance with the 2005 Constitution; and Title Deed Land (TDL) and Concession land acquired by the Crown and held in trust by the iNgcwenyama on behalf of the eMaSwati Nation. The King holds the customary land SNL in trust. However, chiefs have a degree of autonomy in their areas. They are entrusted by the King with the day-to-day maintenance of law and order. This includes distribution of land to headmen and the resolution of land disputes when they arise.

The SNL tenure rights include but are not limited to the freedom to build and continuously improve on a dwelling place; the right to undertake agricultural activities; the right to lay the dead to rest; the right to bequeath land to descendants; and the right to protect the land from intruders. Land rights on SNL do not necessarily include the right to manage and determine how and to what extent a resource may be used (i.e. terms of use). They do not also by their nature encompass the right to exclude from benefiting from land resource and alienation rights. Neither do they automatically enable an owner to sell, lease, or mortgage the land. These grey areas in customary tenure have required the existence of institutions that would deal with them on a case-by-case basis.

While exercising their land administration roles, chiefs delegate certain responsibilities to other people. For example, a chief could entrust his deputy (indvuna) and council of elders with the resolution of minor land matters. At a micro level, the chief entrusts individual male homestead heads with the reallocation of family holdings to individuals who are usually married sons. Wives of the sons are granted access to common land. Overall, the tenure rights protect marginalized members of the community.

Following the weaknesses of the statutory approaches in resolving disputes around customary tenure a recognition of existing reality and the inaccessibility or non-effectiveness of formal/statutory mechanisms, certain countries are recognizing, formalizing and institutionalizing customary land tenure in national policy and legislative instruments. The recognition and integration of customary land tenure in national instruments, such as the constitution, is shown as a viable option for ensuring consistency and fairness. The Constitution of Eswatini provides an opportunity for inclusion of women in traditional leadership structures by calling for 30 percent participation of women in these institutions.

### 2.3

## Challenges of customary tenure

There is general consensus in Africa, that customary tenure systems have opportunities that could be utilized in sustainable land administration and management. However, the systems have challenges that ought to be addressed. The flexibility of customary tenure, for instance, occasionally leads to lack of clarity and certainty in land rights. This calls for the need to clarify the nature of rights and who has authority in their enforcement. The security of land rights is enhanced when ambiguous types of rights and institutional responsibilities are minimized.

Many provisions of customary tenure provide rights of access to populations which might not benefit if the regime was rigid and highly individualized. But while the flexibility allows the groups to use land under certain conditions, it could also expose them to vulnerabilities on account of pressure demanding that such rights be rescinded. There is therefore the challenge of fragility of rights especially among the poor and marginalized when there is pressure from powerful political, economic, and social actors. Clear recognition of the rights of the underprivileged members of society benefitting from customary tenure is necessary.

In situations where customary tenure is legally recognized and protected in national policies and laws, there are gaps in strengthening of local or community institutions to administer legal provisions and regulations. Moreover, there ought to be efforts to fill skill and capacity gaps to minimize community tensions and conflicts through Alternative Dispute Resolution Mechanisms (ADRs) which are viewed as viable in matters related to customary tenure. Such skill and capacity development would need to ensure that those charged with resolving the disputes and conflicts are impartial, can be trusted, and enhance community harmony.

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## 2.4

### Disputes over customary land tenure

Because of its salience in people's lives, land can be also a source of disputes at several levels. They could be interlinked with social, political, economic, and technological developments: population growth and population redistribution which could emanate from resettlement projects. They could also emanate from new employment opportunities, and new agricultural and livestock management developments, technologies and natural resource management (Engel, 2007).

There could also be disputes between neighbours over boundaries; between men, women and children over their land rights; between herders and farmers; states and indigenous people; companies and local populations over resource extraction. While in pre-colonial Africa, such disputes were resolved with minimal effects on community relations by paying attention to reason and feelings, the colonial experience suppressed the place of 'emotion' in dispute resolution and prioritizing reason over other human abilities. Furthermore, colonial administrators ignored the existence of local credible and legitimate institutions and processes that organize political life and address community challenges effectively. They resorted to subjugation - command at obedience power relations - including in the resolution of conflicts. The conceptual universe of the colonizer was universalized, made dominant, and other methods of interpreting the world undermined. But with time, there was recognition that there were indigenous ways of managing community affairs and the need for local solutions which are accessible and sustainable.

