

The Lawyer as a Negotiator, Mediator and Peacemaker in Kenya

Kariuki Muigua

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Abstract

This paper critically examines the role of lawyers in the mediation and negotiation processes in Kenya. Lawyers are trained to help the larger society in conflict management through various mechanisms which include litigation, negotiation, mediation, arbitration, adjudication, and a number of other hybrid mechanisms. The discussion herein focuses on their role in negotiation, mediation and peacebuilding. The paper analyses the attitude of actors in negotiation and mediation in comparison to litigation. It explores how, given the flexible nature of negotiation and mediation as peace building tools, lawyers can effectively participate in the processes to facilitate realisation of a secure and prosperous Kenyan society based on the rule of law and harmony.

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Kariuki Muigua*

1. Introduction

With the promulgation of the current Constitution of Kenya 2010, there has been a renewed push for mainstreaming and use of Alternative Dispute Resolution Mechanisms (ADR) in conflict management in the country. This presents both a challenge and an opportunity for today's lawyer to get involved in the ADR processes as a matter of necessity. Courts have moved more towards compulsory referral of matters to ADR as a legal requirement¹ and this practice requires that if the lawyer is to remain as an all-round conflict management expert, then they must be willing to venture into the ADR arena.

As promoters of a peaceful and just society, lawyers can play a major role in facilitating negotiation and mediation as tools of conflict management in the country for peace building and development. Through peace building, lawyers can go a long way in tackling injustice in non-violent ways and to transform the structural conditions that generate deadly conflict, and ultimately help in not only eradicating conflicts, but also in building communities, institutions, policies, and relationships that are better able to sustain peace and justice. The end result would be development and security for all. It is noteworthy that some of the internal human conflicts that are often experienced in parts of Kenya can be addressed through ADR and specifically negotiation and mediation as opposed to litigation as attested to by the Kofi Annan-led 2008 mediation process.²

*PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL.B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); MKIM; Accredited Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Lecturer at the Centre for Advanced Studies in Environmental Law & Policy (CASELAP), University of Nairobi and past Chairperson CIArb (Kenya Branch) [August, 2015].

¹ Civil Procedure Act, Cap 21, Laws of Kenya- See Order 46, r. 20; S. 59B.

² ReliefWeb, 'Kenya: Mediation is making progress - Kofi Annan,' *Report from Government of Kenya*, 15 Feb 2008, available at <http://reliefweb.int/report/kenya/kenya-mediation-making-progress-kofi-annan> [Accessed on 1/08/2015]; See also G. Machel & B. Mkapu, *Back from the Brink: the 2008 mediation process and reforms in Kenya*, (African Union Commission, 2014).

This discourse focuses on how best the lawyers can participate in negotiation and mediation processes with a view to promoting a peaceful and just society for prosperity. Arguably, successful and comprehensive peace building requires the consolidation of internal and external security, the strengthening of political institutions and good governance, promotion of economic, social rehabilitation, as well as transformation and development.³ Going by the nature of their job, lawyers have a duty to contribute to the general stability and social development of a society through effective conflict management.

At the international level, the United Nations encourages a peaceful approach to management of conflicts amongst States. Article 33 of the Charter of the United Nations states that “*the parties....should, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*” (emphasis added).⁴ The special place of ADR mechanisms in achieving a peaceful society is also reflected in Kenya’s constitutional provisions which encourage the use of ADR in dealing with community conflicts.⁵ The Constitution of Kenya 2010 generally recognises the use of Alternative Dispute Resolution Mechanisms (ADR) in conflicts management by Kenyan courts.⁶ It provides that in exercising judicial authority, the Kenyan courts are to be guided by key principles which include, *inter alia*, promotion of alternative forms of conflict management including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.⁷ As promoters of a peaceful and just society, lawyers can play a major role in facilitating negotiation and mediation of conflicts in the country for peace building and resolution of the same. Lawyers can effectively utilise these mechanisms as peacebuilding tools, even as they serve their purpose as problem solvers.

2. Lawyers and Society

Lawyers are viewed as social engineers, and as such, a lawyer's workspace is expected to extend beyond the courtroom or law office and into the wider society.⁸ Law and lawyers form a

³ F.K. Mulu, *International Peace: The Nexus between Security and Development*, Catholic University of Eastern Africa Press, 2014. p.8.

⁴ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

⁵ Art. 60(1) (g), 67(2) (f), 159(2) (c).

⁶ Art. 159(2).

⁷ Art. 159(2) (c).

⁸ L. O. Uzoachina, ‘Appropriate Dispute Resolution: The Search for Viable Alternatives to Litigation and Arbitration in Nigeria,’ (Scribd, 2009), available at <http://www.scribd.com/doc/24492949/Appropriate-Dispute-Resolution> [Accessed on 1/08/2015].

very important part of the society, due to the role they play in shaping the human society.⁹ It has been argued that law is not an abstract concept but a product of the internal conflicts in a society, created to ensure harmony and co-existence. As such, lawyers who are part of that society are expected to possess and demonstrate knowledge, skills and compassion and be rich enough to encompass the societal dynamics including economics, counseling, negotiations and management.¹⁰ It is important to point out that development is not feasible in a conflict situation and such conflicts and disputes must be managed effectively and expeditiously for development to take place.¹¹ The effects that these conflicts have on society, the economy and development are severe.¹² Therefore, lawyers play the critical role of upholding law and order in the society, in collaboration with other stakeholders, for holistic development in Kenyan society.

The foregoing expectations from clients imply that clients expect lawyers to possess more than legal skills; they expect lawyers to be problem-solvers, regardless of the nature of the problem, provided it has what they consider to be legal aspects however remote.¹³ However, this is not always the case with lawyers. This is partly occasioned by the reality that the core of legal education is mainly legal analysis through the case method. The case method teaches problem solving by asking, in one situation after another, about rights and liabilities of the parties.¹⁴ It relies on a given set of facts and precedents, to determine rights and liabilities of the parties, and although this provides the essential foundation for the lawyer's core task of advising clients about the legal consequences of particular courses of action, it does not take proper consideration of situations where the expected end game is not only determination of rights and liabilities of the parties, but also restoration or *preservation of relations, be they social or commercial in nature* (emphasis added). Law schools often leave out other useful skills that are needed for dealing with problems arising in the today's dynamic world.

⁹ R.C. Clark, 'Why So Many Lawyers? Are They Good or Bad?' *Fordham Law Review*, Vol. 61, Issue 2, 1992, p.277.

¹⁰ A.O.Weda, *The Ideal Lawyer*, (LawAfrica Publishing (K) Ltd, 2014), p.21.

¹¹ See K. Muigua & F. Kariuki, 'ADR, Access to Justice and Development in Kenya,' *Strathmore Law Journal*, Vol. 1, No.1, June 2015, pp. 1-21, p. 1.

¹² S. Loode, *et al*, 'Conflict Management Processes for Land-related conflict,' (Pacific Islands Forum Secretariat, Fiji, 2009), p.12, available at <http://espace.library.uq.edu.au/view/UQ:196546> [Accessed on 1/08/2015].

¹³ R.C. Clark, 'Why So Many Lawyers? Are They Good or Bad?' *op cit*, p.277.

¹⁴ P. Brest, 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' 58 *Law and Contemporary Problems*, Vol. 58, Summer 1995, pp. 5-17, p.7, available at <http://scholarship.law.duke.edu/lcp/vol58/iss3/3> [Accessed on 30/07/2015].

