

UNDERSTANDING THE MEDIATION PROCESS

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In the early part of this year, 2008, the word “**MEDIATION**” featured prominently in the media in Kenya following the appointment of H.E Mr. Kofi Annan as mediator in the post election conflict in Kenya. Three incidents during that period provide a justification for this paper.

THE FIRST INCIDENT.

One politician was reported to have urged the mediator, H.E Mr. Kofi Annan, to speed up his “verdict”. In a talk show program on one of the local television stations, a lawyer remarked that mediation has no place in Kenya as it has, historically only been used where constitutional order has broken down and that, according to him, there is constitutional order in Kenya and a clear constitutional roadmap on how conflicts of an electoral nature should be resolved, namely through the courts. He therefore suggested that mediation had no place in the political dispute.

THE SECOND INCIDENT.

During the early stage of the mediation process H.E. Mr. Kofi Annan was reported in the press to have said, perhaps to the surprise amazement and consternation of some observers that the representatives of the different parties at the Serena Hotel talks, were beginning to work as a team. Yet, that comment by H.E. Mr. Kofi Annan captures the power of mediation as a dispute resolution mechanism over many other dispute resolution methods.

THE THIRD INCIDENT.

A writer in one of the local dailies took issue with the objection by one of the party’s to the talks to the involvement of Mr. Ramaphosa in the mediation panel and suggested that that objection smirked of bad faith.

It is against that background that this paper seeks to briefly look at the process of mediation.

WHAT THEN IS MEDIATION?

Mediation is one of the many ways in which people in conflict seek to respond to or resolve disputes. Disputes arise all the time. Over time society has, and continues to evolve methods of dealing with conflicts. In some cases formal methods are resorted to for instance by using the state provided machinery of courts and tribunals. In other cases the parties in dispute may decide to ignore the dispute or to do nothing about it. In other cases the parties might resort to violence, which marks a breakdown in law and order, as witnessed in Kenya after the December 2007 general election.

One of the more common methods of dealing with conflicts or disputes is negotiation. Everybody negotiates without even being conscious of it. It is a process where the parties in conflict discuss or bargain as between themselves with a view to arriving at a mutually acceptable solution. It is **COMMUNICATION** for purposes of persuasion. In other words, dialogue between two or more people for the purposes of arriving at mutually agreeable solution. In some cases the parties in conflict may seek the intervention of a third party to facilitate the negotiation. That is mediation. The parties in dispute appoint a trusted neutral third party or parties who assist the parties in conflict in steering the negotiations. It is a process where a third party neutral facilitates the negotiation process between the disputing parties. Mediation is therefore an extension of the negotiation process. It is facilitated negotiation using a neutral third party who is appointed by the parties or for the parties.

The mediation process may take different forms. It may be structured to involve the following stages or variations of the following stages:

- 1.** Once the mediator has been appointed by the parties in dispute he will convene a meeting with the parties. Typically the meeting will begin with introductions. The mediator will then familiarize the parties with the process, set the atmosphere for the process and create a positive resolution-seeking attitude among the parties. He will seek to establish and maintain trust and confidence in the process, establish rapport between the parties, negotiate and establish ground rules. The ground rules might include agreement on the order in which the parties will speak, an understanding that everyone will have an opportunity to speak and should be accorded opportunity to do so without interruption, that civility and respect will be maintained. Agreement may also be reached on whether caucuses will be held i.e. whether the mediator may meet privately with the different parties away from plenary and if so the rules of caucusing;

whether the mediator will be at liberty to make suggestions; an understanding that the mediator will not make or have power to make decisions on behalf of the parties; establish parameters of confidentiality, strike an understanding that the mediation is voluntary and that the mediator can terminate the process at any time and that each party can also terminate process at any time etc. In the context of the Kenya mediation talks one of the ground rules that should have perhaps been negotiated and agreed upon should have been that none of the parties should have been at liberty to brief the press and that all communication with the press/media should have been through the mediator once the content of such briefing is agreed upon by the parties.