# Dispute Resolution Mechanisms

## 3.1

### Alternative Dispute Resolution

The Alternative Dispute Resolution Mechanism (ADR) is a general category of processes for resolving disputes quickly, accessibly, inexpensively, and in a less formal manner. Such processes which are sensitive to community relations and sensibilities include negotiation, conciliation, mediation and arbitration. In Eswatini, the Conciliation, Mediation and Arbitration Commission (CMAC) is the key institution set up to deal with the resolution of labour disputes through alternative dispute resolution processes. These processes are viewed as “alternative” because they provide options for dealing with disputes and, depending on the circumstances may be preferred over litigation and the formal adversarial court processes. In some cases, however, the formal system may be “preferred”. ADR processes differ in the way they are conducted and the expected outcomes.

**Negotiation** When used as an ADR mechanism, the “Negotiation approach” utilizes communication to build consensus among people or parties who seek to reach an agreement over a problem, conflict, or interest between them by adjusting their views and positions while as far as possible preserving their interests.

**Mediation** This is a procedure where most of the decisions related to process, design, and agreement rest with the parties who voluntarily follow that route as the process for identifying the mediator(s) and solving their disputes. During this process, the mediator enables communication between the parties, helps them solve their problems, controls the process, and supports full participation from all parties. She/he has no power over the decision to be made and cannot impose anything on parties against their own will.

**Conciliation** This process seeks to “reconcile parties” by drawing on the elements of mediation. However, in many jurisdictions including in Eswatini, conciliation takes on a technical meaning in the context of more formal dispute resolution processes. For example, in Eswatini, conciliation is that mandatory mediation which parties to a labour dispute should go through before they subject themselves to adjudication or industrial action. In other jurisdictions, it is a Court annexed mediation requested by the Magistrate to attempt to solve such issues before they are dealt with in Court. In the latter case, a conciliator may be appointed, or the Magistrate may personally conciliate the matter.

**Arbitration** This process is located between mediation and litigation. As in mediation, arbitration is a private procedure where the parties choose an arbiter and voluntarily participate in the process. It is

usually less formal than litigation, but like litigation, the arbiter listens to both parties, hears evidence and examines witnesses, and her/his decision is binding.

### 3.2

## The adversarial approach

These ADR processes can be contrasted with more adversarial processes of '*litigation*' or '*adjudication*'. Litigation or adjudication is a process where one party forces another party to answer charges put in court and where the outcome is determined by a third party appointed by the state. It is highly adversarial, bruising, leads to a 'win-lose' solution, takes time and could be expensive. Nonetheless, it can be the only path in situation where there is a clear need to establish precedent, to stop further criminal actions or to address blatant bad faith and disregard of the rights of one party from the powerful, the resourceful, or the highly connected. Litigation means the parties cede the entire control of the process and results to the courts and the courts' decisions will be based on the legal argument. Their decisions are binding.

### 3.3

## The mediation approach

The concept of mediation received legislative recognition in Eswatini for the first time in the Industrial Relations Act 1996. Section 81 of the Act gives the Commissioner appointed to resolve the dispute, power to determine the process for settling the dispute which may include mediating the dispute, conducting a fact finding exercise and making recommendations to the parties which may be in the form of an advisory arbitration award.

Mediation is a voluntary, party-centered and structured negotiation process where a neutral third party assists the parties in amicably resolving their dispute by using specialized communication and negotiation techniques. The process can take any of the two forms: Court – referred or Private mediation. Court referred mediation applies to cases pending in Court and which the Court would refer for mediation. In private mediation, however, qualified mediators offer their services on a private, fee-for-service basis to the Court, to members of the public, to members of the commercial sector and also to the governmental sector to resolve disputes through mediation. Private mediation can be used in connection with disputes pending in Court and pre-litigation disputes.

In all forms of the mediation process, the mediator remains impartial, independent, detached and objective and their personal preferences or perceptions do not have any bearing on the dispute resolution process and only plays a facilitative and evaluative role. During the mediation, the parties retain the right to decide for themselves whether or not to settle a dispute and, if so, the terms of the settlement. Even though the mediator facilitates their communications and negotiations, the parties always retain control over the outcome of the dispute.

There are a number of characteristics that define the mediation approach.