3. Negotiation and Mediation Processes

Mediation refers to a method of conflict management where conflicting parties gather to seek solutions to the conflict, with the assistance of a third party who facilitates discussion and the flow of information, and thus aiding in the processes of reaching an agreement.¹⁵

It is important to point out that the main difference between mediation and negotiation is that mediation is a conflict resolution process in which the parties negotiate with the aid of a neutral third-party. They both work towards preserving relationships between the parties by arriving at mutually acceptable outcomes of the process. Mediation is actually negotiation with the assistance of a third party. This is because mediation is a continuation of the negotiation process by other means whereby, instead of having a two way negotiation, it now becomes a three way process: the mediator in essence mediating the negotiations between the parties. The underlying point in the mediation process is that it arises where the parties to a conflict have attempted negotiations, but have reached a deadlock.¹⁶

The mediator's role in such a process is to assist the parties in the negotiations although they cannot dictate the outcomes of the negotiation process.¹⁷ A mediator is one "who comes between the conflicting parties with the aim of offering a solution to their dispute and/or facilitating mutual concessions." However, such a person must be acceptable to both parties and should have no interest in the dispute other than achievement of a peaceful settlement.¹⁸ They have also been described as a third party who is independent, impartial, and has no stake in the outcome of the process; helps parties in dispute to clarify issues, explore solutions and negotiate their own agreement and does not advise those in dispute, but helps people to communicate with one another.¹⁹

Conflict resolution processes such as negotiation and mediation delve into the roots or the underlying causes of the conflict and relationships and are thus concerned with removing them altogether.²⁰ Due to their peculiar nature, conflicts are well addressed through resolution by the

¹⁵ J. Bercovitch, "Mediation Success or Failure: A search for the Elusive Criteria," *Cardozo Journal of Conflict Management*, Vol. 7, 289, p. 290.

¹⁶ M. Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

¹⁷ K. Muigua, *Resolving Environmental Conflicts through Mediation in Kenya* Ph.D Thesis, 2011, (Unpublished, University of Nairobi), p.43.

¹⁸ M. Barkun, "Conflict Resolution through Implicit Mediation," *Journal of Conflict Resolution*, VIII (June, 1964), p. 126.

¹⁹ A.W. Gichuhi, "Court Mandated Mediation-The Final Solution to Expeditious Disposal of Cases," *Chartered Institute of Arbitrators, Alternative Dispute Resolution*, Vol. 2, No. 1, 2014, pp. 135-180 at p. 137.

²⁰ M. Mwangi, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, Nairobi, 2008), pp.36-38.

non-coercive, non-legal or non-adjudicatory mechanisms.²¹ Resolution is the mutual construction of a relationship which is legitimate because the needs of each party are satisfied. It is only through these mechanisms that the mutual needs of the parties and removal of the underlying causes of the conflict can be satisfied.²² On the other hand, Disputes develop when conflicts are not or cannot be effectively managed.²³ They are about interests or issues. Interests are negotiable, divisible and finite whereas needs are not. Conflicts and disputes arise where two or more people or groups who perceive their rights, interests or goals to be incompatible, communicate their view to the other person or group. Similarly disputes can be based on the interests, rights or the power imbalances in the society. These interests or issues can be negotiated and even bargained about.²⁴

Since a dispute can be interest-based, rights-based or power-based the approaches in dealing with disputes are also varied. Where the dispute is interest-based the best approaches for dealing with it are negotiation and mediation. Where it is rights-based litigation is the best response and if it is power-based the use of force, threats, violence such as the one used by the police and the army would be the best response.²⁵

It is necessary to understand the origins or sources of a dispute since if it is not addressed properly the chance for escalatory responses increases.²⁶ This can ultimately lead to violence and long-term fission of society. In certain types of disputes, such as those involving the use and access to natural resources, it should be noted that tensions keep recurring. Recurrence of a dispute over years could be a symptom of a much deeper conflict in which individuals or groups are embroiled.²⁷ In such cases the responses employed must take into consideration the interests,

²¹ L. A. Swatuk, 'Conflict Resolution and Negotiation Skills for Integrated Water Resources Management,' *Cap-Net Training Manual*, July, 2015, (International Network for Capacity Building in Integrated Water Resources Management, 2015), available at http://www.academia.edu/216405/Conflict_Resolution_and_Negotiation_Skills_for_Integrated_Water_Resources_Management [Accessed on 1/08/2015].

²² K. Cloke, "The Culture of Mediation: Settlement vs. Resolution," *The Conflict Resolution Information Source*, Version IV, December, 2005.

²³ P. Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), pp.12-13.

²⁴ A.B. Fetherston, "From Conflict Resolution to Transformative Peacebuilding: Reflections from Croatia", *op cit*; M. Mwangi, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, *op cit*, pp.36-38.

²⁵ *Ibid*.

²⁶ S. Loode, *et al*, 'Conflict Management Processes for Land-related conflict,' *op cit*, p.14.

²⁷ See generally, L. Owen, *et al*, "Conflicts over Farming Practices in Canada: The Role of Interactive Conflict Resolution Approaches," *Journal of Rural Studies* Vol.16, No.4, 2000, pp. 475-483; E.E. Osaghae, 'The persistence of conflict in Africa: Management failure or endemic catastrophe?' *South African Journal of International Affairs*, Vol. 2, Iss. 1, 1994, pp. 85-103.

rights and power imbalances in the wider context of the dispute.²⁸ This would mean that the responses must target the dispute at various levels. Some responses could aim at settling the particular dispute, for example through adjudication mechanisms such as the courts and arbitration. Other intervention processes could aim at addressing the often much larger underlying causes of the dispute, for example through negotiations or mediation in the political process, involving the whole community or even a number of communities and which aim at airing grievances and inequalities which are perceived by different groups in the area.²⁹

Litigation or judicial settlement and arbitration are the main power- and rights-based processes. They are dispute settlement mechanisms. Disputes are thus manageable using the adjudicatory or legal or coercive mechanisms such as courts and arbitration.³⁰ Both the power- and rights-based processes lead to results in which one side loses and the other side wins. These processes can lead to the issues in disagreement flaring up again. They can lead to resistance, violence and revolt as they are merely settlement mechanisms not addressing the underlying causes of the conflict.³¹ Although rights-based dispute settlement feels fairer and less arbitrary than power-based processes, the outcome is zero-sum since one side must win and the other loses.³²

On the other hand, Interest-based processes, can lead to win-win outcomes, in that they explore the real interests, goals and motivations of disputants and aim to develop a solution which mutually satisfies those needs. Interest-based processes are also more efficient at bringing about participant satisfaction, process fairness, effectiveness, efficiency, fostering of relationships and addressing power-based issues, all of which are important considerations in the conflict resolution process.³³

As an opinion leader and peacebuilder in society, it is important that the contemporary lawyer in Kenya broadens their areas of practice and expertise to include out of court conflict management mechanisms and specifically, negotiation and mediation. These mechanisms can go a long way in enhancing lawyers' effectiveness as problem solvers in society. However, there are

²⁸ A. Engel & B. Korf, 'Negotiation and mediation techniques for natural resource management,' (Food and Agriculture Organization of the United Nations, Rome, 2005), available at <http://www.fao.org/docrep/008/a0032e/a0032e00.htm#Contents> [Accessed on 31/07/2015].

²⁹ Ibid.