2. Once the ground rules are agreed upon each party should have an opportunity to provide his perspective of the dispute or present his interpretation of the facts preferably without interruption. This does not only give the parties opportunity to vent or let out their frustrations and express their anger and emotions (there is no such opportunity in court) but it also helps the parties to understand each other's perspective of the facts, interests and issues. It also helps the mediator understand the parties interests and issues and to identify obstacles to resolution. It also provides an opportunity for the parties to hear, directly from the other party, that other party's perspective. The mediator needs to be an active listener and may ask questions and may seek clarification during this stage of the mediation process.

3. Once the parties have told their stories the mediator will clarify and confirm the interests of the disputants by summarizing for each disputant his understanding of the disputant's perspective. He checks with each disputant to ensure accuracy of mediators understanding of the disputants interests and may encourage parties to speak directly to one another and to ask and answer questions, clarify misunderstandings and offer acknowledgement.

4. Having obtained clarification the mediator will next facilitate the disputants to develop a list of issues with the object of helping them focus on the specific matters or items, which must be resolved. The object should be to ensure that all issues which must be resolved in order to resolve the dispute are identified, ensure the list is complete and frame the issues in a way that promotes problem solving i.e. frame issues in a positive way and using neutral language and in a way that invites option generation.

5. Having generated a list of issues the mediator encourages the parties to generate options. The mediator should aspire to get the disputants to express options with which they are familiar and should also encourage the parties to be as creative as possible.

At this point the pros and cons of each option should, it is suggested, not be explored or discussed. The mediator should thus encourage the disputants to suspend criticism and urge them to focus their attention to the problem rather than on each other. In other words “remove or separate the people from the problem”. It is debatable whether the mediator should suggest options, as there may be concerns of bias.

6. Once all the options are in the basket the mediator will then facilitate negotiation between the parties. He will help the parties explore the options against their respective best alternatives to a negotiated agreement and help the parties pick realistic options for resolution for instance by encouraging parties to use objective criteria to choose from among options. Caucus may be a useful technique for this purpose.

7. The mediation will hopefully result in agreement. The mediator assists the parties to make the transition from a preferred settlement option to a settlement agreement. He should ensure that the settlement deals with all the issues. If there is no agreement, he should acknowledge progress made and explore prospects for use of mediation process in future.

Often times the process of mediation transforms disputants from adversaries to allies in the search for solutions and in the words of H.E Mr.Kofi Annan, erstwhile disputants begin to work as a team. The role of a mediator is not to give a verdict. He does not hold the position equivalent to that of a Judge or magistrate or that of an arbitrator whose role is to render a verdict or to make a determination or give a binding decision. The power to make decisions in mediation vests on the parties.

The mediator must attempt to understand as much of the conflict as possible. He must be an impartial convenor. He facilitates the negotiation process as a neutral. Mr. Ramaphosa captured this role of a mediator in his remarks to the press after he declined involvement in the mediation following objection by one of the parties by stating that a mediator must enjoy the full confidence of the disputants in the mediation process. He must strive to enhance communication between the parties.

A mediator must serve the role of a reality tester – typically in caucus when the mediator might ask difficult questions, which make parties think about positions they may be taking. He is a resource expander in that the mediator may assist the parties with information they need to make informed decisions.

He is also an educator of interest based bargaining, as the mediator will educate the parties in principled negotiation that seeks to get the parties to focus on interests as opposed to positions and posturing. He is also a guardian of the process in the sense that he should endeavour to ensure that the process is not abused or used to oppress.

On the whole the mediation process is very unlike the adversarial court process where issues are narrowly defined, addressed and a binding decision or verdict handed down which may or may not adequately or fully address the disputants underlying interests and concerns. To a large extent the mediation process should result in procedural, psychological and substantive satisfaction to the parties in dispute.

Whereas mediation may not be appropriate for all types of disputes it is certainly an effective efficient and cost effective dispute resolution mechanism for parties in conflict genuinely intent on seeking solutions to such conflicts. It would be useful and indeed desirable to have a constitutional or legal framework for mediation in Kenya. The initiative by the Rules committee to amend the Civil Procedure Rules to provide for court mandated mediation must be applauded. Even without a legal framework there is no legal impediment in my view to resolving conflicts through mediation and Kenyans should embrace the process whether in relation to commercial, relationship, family or other types of disputes.

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