**It is a voluntary process driven by the involved parties themselves.**

Even where the court has referred the case for the mediation or if mediation is

required under a contract or a statute, the decision to settle and the terms of settlement always rest with the involved parties. This right of self-determination ensures that the outcome is acceptable to them. Because the parties have ultimate control over the outcome any party may withdraw from the mediation proceedings at any stage before its termination and without assigning any reason.

**It is anchored on active and direct participation of the disputing parties.**

Although mediators, lawyers, and other participants involved have active roles in mediation, it is the involved parties who explain the factual background of the dispute, identifying issues and underlying interests, generating options for agreement and making a final decision regarding settlement (Susskind, et. al. 2000).

**It is driven by flexibility and informality.**

This means that it is not governed by the dictates of evidence and formal rules of procedure. Nonetheless, it is not an extemporaneous or casual process but is structured with clearly identifiable stages towards the final resolution of a dispute.

**It is assisted negotiation process which addresses both the factual and legal issues and the underlying causes of a dispute.**

Thus, mediation is broadly focused on the facts, law, and underlying interests of the parties, such as personal, business/commercial, family, social and community interests. The goal of mediation is to find a mutually acceptable solution that adequately and legitimately satisfies the needs, desires and interests of the parties.

### Communicating beyond speech

#### 3.3.1

Statutory approaches to dispute resolution tend to privilege speech as the medium of resolving challenges and arriving at agreements. Speech is valorized and other forms of human capabilities are understated (Morgan, Brigg and Bleiker, 2011). But communication occurs beyond speech and its other forms play a role in reaching agreements over contentious issues. Non-verbal communication forms, which carry individual and community feelings, are at play in mediation and help parties overcome negotiation impasses and find mutually acceptable solutions.

The mediation process and the role of the mediator are inherently designed to help achieve open and constructive communication. This is done by, among others, determining whether the dispute can be handled through mediation and whether the disputing parties are ready to participate in the process. Once it is determined that the mediation approach can be utilized, the mediator explains the dispute resolution process and the role of the various parties. The mediator also explains his or her role.

The mediator functions to undertake the following:

- assist the parties in exchanging information;
- gather facts and evidence by enquiry of the parties;
- help the parties identify points for negotiation;
- assist the parties to express and frame the final agreement.

The mediation process usually starts by referral of a dispute to the mediator by the community leadership.

It may also be referred directly by one or both parties, but in cases involving customary land the mediator ought to inform the community leadership and receive permission to attempt to resolve the dispute by mediation. This is important because if mediation fails, the dispute would then go before the relevant community dispute resolution forum for adjudication, and therefore they should have prior knowledge that a dispute exists.

The privacy, confidentiality and non-disclosure of agreements are part of the communicative signals that help build confidence in the mediation approach. Moreover, any statement made or information furnished by either of the parties, and any document produced or prepared for/during mediation is inadmissible and non-discoverable in any proceeding. Any concession or admission made during mediation cannot be used in any proceeding. Further, any information given by a party to the mediator during mediation process is not disclosed to the other party, unless specifically permitted by the first party. No record of what transpired during mediation is prepared. The mediator cannot be called upon to testify in any proceeding or to disclose to the court as to what transpired during the mediation.

The settlement reached in a case that is referred for mediation during the course of litigation is required to be reduced to writing, signed by the concerned parties and filed in Court for the passing of an appropriate order. A settlement reached at a pre-litigation stage is a contract, which is binding and enforceable between the parties. In the event of failure to settle the dispute, the report of the mediator does not mention the reason for the failure. The report will only say "not settled".

### 3.3.2 The agreement

If the mediation is successful a documentary record of the settlement agreement must be prepared. If requested by the parties, the mediator can assist with the drafting of the agreement. However, it is often best that the parties write it themselves, which helps to reinforce and sustain the agreement, but this is not always practical.

## 3.4

### Lessons from the Eswatini experience

#### Training Objectives

##### 3.4.1

The Eswatini Capacity Development Project in conflict resolution through mediation was undertaken in order to reduce, manage, and mitigate tenure related conflicts affecting customary tenure in SNL. The overall objective was to contribute to the FAO's objective of eradicating hunger, food insecurity and malnutrition through the implementation of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of National Food Security (VGGT). Disputes over land undermine food production and security and can lead to hunger (CFS-FAO, 2012).