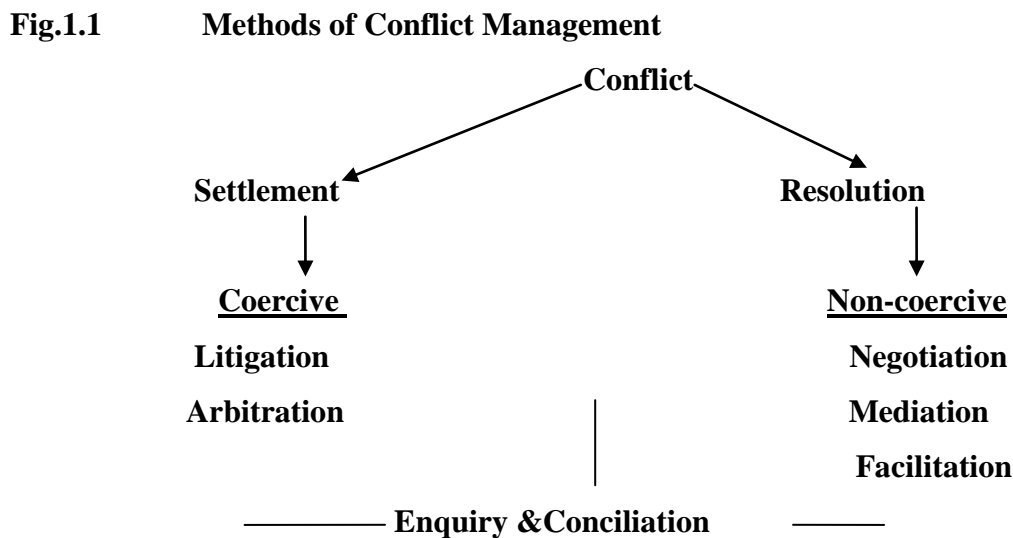
³⁰ See T.F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society*, (Berkeley: University of California Press, 2002).

³¹ M. Mwangi, *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, *op cit*, pp.36-38.

³² Ibid.

³³ See L. Serge, *et al*, "Conflict Management Processes for Land-related conflict," *A Consultancy Report by the Pacific Islands Forum Secretariat*, *op cit*; K. Cloke, "The Culture of Mediation: Settlement vs. Resolution," *The Conflict Resolution Information Source*, *op cit*.

certain skills that any lawyer who wishes to engage in negotiation and mediation must acquire to enable them effectively participate in the process.



*Source: The author

Figure 1.1 shows that there are certain methods of conflict management that can only lead to a settlement. Those that lead to a settlement fall into the category of coercive methods where parties have little or no autonomy over the forum, choice of the judges and the outcome. The coercive methods are litigation or judicial settlement and arbitration. It also shows the non-coercive methods (negotiation, mediation and facilitation) which lead to resolution. In the non-coercive conflict management methods the parties enjoy autonomy over the choice of the mediator or third party, the process and the outcome. Conciliation and enquiry can be classified as coercive (when the reports emanating from them are enforced) and non-coercive for example when the reports are used as the basis for negotiation between the parties.

3.1 Lawyer in the Negotiation Process

Negotiation is one of the informal methods of conflict resolution, and one that offers the parties maximum control over the process.³⁴ It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.³⁵ As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests.³⁶

It has been observed that negotiations take place when both parties to a conflict lose faith in their chances of winning and see an opportunity for cutting losses and achieving satisfaction through accommodation.³⁷ Despite the popular and often misleading perception that negotiation which is classified as part of ADR is alternative to litigation, lawyers spend more time on settlement discussions than on research or on trials and appeals.³⁸ It is noteworthy that legal negotiation is conducted by agents (lawyer), rather than the principal (the client).³⁹ Arguably, this therefore places negotiation in a central point in the conflict management efforts and especially with regard to litigation process. In negotiation, the two parties directly and voluntarily exchange information back and forth, until the decision-maker makes his final decision.⁴⁰

It has been observed that all lawyers negotiate, but few of them have either a conceptual understanding of the process or particular skills in it.⁴¹ It is therefore suggested that if lawyers chose to specialise in negotiation, it would improve both their understanding of the process and the relevant skills.⁴² There is a fundamental shift in lawyers' conduct, and especially ethical

³⁴ See O. Animashaun & K. O. Odeku, 'Industrial Conflict Resolution using Court-connected Alternative Dispute Resolution,' *Mediterranean Journal of Social Sciences*, Vol. 5, No 16, July 2014, pp. 683-691, p. 685.

³⁵ United Nations Institute of Training and Research (UNITAR), 'Negotiations in Debt and Financial Management,' *Document No.4*, December 1994.

³⁶ R. Fisher, *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, (3rd ed., Random House Business Books, 2012), p. 27.

³⁷ F.K. Mulu, *The Role of Regional Organizations in Conflict Management: IGAD and the Sudanese Civil War*, The Catholic University of Eastern Africa, 2008. p. xvii.

³⁸ M. Galanter, "Worlds of Deals: Using Negotiation to Teach about Legal Process," *Journal of Legal Education*, 1984, 34, pp.28-276 at p. 269; See also A.B. Rubin, *A Causeurie of Lawyers' Ethics in Negotiation*, 35 La. L. Rev. (1975), pp.577-578.

³⁹ R.H. Blumoff, "Just Negotiation," 88 *Wash. U.L. Rev.* 381 (2010-2011) at p. 381.

⁴⁰ M. Goltsman, *et al*, "Mediation, Arbitration and Negotiation," *Journal of Economic Theory* 144 (2009), pp.1397-1420 at 1398.

⁴¹ F. Roger, "What about Negotiation as a Specialty," *A.B.A. J.*, Vol. 69, 1983, p.1221, available at <http://heinonline.org/HOL/LandingPage?handle=hein.journals/abaj69&div=198&id=&page=> [Accessed on 5/07/2015].

⁴² *Ibid*.

guidelines or rules when it comes to ADR. The lawyer must use different persuasive tactics when it comes to ADR as compared to the court process.⁴³

It is suggested that instead of approaching negotiations as a battle with winners or losers, one can view negotiations as involving two parties, each with a problem that needs to be solved. By taking a collaborative rather than a competitive approach to negotiation, parties can attempt to find a solution satisfactory to both parties-making both sides feel like winners.⁴⁴ The outcome of a collaborative approach to negotiations is: improved relationships; a better chance of building trust and respect; self-confidence; more enjoyment; less stress; and more satisfactory results.⁴⁵ It is therefore imperative that when getting into negotiations, lawyers ought to have a mental shift from battling to win your initial position, to adopting approaches that help them genuinely look for more creative ways where a 'win-win' outcome can be achieved.⁴⁶

3.1.1 Methods of Negotiation

There are various approaches to negotiation which include: positional negotiation; principled negotiation; and interest-based negotiation.⁴⁷

Positional bargaining is not the best form of negotiation because arguing over hardline positions produces unwise agreements, is inefficient, endangers an ongoing relationship and also leads to formation of coalition among parties whose shared interests are often more symbolic than substantive.⁴⁸

Principled negotiation on the other hand, decides issues on their merits rather than through a haggling process focused on what each side says it will and will not do. It suggests that a negotiator should look for mutual gains whenever possible, and that where various interests conflict, negotiators are encouraged to have a result based on some fair standards independent of the will of either side.⁴⁹ Principled negotiation, which is the focus of this discussion, allows parties to obtain their fair share while still protecting them against exploitation of such fairness.⁵⁰

Negotiation as discussed in this paper is meant to be a tool for peacebuilding. Accordingly, the aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.

⁴³ See S.J. Schmitz, 'What Should We Teach in ADR Courses?: Concepts And Skills For Lawyers Representing Clients In Mediation,' *Harvard Negotiation Law Review*, Vol.6, Spring 2001, p.289.

⁴⁴ A. French, *Negotiating Skills*, (Alchemy, 2003), p. viii.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ R. Fisher, *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, *op cit*, pp. xxvi-xxvii.

⁴⁸ Ibid, p.23.

⁴⁹ Ibid.

⁵⁰ Ibid, p. xxvi.

3.1.2 Negotiation Skills for Lawyers

a. Flexibility in Negotiation

It has been rightly observed that the most important characteristic of an effective negotiator is flexibility, that is, the ability to adapt to the situation and adopt a different approach as the circumstances demand.⁵¹ Negotiating flexibility can also be defined as any action taken to facilitate a movement in the direction of a mutually acceptable agreement.⁵² It is important for lawyers in negotiation to remember that the aim of negotiation is to look out for mutually satisfying outcomes and as such, it is important to be flexible in the process, instead of adopting hardline positions, so as to facilitate resolution.

b. People Skills

It is important to point out negotiations are always about two things, namely, people and issues. Lawyers were taught in law school to think like lawyers, and were discouraged from thinking about anything that was emotional. They were also taught skills of litigation, in drawing fine distinctions that focus on the differences between people while debating positions rather than engaging in dialogue focused on understanding each other.⁵³

It is therefore important that lawyers, while engaged in negotiations, should not get carried away by issues to the extent of forgetting the people involved therein. It is essential that one develops or acquires people skills to improve the way they handle people since this, normally informs the perception parties have towards the negotiator.⁵⁴ It is important to separate people from the issues. A negotiator ought to maintain a positive and friendly attitude towards the other party while at the same time being tough about working to find a solution that satisfies both parties' needs.⁵⁵ The approach should be different from that exhibited in adversarial settings since addressing parties' personal issues such as feelings is part of the solution process.⁵⁶

c. Listening and Questioning

⁵¹ J.E. Raasch, 'Win-Win Negotiation Skills for Lawyers: The Art of Getting What You Both Want,' available at <http://www.cba.org/cba/PracticeLink/WWP/negotiation.aspx> [Accessed on 30/07/2015].

⁵² N.B. Atiyas, 'Mediating Regional Conflicts and Negotiating Flexibility: Peace Efforts in Bosnia-Herzegovina,' *The Annals of the American Academy*, Vol.542, November 1995, pp. 185-201, at pp. 186-7.

⁵³ J.K. Wright, 'Chapter One of Lawyers as Peacemakers, Practicing Holistic, Problem-Solving Law,' (Resourceful Internet Solutions, 2010), available at <http://www.mediate.com/articles/wrightK1.cfm> [Accessed on 1/08/2015].

⁵⁴ A. French, *Negotiating Skills*, *op cit*, p.11.

⁵⁵ *Ibid*, p. 48.

⁵⁶ R. Fisher, *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, *op cit*, p.21; See also D. Carneiro, *et al*, 'The Conflict Resolution Process,' *Law, Governance and Technology Series*, Vol. 18, 2014, pp. 163-186.

Listening and questioning skills are important for a negotiator mainly because they help one to understand the issues and underlying interests and build relationships, as well as asking the right questions.⁵⁷ It is important to remember that if parties feel that their needs are genuinely understood and being addressed, chances of parties accepting the outcome are high, even if the same is achieved by way of reasonable compromise by parties involved. The knowledge of available options, openness and the willingness to accept a compromise are the main factors contributing to a real and voluntary agreement.⁵⁸ As such, it is important that negotiators polish their listening and questioning skills so as to understand the issues to be addressed.

d. Handling Emotions

At times, pressure builds around the negotiator to succeed in negotiation processes. It is important that one develops the skill to keep emotions in check since they can easily hamper the ability to think straight, be creative or get accurate information.⁵⁹ It is also important to handle the other party or parties well to avoid making them feel misunderstood, and in the process causing a flare up of emotions which would affect the process. Having the ability to identify the psychological dimensions of the conflict can effectively assist in concluding negotiations and reach mutually acceptable solutions.⁶⁰

e. Building Rapport

Building rapport by the negotiators on both sides can help keep the process going, to the benefit of all parties. One should start the negotiation by establishing rapport and mutual interests, while focusing on parties' interests and not positions.⁶¹ It is important for the negotiator to come up with creative options based on both sides' interests.⁶²

Negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.⁶³

⁵⁷ A. French, *Negotiating Skills*, *op cit*, p.12.

⁵⁸ D.J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* [1996] p.383.

⁵⁹ A. French, *Negotiating Skills*, *op cit*, p.62.

⁶⁰ K. Muigua, *Resolving Conflicts through Mediation in Kenya*, *op cit*, pp. 110-111.

⁶¹ A. French, *Negotiating Skills*, *op cit*, p. 49.

⁶² *Ibid*, p. 50.

⁶³ M. Mwangi, *Conflict in Africa; Theory, Processes and Institutions of Management*, *op cit*, pp. 115-116.

3.2 Mediation in Kenya

Mediation is preferred over litigation as it offers some advantages over adversary processing namely: it is cheaper, faster, and potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants; it can also educate the parties about each other's needs and those of their community.⁶⁴ Thus, it can help them learn to work together and to see that through cooperation both can make positive gains.⁶⁵ Law and mediation are inseparable in that most commercial disputes referred to mediation are legal in nature. Besides, parties usually resort to mediation after first engaging the legal remedies available. Additionally, due to the non-binding nature of mediation, parties appeal to legal avenues afterwards to render the decisions thereof binding and enforceable. Indeed, in recent times the trend towards having mediation provided for by law has also emerged.⁶⁶

However, parties in litigation can engage in mediation outside the court process, then move the court to record a consent judgment, a procedure that exists as a remote form of court-annexed mediation. Parties who have presented their cases to court or about to do so get into mediation under the supervision of the court.⁶⁷ A successful mediation is then made binding through the recording of a consent in Court.⁶⁸ On the other hand, parties in a dispute that is not before a court may undertake mediation and conclude the mediation agreement as a contract *inter partes* enforceable and binding as between them, so long as it abides by the provisions of the Law of Contract Act.⁶⁹

Currently, there are efforts by the legal fraternity in Kenya and other parties to enhance legal and institutional frameworks governing mediation in general. The Civil Procedure Act⁷⁰ provides for mediation of disputes.⁷¹ The Act was amended to introduce the aspect of mediation of cases as an aid to case management for the streamlining of the court process.⁷² This amendment of the Act required the setting up of a Mediation Accreditation Committee by the Chief Justice to determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics

⁶⁴ L.L. Riskin, 'Mediation and lawyers,' *Ohio State Law Journal*, Vol.43, 1982, pp.29-60 at p.34.

⁶⁵ *Ibid.*

⁶⁶ Civil Procedure Act, Cap 21, Laws of Kenya. Order 46; S. 59B. These provisions envisage court-annexed mediation.

⁶⁷ Kathy, "What is court-annexed mediation?" Available at <http://www.janusconflictmanagement.com/2011/10/q-what-is-court-annexed-mediation/> [Accessed on 27/06/2015].

⁶⁸ S. 59B (1).

⁶⁹ Cap 14, Laws of Kenya.

⁷⁰ Cap 21, Laws of Kenya.

⁷¹ Ss. 2 and 59 Civil Procedure Act as Amended by the Statute Law (Miscellaneous Amendments) Act No. 17 of 2012, (Government Printer, Nairobi, 2012), at pp.1092-1097.

⁷² *Ibid.*

for mediators as may be prescribed and set up appropriate training programmes for mediators.⁷³ The Chief Justice has since appointed Members to the Committee and had them gazetted.⁷⁴

Under customary law, mediation is applied in resolution of many disputes in Kenya. The most prevalent ones are boundary conflicts and family conflicts, where in both cases and particularly boundary conflicts, parties in dispute bring the matter before a panel of elders who are drawn from respected members of the society. The elders listen to the parties and encourage them to come to a consensus. This serves to permit access to justice for the aggrieved parties as the consensus reached is binding, and various communities have internal enforcement mechanisms widely accepted by the given society.⁷⁵ It is however noteworthy that informal mediation may not require the use of writing although this may change with the codification of mediation rules.