The training, which sought to fill capacity gaps in mediation, comprised of training on mediation of customary land disputes and contributed in the enhancement of capacities among community leaders to mediate (Gumede, 2020). The programme was part of the broader European Union's Land Governance Programme (EULGP).<sup>2</sup>

The implementation was undertaken through the Conciliation, Mediation and Arbitration Commission (CMAC) and included reviewing of the Mediation Guidelines, developing and translating the training module into Siswati, community mobilization, participant selection and training. The Guidelines were aimed at mediating disputes between landholders and land users on Swazi Nation Land and would be less applicable in disputes between a landholder and *umphakatsi* (chief and/bandlancane) due to power asymmetries, although the mediation principles apply. The principles would also apply in disputes between chiefdoms and between insiders and outsiders. For sustainability, the project targeted rural women and men engaged in agriculture on SNL and traditional authorities responsibility for the administration and governance of SNL. Gender integration was mainstreamed.

### Linkage with Sustainable Land Administration and Management (SLAM) project

#### 3.4.2

One of the challenges of customary tenure is documentation of landholders which can lead to disputes as boundaries are unclear. Therefore, the training was linked with the SLAM Project and the tools developed, tested and utilized (COWI, 2018). The developed tools included data collection and information management technologies, landholding maps and registers – in both hardcopy and digital land information system (GIS) – and guidelines and procedures for land administration and dispute resolution. Chiefdoms and national agencies were capacitated to use the land information system to manage SNL more efficiently and sustainably using the tools. The tools had the effect of creating a neo-customary land administration system to be used locally. Using the new facility, landholding rights are secured through an entry in the land register. Landholders are not provided certificates. This neo-customary system is an important facility in the resolution of disputes related to customary tenure. It utilizes technology as an enabler of transparency in tenure rights administration by making them accessible and easily searchable (Larbi and Rizzo, 2019).

### Participatory approach

#### 3.4.3

The training comprised of training on mediation of customary land disputes and contributed in the enhancement of capacities among community leaders to mediate. For sustainability, the project targeted rural women and men engaged in agriculture on SNL and traditional authorities responsible for the administration and governance of SNL. Gender equity was mainstreamed. The Project targeted 40 participants in four constituencies (Mkhiweni, Sandleni, Dvokodweni, and Ndzingeni). This target was exceeded by 30 percent as a total of

<sup>2</sup>The European Union Land Governance Programme funded 18 individual country-level projects out of which 15 are in Africa (Angola, Burundi, Cameroon, Côte d'Ivoire, Eswatini, Ethiopia, Ghana, Guinea Bissau, Kenya, Malawi, Niger, Somalia, South Sudan, Sudan and Uganda), one in Asia (Pakistan) and two in South America (Brazil and Colombia). All the projects address tenure issues, and are implemented alongside various partners, among which are government agencies, civil society organizations, bilateral and multilateral organizations and private sector companies. All project activities are carried out within the framework of the VGGT, and, in the African context, the AU Declaration on Land and the Framework and Guidelines on Land Policy in Africa.

52 participants were trained. Out of these 30 (58 percent) were males and 22 (42 percent) were females. The trained participants were diverse and included community leaders, chiefs councils, community headmen, rural health motivators, neighbourhood care points, chiefs, messengers, community development officers, members of school committees, church leaders, gogo centre managers, and other rural development committee members. A training manual based on the VGGT was prepared for the programme.

The customary land tenure targeted for mediation includes the two types of SNL: registered and unregistered. The registered SNL refers to previous or repurchased Title Deed Land (TDL) bought by the Swazi monarchy and leased out to private companies to attract income, and administered by the Swazi government through the parastatal called *Tibiyi Taka Ngwane* (Wealth of the Nation). The unregistered SNL is held under customary land tenure and allocated to individuals or families by traditional chiefs. Tenure over unregistered SNL is regulated by tradition and can also be acquired through inheritance. Disputes can occur over access to the unregistered SNL. Grants of unregistered SNL are normally undocumented.

Resolving disputes within chiefdom communities is and always has been the jurisdiction of traditional authorities, and the project task for developing dispute resolution processes commenced by broadening, in a discussion paper, an understanding of customary dispute resolution and identifying the most appropriate and complementary alternative process. The background discussion paper was presented at a workshop at which key stakeholders decided and agreed that the project should focus on introducing mediation as a means to help people resolve their own disputes before they are referred to traditional authorities for adjudication. Guidelines were prepared on how to conduct dispute mediation and these provide the training material and support for local community land dispute mediators.