3.2.1 Lawyers and the Mediation Process

As already noted, mediation applies to different fields, with some common elements and some differences for each of its specialties. However, its main fields of application are business/commerce, environmental disputes, family disputes and minor forms found in other fields. Indeed, it is noteworthy that mediation has been made the *primary* conflict management process in family law in Australia and is increasingly being promoted in other legal contexts.⁷⁶

Mediation is a useful and effective tool to resolve current conflicts and prevent future disputes. Mediation has a number of distinct advantages and unlike litigation, there are only parties in mediation and not adversaries. Mediation is associated with the bonus feature of providing speedy resolution of conflicts at low cost while at the same time preserving relationships. It also provides empowerment as it gives all involved parties a share of responsibility for a negotiation and develops in them the ability to make an independent contribution to a dispute's solution. In addition, mediation can open a dialogue between parties and also identify alternative solutions towards a win for all parties.⁷⁷

⁷³ S. 59 A (1) and (2) of the Civil Procedure Act.

⁷⁴ Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20th February, 2015, p. 348.

⁷⁵ K. Muigua, *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, 2012). pp. 21-22.

⁷⁶ D. Bagshaw, "Mediation, human rights and peacebuilding in the Asia-Pacific," p. 195 in R.G., Garbutt (ed.), *Activating Human Rights and Peace: Universal Responsibility Conference 2008 Conference Proceedings, Byron Bay, NSW, 1-4 July, 2008*, (Centre for Peace and Social Justice, Southern Cross University, Lismore, NSW, 2008).

⁷⁷ UNESCO-IHP, 'Alternative Dispute Resolution Approaches and Their Application in Water Management: A Focus On Negotiation, Mediation And Consensus Building,' available at http://www.un.org/waterforlifedecade/water_cooperation_2013/pdf/adr_background_paper.pdf [Accessed on 30/07/2015]; See also M. Considine, 'Beyond Winning: Unlocking Entrenched Conflict Using Principles and Practices of Negotiation in the Mediation Room,' p.12, available at http://eprints.maynoothuniversity.ie/5840/1/M.Considine_Final_14th_Feb.pdf [Accessed on 30/07/2015].

In relation to litigation, mediation is usually faster, more cost-effective, private and confidential, and it gives participants the chance to create their own agreement since the outcome is entirely dependent on the parties' concessions. Mediation also creates the appropriate environment to address the conflict and this may also result in an understanding on how to deal with similar issues should they arise in future.⁷⁸

The foregoing advantages however, do not mean that mediation has no demerits. Its success lies on the willingness of the parties to make the necessary concessions.⁷⁹ Secondly, mediation can only be as effective as the parties wish it to be and this is governed by their immediate situation.⁸⁰

It is also non-binding in nature and parties have sometimes used it merely as a delaying technique in the negotiation process or to obtain more information about the other party's case.⁸¹

It has been observed that given the flexible nature of mediation as a conflict resolution mechanism, it is the attitude adopted towards it in a legal system that determines the roles lawyers play in mediation and their effectiveness in the same.⁸² It is important to point out that the term 'lawyer' is used in this discussion in its broader term to mean anyone whose profession is about the law (law professors, attorneys, notaries, legal officers, non-practicing members of the legal profession, judges, amongst others) as opposed to only advocates who are lawyers admitted to the bar and entitled to and represent persons in courts of law.

Arguably, involvement of lawyers in the process can help surmount the limitations highlighted above. However, this calls for the lawyers to understand the difference between mediation and adversarial advocacy. The lawyers also have to be committed to deliver client satisfaction without allowing themselves to be used unprofessionally by the clients.⁸³ That way, the lawyers can gauge their client's objectives in mediation and judge whether the same are

⁷⁸ UNESCO-IHP, 'Alternative Dispute Resolution Approaches and Their Application in Water Management: A Focus on Negotiation, Mediation And Consensus Building,' *op cit*, p.12.

⁷⁹ J.G. Merrills, *International Dispute Settlement*, Cambridge University Press, 1991, p. 39.

⁸⁰ S. Yahaya, 'Is Mediation a Viable Option for resolving International Disputes?' (University of Dundee, Centre Energy, petroleum and Mineral Law and Policy), p.16, available at www.dundee.ac.uk/cepmlp/gateway/files. [Accessed on 30/06/2015].

⁸¹ See C. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd ed., (San Francisco: Jossey-Bass Publishers, 1996); See also L. J. Ravdin, 'Coping with the Difficult Lawyer in Settlement Negotiations,' *The Complete Lawyer*, Vol. 13, No. 2, Spring 1996.

⁸² Y. Shamir, 'Alternative Dispute Resolution Approaches and Their Application,' (Israel Center for Negotiation and Mediation, 2003), p.33, available at

http://webworld.unesco.org/water/wwap/pccp/cd/pdf/negotiation_mediation_facilitation/alternative_dispute_resolution_approaches.pdf [Accessed on 2/07/2015]; C. SS Ooi, 'The Role of Lawyers in Mediation: What the Future Holds,' *The Malaysian Bar*, August, 2005, available at

http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=1757 [Accessed on 2/07/2015].

⁸³ C. M. Meadow, 'Pursuing Settlement in an Adversary Culture: a Tale of Innovation Co-opted or the Law of ADR,' *Fla. St. UL Rev.*, Vol.19, 1991, p.1.

sustainable. The lawyers stand to give advice to their clients on their case and what they can gain if they utilize mediation so that the client does not enter mediation under the illusion that there is a boon awaiting them. Lastly, the lawyers can help in reducing the final product of mediation into a binding instrument and therefore ensure the whole process is not rendered futile.⁸⁴

The question that arises therefore is: Considering the general perception that mediation and other ADR methods are still viewed as alternatives to law and lawyers, how come the presence of lawyers in mediation is still inevitable? Invariably, lawyers end up at the mediation table for a number of reasons.

To begin with, disputes usually come with lawyers involved. It may happen that an advocate is already on record if the dispute has reached the litigation arena. Further, if the mediation is triggered by a contractual clause mandating mediation as a precondition to the filing of lawsuit, the lawyer is usually already part of the remedial process. In fact, the real world scenario is that many, if not most, mediations are initiated by lawyers. After an assessment of the client's case, and in particular the relationship of the parties, the lawyer may advise the client to take the advantages offered by mediation. This is especially so where the case has slim chances of success and the other side is willing to mediate.⁸⁵

Secondly, lawyers understand the risks involved better. Often, a client may not fully appreciate what is at stake should he/she lose a claim or defence. However, lawyers are well versed with court matters and taxation of cases. The lawyer also understands better what the impact of a failed effort to compromise might be. Importantly, the clients understand that lawyers have superior knowledge of the matter at hand and are willing to take their counsel.⁸⁶

Thus, lawyers invariably find themselves advising clients before and during mediation process on what interests to secure protection for and the positions to take. In mediation also, every party is in theory entitled to the partisan advocacy of his or her lawyer. The lawyer knows that in many instances, the strength of the client's case and likelihood of prevailing is offset by the costs and uncertainties of a trial. By bringing in the experienced mediator, the lawyer is providing the client a valuable reality check by an impartial third person without appearing to be foregoing his or her duty to represent that client and be their advocate.⁸⁷

⁸⁴ See T. Cockburn & M. Shirley, 'Setting Aside Agreements Reached at Court-Annexed Mediation: Procedural Grounds and the Role of Unconscionability,' *Western Australian Law Review*, Vol.31, February, 2003, pp. 70-86.

⁸⁵ See M.J. Breger, 'Should an Attorney be required to Advise Client of ADR Options?' *Geo. J. Legal Ethics*, Vol.13, 2000, p. 427.

⁸⁶ See F.C. Zacharias, 'The Pre-employment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?', *William & Mary Law Review*, Vol.49, No. 2, 2007, pp.569-641;

⁸⁷ See R.D. Benjamin, 'Considering Mediation: What Lawyers and Clients Should Know,' *ABA Journal*, Vol. 18, No.7,

Thirdly, the lawyer's role invites involvement. A lawyer can and should be an important part of the mediation process. The conscientious lawyer can influence his client to consider mediation when a dispute arises, or ideally in advance by the policy of using a mediation clause in the contracting documents of each transaction.⁸⁸ The lawyer can retain the posture of an advocate for his client, while letting the mediator deal with the development of issues of compromise. In addition, through the judicious selection of an experienced mediator, the lawyer will be saving much time and cost for their client since the parties will not have to take the time to educate a court on the issues and practices common to a particular industry or area.