### Program achievements

#### 3.4.4

To succeed the project had to be situated in the community value system by paying attention to the local language and cultural institutions. To start, the Mediation Guidelines were translated into Siswati and a Community Mobilization Strategy was developed so that the representation was viewed to have legitimacy.

The local consultations ensured that the Regional Secretaries and the Tinkhundla Centres owned the process and program participants were identified by their chiefdom in consultation with the *Bucopho, Ndvuna and YeNkundla*. Participants were screened prior to the training using a 'Recognition of Prior Learning Form' to discern their level of understanding of the issues. Beyond giving skills in mediation, the training-built confidence and trust on the reliability, effectiveness and efficacy of ADR previously not trusted due to underuse by the judicial system. The project was inclusive, participatory and holistic and the training utilized interactive, learner-centered methods which anchored experiential learning and practical exercises, group work, role play, and case studies.

An analysis of the pre- and post-Training Assessment showed an increase in trust and knowledge uptake about mediation, including institutions and structures involved in mediation; knowledge about food security; knowledge about land rights and the Constitution; the role of the trained mediators as community leaders in resolving disputes; land administration and food security.

## Challenges

Applying mediation to dispute settlement on customary lands in Eswatini is not without challenges, the dominant one being the socio-cultural context of implementation. A major feature of customary land tenure is the dominance of patriarchal structures at the various levels of decision making. This made it difficult to mobilize women participants. Other challenges related the low levels of literacy in the community and timing of the training at the end of the year when there are cultural events such as *Incwala* and Christmas holidays. This meant that participants could not put into practice the skills gained as the hearing of disputes by *Umphakatsi* were suspended until February 2020. Moreover, that the number of the participants trained per Inkhundla was ten and these were few compared to the number of disputes. Finally, there was the potential of conflict of interest among the trained mediators who are also adjudicators in the community. To mitigate this conflict, the trained mediators who are also adjudicators committed to training other mediators in the community.

### 3.4.5

## Lessons learned

A number of lessons have emerged from the capacity development programme:

### 3.4.6

### **1 Linkages with the Sustainable Land Administration and Management (SLAM) project**

The linkages with the SLAM project were very clear as participants were able to identify the community mapping tools as helpful in determining the boundaries and settling land disputes.

### **2 Working with traditional authorities**

It is possible, with the right approach, to effect change to customary land governance, management and administration with the support of traditional authorities; provided that such change does not erode their role, responsibilities and powers in relation to land. Because all SNL is held in trust by the *iNgwenyama*, the starting point for engaging with traditional authorities had to be a meeting with His Majesty the King (HMK). This delayed implementation slightly but was necessary in order to build trust and support of traditional authorities, chiefdom community beneficiaries and other stakeholders who are often reticent to get involved because of enduring sensitivities surrounding land issues.

### **3 Inconsistency in practices and procedures for dispute resolution**

These have been identified as one of the biggest challenges in the pilot communities.

Eswatini recognizes a dual system of laws at the community level: Swazi Law and custom is applied in the resolution of land dispute. However, it is not codified and is passed down orally from generation to generation. The transmission, which is dependent on memory, has led to varying, and sometimes conflicting versions of customary law. It is therefore not applied uniformly from one region to another.

#### **4 Women tenure rights**

During the training some participants noted that women have the right to access land in their own name in some regions but leaders from different regions held that such rights, even though entrenched in the constitution (2005) had no place in traditional forums.

#### **5 Capacity building on National Constitution**

There is a need for training on the National Constitution (2005) and family law.

#### **6 Documentation of dispute resolution structures:**

Eswatini is divided into four regions Hhohho, Lubombo, Manzini and Shiselweni. Each region is further divided into *Tinkhundla*. There are 55 tinkhundla and each elects one representative to the House of the Assembly of Eswatini. Tinkhundla are, in turn, divided into *imiphakatsi*. There is a need to also document the dispute resolution structures that exists in the various communities, the powers and jurisdiction of each. In the Shiselweni and Hhohho region, for example, the observation was that there exists a semi-autonomous structure at the sub community level which presides over minor disputes and decides which and if matters should be referred to the *umphakatsi* inner council. Such a structure is unknown in the other constituency and has been challenged as being “untraditional”.

#### **7 Training on adjudication responsibilities**

The majority of the participants trained were involved in dispute resolution at the community level but had never been trained on their adjudication responsibilities and the relationship between formal and informal justice. For example, the systems for documenting their decisions were very poor, inconsistent and not well managed. There is a need to train and equip them with the necessary tools including introducing them to the relevant legislation such as land and family laws, procedural issues of due process - fair hearing, opportunity to present and rebut evidence, gender equality in litigation, etc.

#### **8 Record keeping**

Poor record keeping practices or documentation of reported disputes and outcomes is an inherent problem across all the regions that have been trained.

#### **9 Overreliance on memory of community elders**

The community leaders appoint senior members of the community as Mappers and to determine disputes who rely only on memory which is unreliable;

### 10 Women in traditional structures

Despite the Constitution calling for a minimum 30 percent participation women in leadership positions there is still a gap in the number of women participation in these traditional leadership structures. There is need for more awareness raising on these constitutional obligations with traditional leadership stakeholders.

## 3.5

### Recommendations

- The Land Management Board and National Council who are the final authority on land disputes in Eswatini should be engaged for their buy-in and scaling up of the initiative to support traditional dispute resolution mechanisms.
- Wide dissemination of the VGGT for all stakeholders in land governance, land administrations at community, regional and community level.
- All the key national and community stakeholders responsible for land dispute resolution should adopt the guidelines for mediating land disputes.
- The Basic course on customary land disputes including topics on due process, gender equality, documentation, etc. should be provided to customary dispute resolution providers, Regional Secretaries, Regional Administrators and National Court Presidents so that they are equipped to mediate land dispute at the regional level.
- Extension officers from the Ministry of Agriculture and Tinkhundla Administration should be equipped to provide support to Mediators on land dispute management.
- Efforts should be made to promote women participation in community leadership positions.
- Documentation of community decisions should be a priority for this intervention.



# Conclusion

Because mediation is a flexible process of dispute resolution, it provides an efficient, effective, speedy, convenient and less expensive process to resolve a dispute with dignity, mutual respect and civility.

It can sustainably strengthen land governance and customary land tenure security because it is located in the community and uses institutions that carry legitimacy and resonate with the value system embedded in the culture and that respects social harmony, compared with adversarial approach to dispute resolution which can tear the community apart.

When successfully utilized in resolving disputes around customary land tenure mediation can advance reforms and modernize customary land administration and management, improve land use, and promote agricultural outcomes in communities. In situations of customary land tenure disputes, structural changes might be necessary for more “efficient” land dispute management process. Such changes would include standardization of selected rules and procedures of customary land dispute management; improved communication to the public about these rules and procedures; and improved communication within and between responsible government agencies about land dispute management procedures.

Finally, the dispute resolution mechanisms would have to address the challenges of patriarchy and include more women in decision making institutions. Gender relations are culture and context specific, and dynamic. They can therefore be engaged to bring in more equity in tenure rights and the mediation of those rights. Generally, the patriarchal social structures and customary practices reveal a gender bias advantageous to males, including on tenure rights. In most cases, these rights are mediated through male family members. Because inheritance is the main method of transferring land according to custom, men are more likely than women to inherit land. In cases of disputes, the mediator is most likely to be male and could carry patriarchal biases into the decision-making process.

To make mediation in customary tenure more inclusive, women ought to be part of the decision-making organs in the community. Furthermore, the number of mediators trained is insufficient to make meaningful impact on improving governance of customary tenures in Eswatini and the linkages with food security, poverty reduction and environmental management. There is need to scale up the capacity development.

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# Glossary

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<b>Bandlancane</b>	Chiefdom Inner Council
<b>Bucopho</b>	Subordinate to Indvuna
<b>emaSwati</b>	the Swati
<b>Incwala</b>	(pl. tinvuna) Chief's deputy, lieutenant chief, local commander of age regiments, head of inkhundla
<b>iNgwenyama</b>	King of the Swazi
<b>Inkhtundla</b>	(pl. Tinkhundla) regional committee comprising several chiefs
<b>Tibiyo Taka Ngwane</b>	Wealth of the Nation
<b>umphakatsi</b>	(pl. imiphakatsi) chief
<b>YeNkundla</b>	of the court

# Applying mediation in customary land tenure disputes

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Lessons from Eswatini



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