Through incorporation of mediation into the resolution process, the lawyer can reduce the stress endemic to dispute and increase the likelihood of the preservation of important relationships.⁸⁹

Finally, lawyers can help in achieving client's satisfaction. A successful mediation usually produces a satisfied client. Even where mediation does not result in a compromise agreement it is useful and satisfying in that it usually clarifies, eliminates or consolidates the issues, and enables the parties to meet in a temperate setting for what has probably been the first direct exchange of views between them since the dispute arose.⁹⁰

3.2.2 Making Positive impact to the mediation Process

The main question is how lawyers can enhance the mediation process. It is noteworthy that more and more lawyers in Kenya nowadays are beginning to understand and appreciate mediation. Advocates who are well informed on mediation are in a better position to transmit that understanding to their clients and to participate in preparing and coaching to take full advantage of what mediation has to offer.⁹¹

Lawyers can help clients make informed decisions. One of the foundational principles of mediation is informed decision-making by parties. In fact, mediation proceedings can easily stall when parties lack critical information. To participate meaningfully in the process, parties should fully understand the mediation process itself, the issues involved, options for settlement, and the

October/November 2001.

⁸⁸ See R.D. Benjamin, 'The Use of Mediative Strategies in Traditional Legal Practice,' *Journal of the American Academy of Matrimonial Lawyers*, Vol. 14, No. 2, 1997, pp. 203-231, p.214.

⁸⁹ J.R. Linda, "Lawyers and Mediation: Their Role as Consultants," 2007.

Available at <http://www.familydisputesolutions.com/pdf/lawyermediation.pdf> [Accessed on 30/05/2015].

⁹⁰See B. Rix, "The Interface of Mediation and Litigation," *Chartered Institute of Arbitrators 6th Mediation Symposium 2013* in Chartered Institute of Arbitrators, *The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 80, No. 1, February 2014, pp. 21-27 at pp. 24-25.

⁹¹ F.S. Mosten, 'Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court,' *Family Law Quarterly*, Vol. 43, No. 3, Fall 2009, p. 489-518; F.S. Mosten, 'Collaborative Law Practice: An Unbundled Approach to Informed Client Decision Making,' *Journal Of Dispute Resolution*, Vol. 2008, No. 1, 2008, pp. 163-193.

alternatives that await the parties in the event that no agreement is reached. Attorneys at the table can provide their clients with the advice and information that they need to make the most of mediation. They also assist the clients evaluate options on the table and weigh the merits of settlement proposals.⁹²

Lawyers can also enhance client's participation in the mediation process. Mediators can inform mediation clients about general legal issues that need to be addressed by the parties, but they cannot give specific legal advice. As a result, clients are encouraged by mediators to seek advice of lawyers at all points in the process. A good advocate will know and understand their client's interests and can help their client communicate those interests clearly and effectively in the mediation table.⁹³

In addition to the foregoing, lawyers are also useful in promoting creative problem-solving. First, as a lawyer, one is a skilled problem solver since it is part of their job. Secondly, there is the "two heads are better than one" phenomenon-an advocate and their client can arguably work together to brainstorm solutions and fine-tune options with the mediator's help.⁹⁴ They can do so through assisting settlement by reframing the issues and potential outcomes, such as by broadening them to include "non-legal" and non-monetary issues when they are important to the resolution of the dispute or by emphasizing the benefits of resolving the dispute and the costs of not settling.⁹⁵

Lawyers can also help in offsetting power imbalances which can easily throw mediation out of the right course. The presence of advocates at the mediation table can act as a safeguard to ensure that each party is able to make decisions free from intimidation, influence or pressure by the other. Indeed, it has been argued that a mediator is a catalytic agent whose mere presence besides anything he or she may do or say will bring about positive changes in the behaviour of

⁹² Ibid; See also D. Levin, 'Bridging the divide between lawyers and mediators, Part 3: what lawyers can do for mediators,' (Online Guide to Mediation, March, 12, 2007), available at <http://mediationblog.blogspot.co.ke/2007/03/bridging-divide-between-lawyers-and.html> [Accessed on 2/08/2015]; See also M. Emerson, 'Tips to enhance mediation and negotiation skills,' (Emerson Family Law Partner – Brisbane Mediations, 2011), available at <http://www.emfl.com.au/.../Tips%20to%20Enhance%20Mediation%20&%20N...> [Accessed on 2/08/2015].

⁹³ See American Bar Association, *Ethical Guidelines for Settlement Negotiations*, August 2002, p.2, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.authcheckdam.pdf [Accessed on 2/08/2015].

⁹⁴ See J.K.L., Lawrence, "Mediation Advocacy: Partnering With the Mediator," 2000, 15, *Ohio Journal Dispute Resolution*, 425.

⁹⁵ C.A. McEwen and R.L. Wissler, Finding out If It Is True: Comparing Mediation and Negotiation through Research, *Journal of Dispute Resolution*, Vol. 2002, Iss. 1 [2002], Art. 8, pp. 130-142 at pp. 137-138.

the disputing parties, and that progress achieved through the mediator's presence brings about nothing more than temperate speech.⁹⁶

Lawyers can further help their clients strategically assess their Best Alternative to a Negotiated Agreement (BATNA). It is however important to point out that "Best" may not mean "good". If the BATNA is trial, advocates know from experience that the possibility of success in court and how much time trial, with the possibility of appeal, may realistically take.⁹⁷

Lawyers can also help in taking care of the details. After all the hard work that goes into mediation, no one wants a mediated agreement to fall apart later. A critical role that lawyers can and do play is to make sure that no details in an agreement have been left to chance and hence enhance chances of success of the settlement.⁹⁸

To make the foregoing contribution in the mediation process, lawyers need to acquire basic skills that will enhance their role in the process. It is however noteworthy that some of the skills are natural and instinctive, but they can be enhanced or polished. This is important to enable them shift their approach to the process from the *rights-based training in law schools to the interest-based approach in mediation* (emphasis added).

3.2.3 Mediation Skills for Lawyers

a. Active Listening Techniques

One of the principal functions of the mediator has been identified as managing the communications process. He or she must intervene carefully at the correct moments and also, they must understand interpersonal relations and negotiations. They must also be able to listen well and perceive the underlying emotional, psychological, and value orientations that may hold the keys to resolving more quantifiable issues.⁹⁹ It has been noted that nearly all mediation efforts distinguish between the functions of the lawyer and those of the mediator, even where the mediator is a lawyer.¹⁰⁰

There are several *active listening techniques* at the disposal of a mediator that can be employed to help the parties come up with a solution to the conflict. These include: paying attention, listening attentively, listening to the voice of silence/what is not said, encouraging

⁹⁶ A. Meyer, "Function of the Mediator in Collective Bargaining," *Industrial and Labour Relations Review*, XIII, No. 2 (January, 1960), p. 161.

⁹⁷ R. Fisher, *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, *op cit*, pp.99-108.

⁹⁸ See B. Rix, "The Interface of Mediation and Litigation," *Chartered Institute of Arbitrators 6th Mediation Symposium 2013*, *op cit*, p.27.

⁹⁹ L.L. Riskin, 'Mediation and lawyers,' *op cit*, p.36.

¹⁰⁰ *Ibid*, p. 36.

parties, clarifying /paraphrasing/backtracking/restating, reframing,¹⁰¹ reflecting, summarizing and validating. To be an active listener, the mediator must ensure that they do not pay attention to their own emotions; should react to ideas and not a person; must recognize own prejudices; must avoid assumptions/judgments; use non-verbal behavior to show understanding and acceptance; show empathy; rephrase/ restate/reframe key thoughts and feelings and must conduct caucuses.¹⁰²

b. Non-Verbal Communication Techniques

A mediator needs to display in the mediation process are: maintaining frequent eye contact with the parties; body movements such as nodding and positioning; voice tone; keeping body oriented towards the speaker and showing a genuine curiosity to whatever is being said.

These techniques allow the mediator to know and meet the parties' needs. They also help the to make proposals which allow both parties to save face and enter an agreement, that neither is willing to propose, and come up with creative solutions to the conflict.

c. Rapport Building

In order to establish relationships of trust and respect with the parties and their advisors, mediators need to build rapport using various ways which include: including everyone in the discussions; attentive listening; being neutral and non-judgmental; being approachable, open, honest and friendly; being harmonious in verbal and non-verbal language, amongst others.¹⁰³

With the foregoing skills, lawyers can resourcefully participate and enhance the effectiveness of a mediation process for mutually satisfying outcomes for the parties. The development of mediation can greatly be influenced by the attitudes and involvement of the legal profession, either positively or negatively.¹⁰⁴

¹⁰¹ The mediator uses this technique as a way of reciting back or neutrally, paraphrasing the statements of the parties in order to demonstrate understanding of whatever they are saying.

¹⁰² Caucuses are private sessions that the mediator may have with a party to the dispute so as to get more information or clarity on a particular issue.

¹⁰³ D. Richbell, *Module 1: Commercial Mediation Training Handbook*, (Chartered Institute of Arbitrators, 2014), p.14.

¹⁰⁴ L.L. Riskin, 'Mediation and lawyers,' *op cit*, p.36.

4. Role of the Lawyer as a Peacemaker in Society

Peace has been described as either negative peace, that is, the absence of violence or fear of violence, or positive peace which is defined as the attitudes, institutions and structures that, when strengthened, lead to a more peaceful society.¹⁰⁵ The Institute for Economics and Peace, identifies eight pillars of peace which they associate with peaceful environments and are both inter-dependent and mutually reinforcing, such that improvements in one factor would tend to strengthen others and vice versa. These include: a well-functioning government; a sound business environment; an equitable distribution of resources; an acceptance of the rights of others; good relations with neighbours; free flow of information; a high level of human capital; and low levels of corruption.¹⁰⁶ Conflict is grounded in social, structural, cultural, political and economic factors as seen from the foregoing pillars, since depreciation in one increases chances of conflict in a particular society.¹⁰⁷

It has been argued that peaceful nations are better equipped through their attitudes, institutions and structures to respond to external shocks. This can be seen with internal peace correlating strongly to measures of inter-group cohesion and civic activism, which are key proxies that indicate the ability of societies to resolve internal political, economic, and cultural conflicts as well as being able to respond to external shocks.¹⁰⁸ The quest for a united, stable and more developed country calls for the active involvement of all parties, including lawyers. Peace is statistically associated with better business environments, higher per capita income, higher educational attainment and stronger social cohesion.¹⁰⁹ Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.¹¹⁰

As already observed, lawyers are important in a societal setup as problem solvers. It has been observed that when a client with a problem consults a lawyer, it is because they perceive the

¹⁰⁵ Institute for Economics and Peace, 'Pillars of Peace: Understanding the key attitudes and institutions that underpin peaceful societies,' *Global Peace Index Report, 2014*, p.1, available at <http://economicsandpeace.org/wp-content/uploads/2015/06/Pillars-of-Peace-Report-IEP2.pdf> [Accessed on 31/07/2015].

¹⁰⁶ *Ibid*, pp.1-2.

¹⁰⁷ M. Maiese, 'Social Structural Change,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at <http://www.beyondintractability.org/essay/social-structural-changes> [Accessed on 31/07/2015]; See also M. Maiese, 'Causes of Disputes and Conflicts,' in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at <http://www.beyondintractability.org/essay/underlying-causes> [Accessed on 31/07/2015].

¹⁰⁸ Institute for Economics and Peace, 'Pillars of Peace: Understanding the key attitudes and institutions that underpin peaceful societies,' *op cit*, p. 5.

¹⁰⁹ *Ibid*, *op cit*, p. 2.

¹¹⁰ *Ibid*, *op cit*, p. 6.

problem to have a significant legal dimension.¹¹¹ However, since few real world problems conform to the boundaries that define and separate different professional disciplines, it is contended, therefore, that it is only a rare client who wants his or lawyer to confine themselves strictly to "the law." Rather, most clients expect their lawyers to integrate legal considerations with other aspects of their problems to come up with solutions that are often constrained or facilitated by the law, but finding the best solution - a solution that addresses all of the client's concerns.¹¹²

It is noteworthy that such solutions may not always be reached through the court process; there are those situations that require alternative approaches, depending on the expected outcome. These alternative approaches may include, but not limited to alternative dispute resolution mechanisms (ADR) such as negotiation and mediation, amongst others. Indeed, it has been observed that in addition to being trained as adversaries, however, lawyers are also trained to resolve disputes. As a result, only the poor lawyer mechanically applies legal principles and in so doing fails to recognize a client's underlying interests and emotions. The prospect of mediating such interests and of bringing parties together in the process is not without foundation in the traditional practice of law.¹¹³

It has been argued that the essence of lawyers in society is that they create, find, interpret, adapt, apply, and enforce rules and principles that structure human relationships and interactions, that is, they "handle" the rules and norms that define rights and duties among people and organizations.¹¹⁴ In other words, they are viewed as specialists in societal ordering since they engage in various activities that form aspects of normative ordering, including, legislation, administrative rule-making, private contracting and deal-making, counseling and planning, mediation, arbitration, and litigation which all involve the processing of rules and norms that structure and stabilize human relationships.¹¹⁵ It is noteworthy that law should not be practiced in the abstract since the societal context is important. Lawyers have a role to play as negotiators and peacebuilders. They are opinion shapers in society and what they say matters. The many lawyers in Kenya are leaders in their counties and villages or communities where they come from. It has been observed that the leadership roles that lawyers play in society tend to bring them into

¹¹¹ P. Brest & L. H. Krieger, 'New Roles: Problem Solving Lawyers as Problem Solvers,' *Temple Law Review*, Vol. 72, 1999, p.811.

¹¹² *Ibid.*

¹¹³ W. Rich, 'The Role of Lawyers: Beyond Advocacy,' *BYU Law Review*, Vol. 1980, Issue 4, 1980, pp. 767-784 at p.767.

¹¹⁴ R.C. Clark, 'Why So Many Lawyers? Are They Good or Bad?' *Op cit*, p.281.

¹¹⁵ *Ibid*, p. 282.

situations of greater, not less, uncertainty. They need to know how to make unbiased assessments of risky situations.¹¹⁶ As such, a good lawyer can assist clients in articulating their problems, defining their interests, ordering their objectives, and generating, assessing, and implementing alternative solutions.¹¹⁷ This demands multifaceted problem-solving and decision-making skills, amongst other skills as highlighted elsewhere, which in turn requires a broad approach to teaching and training of lawyers.¹¹⁸

5. Remoulding the Lawyer

It has been observed that negotiation tends to be used when conflicts are relatively simple, of a low intensity, and when both parties are relatively equal in power while mediation, on the other hand, tends to be used in disputes characterized by high complexity, high intensity, long duration, unequal and fractionated parties, and where the willingness of the parties to settle peacefully is in doubt.¹¹⁹ Both negotiation and mediation are vital ingredients to peacebuilding. Lawyers have a role to play in the processes. It is however necessary to remould their thinking and effect necessary reforms so as to enable the lawyer to participate as a negotiator, mediator and peacemaker more effectively.

5.1 Guaranteed Remuneration

As way of encouraging more lawyers to take up ADR practice, the *Advocates (Remuneration) (Amendment) Order*, 2014 can be reviewed so as to include provisions on charges for ADR services rendered by advocates acting as ADR practitioners. This is because, as it is now, the Order mainly provides guidelines on fees related to matters that are considered 'legal' in terms of content and the arising rights or obligations. That is, it contemplates matters or transactions that relate to justiciable rights and obligations which can be defended through litigation, when violated. It thus leaves out services or processes carried out by lawyers, as problem solvers, with the aim of addressing human needs and desires which are more psychological than material in nature. The effect is that few lawyers engage in direct peacebuilding because, amongst other possible reasons, there is no financial incentive to do so. It needs not be emphasised that human needs and desires are some of the main issues that affect peace, stability and the general wellbeing of a society. ADR mechanisms offer the perfect

¹¹⁶ P. Brest, 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' *op cit*, p.11.

¹¹⁷ *Ibid*, p.9.

¹¹⁸ *Ibid*.

¹¹⁹ J. Bercovitch and R. Jackson, "Negotiation or Mediation? An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict," *Negotiation Journal*, Vol. 17, Issue 1, January 2001, pp. 59–77, p.59.

opportunity to address such issues and should therefore be encouraged. Including a charging schedule for ADR services offered by practising lawyers can assure them of income, and this perhaps would address the existing fear that promotion of ADR may deny the advocates income. Instead, this would offer the country a chance to tap into the benefits that come with the exploitation of these mechanisms. ADR practitioners would also be motivated by the guaranteed income to engage in ADR and even promote its use in the country. The outcome would be savings in cost and time and ultimately, creation of a just, secure and peaceful society for all. With internal peace and harmony guaranteed, it becomes easier to deal with external threats to the country's peace and cohesion.

5.2 Training in ADR

The changing practice of law means that lawyers should be dynamic in their practice of law. There is need for reconceptualization of a lawyer's job to make their formal engagement as negotiators, mediators and peacebuilders part of what they do, and charge for it. There should be a formal mechanism that provides guidelines on how lawyers can be engaged to act as negotiators, mediators and peacebuilders in resolving community conflicts.¹²⁰ Conflict resolution processes have evolved as major alternatives to the litigation or adversary system, and practice in these processes continues to increase.¹²¹ Another focus of law practice and legal education in the twenty-first century involves creative problem solving as an evolving role for lawyers.¹²² They should be ready to embrace the non-adversarial approaches instead of traditional litigation strategies and this may include the practice of preventive law which departs from the more common litigation or court system approach and focuses primarily on counseling and regular "legal check-ups," in order to anticipate or avoid legal matters.¹²³ Lawyers ought to be problem solvers and peace makers, not ones obsessed with 'winning' cases.¹²⁴ In both mediation and negotiation, lawyers should reduce unrealistic expectations by their clients while maintaining the confidence of their clients to reach favourable outcomes for them.

¹²⁰ For instance, in the 2008 post-election violence in Kenya, the involvement of lawyers as peacebuilders was minimal.

¹²¹ K.K. Kovach, "Lawyer Ethics must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards." *Idaho L. Rev.*, Vol. 39, 2003, pp. 399-713.

¹²² T.D. Morgan, 'The Changing Face of Legal Education: Its Impact on What it Means to Be a Lawyer,' *Akron L. Rev.*, Vol. 45, 2011, p. 811.

¹²³ *Ibid.*

¹²⁴ See generally C.J.M. Meadow, "When Winning Isn't Everything: The Lawyer as Problem Solver," *Hofstra Law Review*: Vol. 28: Iss.4, 2000.

5.3 Holistic Law Curriculum

Arguably, both legal education and the lawyering process could benefit from careful attention to the skills and concepts needed for effective non-adversarial conflict management.¹²⁵ There is need to change the way university law schools in Kenya train lawyers. Right from first year, they are taught how to be combative in court. Attention is not drawn to the potential that exists in the ADR arena. Lawyers are not taught that they can be boardroom negotiators dealing with millions of dollars. They are not taught to be community peacemakers. 'Legal practice' needs to be redefined and include ADR practice considering that this is now part of Kenya's legal framework.¹²⁶ It has been argued that the need for these skills can only grow as law school graduates encounter problems with increasingly complex technological, global, financial, institutional, and ethical dimensions.¹²⁷ This is important if the legal education offered in law schools is to effectively prepare the lawyers in addressing the needs of a changing society.¹²⁸ This way, it is argued, students can develop lawyering skills in the contexts of different areas of practice, emphasizing those that fit their particular interests and career plans.¹²⁹

Law schools can adequately prepare lawyers through equipping them with basic skills in negotiation and mediation, which will in turn help them play an active role in nation-building and peacebuilding for a better Kenya. To give them such a voice, they should be equipped with negotiation and mediation skills right from school or college level. Arguably, as a country, we might have been able to resolve the Kenyan 2007/2008 post-election crisis faster, had we had prominent lawyers engaged in the peace process. They would have participated as peacemakers not as hawkish partisans, like everyone else. Nelson Mandela, former South Africa's President, was a lawyer and a peacebuilder and his contribution to society was not in courtroom battles and submissions. His legacy is in what he did to ensure a peaceful transition. George J. Mitchell, a former U.S. Senate majority leader and lawyer known for efforts at brokering peace in Northern Ireland and the Middle East, was described in a May 2012 statement by President of the United States, Barack Obama, as "a tireless advocate for peace."¹³⁰ Obama went on to state that "His

¹²⁵ W. Rich, 'The Role of Lawyers: Beyond Advocacy,' *op cit* p.777.

¹²⁶ The Policy, legal and institutional framework for ADR is systematically falling in place with the promulgation of the 2010 Constitution, the amendment to the Civil Procedure Rules and acceptance of ADR as an effective conflict management tool by various stakeholders.

¹²⁷ P. Brest, 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' *op cit*, p.5.

¹²⁸ *Ibid*.

¹²⁹ *Ibid*, p.6.

¹³⁰ B. McNeill, 'Former U.S. Sen. George Mitchell to Receive Thomas Jefferson Foundation Medal in Law,' (University of Virginia School of Law, Feb. 28, 2012), available at http://www.law.virginia.edu/html/news/2012_spr/mitchell_tj_medal.htm [Accessed on 1/08/2015].

[George's] deep commitment to resolving conflict and advancing democracy has contributed immeasurably to the goal of two states living side by side in peace and security."¹³¹

It has been argued that although no law school curriculum can substitute for good mentoring in a lawyer's early years of practice and for the experience of grappling with actual problems day to day, law schools can however, provide a strong foundation for the ongoing, reflective self-education that is integral to any successful professional career.¹³² It is further contended that ensuring that today's law students graduate with this foundation will not, by itself, turn the legal profession around. However, to the extent that we increase the number of lawyers who possess the requisite skills for negotiation and mediation for peacebuilding we will improve the effectiveness of lawyers in their work, especially as peacemakers and development agents in the society.¹³³

6. Conclusion

It is evident from the discussion above that lawyers have a critical role to play in society. They can enhance the rule of law through peacebuilding and engaging in ADR processes such as negotiation and mediation. Peace is necessary for development to take root. Lawyers have a role to play. It is possible to remould the Kenyan lawyer to be the ultimate negotiator, mediator and peacemaker in a society that aims at achieving the rule of law, development and prosperity.

¹³¹ Ibid. George Mitchell served as special envoy (until May 2012) for Middle East peace under President Barack Obama, a role in which he led American efforts to advance Israeli-Palestinian peace negotiations.

¹³² P. Brest, 'The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers,' *op cit*, p.17.

¹³³ Ibid, p.17.

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