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Dealing with Conflicts in Project Management

By Kariuki Muigua*

A Paper Presented at the Continuous Professional Development Workshop for Architects and Quantity Surveyors on 22nd & 23rd September 2011

Abstract

This paper addresses the issue of dealing with conflicts in project management. It looks at the range of dispute settlement mechanisms available to parties in the course of project management in Kenya. Their various merits and demerits are examined. The challenges facing the legal and institutional infrastructure for management of conflicts in Kenya are discussed. These challenges are likely to impact on project implementation and delivery. The paper examines the opportunities afforded by various mechanisms in dealing with conflicts expeditiously and hence ensuring smooth and timely implementation and delivery of projects.

1.0 Introduction

Project management is a methodological approach to achieving agreed upon results within a specified time frame with defined resources and involves the application of knowledge, skills, tools, and techniques to a wide range of activities in order to meet the requirements of a project.[1] Project management is premised on performance, cost and time as its main goals

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[1] Amy Ohlendorf, Conflict Resolution in Project Management, Information Systems Analysis MSIS 488, Fall 2001, available at <http://www.umsl.edu/~sauterv/analysis/488_f01_papers/Ohlendorf.htm> accessed on 24/08/2011

wherein the focus is to meet customer expectations, deliver projects within budget, and complete projects on time.[2]

A conflict is a situation that exists when persons pursue goals that are incompatible and end up compromising or contradicting the interests of another.[3] Conflicts are inevitable in project management and can be time consuming, expensive and unpleasant in that they can destroy the relationship between the contractual parties and also add to the cost of the contract.[4] They can bog down and impede the smooth implementation of projects. P. Fenn argues that disputes and conflicts in projects divert valuable resources from the overall aim, which is completion of the project on time, on budget and to the quality specified. He further argues that they generally cost money, take time and destroy relationships, which may have taken years to develop.[5]

Protracted disputes that remain unsettled can negatively impact on the progress of a project and ultimately delay its delivery. They have attendant negative impact on projects. A delayed project continues to attract costs, fees, penalties and numerous other charges that would otherwise be avoided. For instance a project that is finalized through a loan needs to be implemented and delivered expeditiously so as to minimize financial losses occurring due to interest and other charges.

They impact negatively on relationships. Projects need teamwork in order to be implemented and delivered as planned. But disputes do occur. Indeed they are envisaged in

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[2] Ibid

[3] M.O. Odhiambo, "The Karamoja Conflict: Origins Impacts and Solutions," *Oxfam 2003*, available at, http://www.oxfam.org, accessed on 18/09/2011.

[4] Amy Ohlendorf, Conflict Resolution in Project Management, Information Systems Analysis, op. cit.

[5] Peter Fenn, "Introduction to Civil and Commercial Mediation", in Chartered Institute of Arbitrators, *Workbook on Mediation*, (CIArb, London, 2002), at p. 12.

contracts hence the Dispute Resolution Clause found in various standard form contracts[6]. For example in construction disputes, the most common disagreement will be between the contractor and employer or sub-contractor and the main contractor. It is important for the parties to choose a dispute settlement mechanism that is practicable and effective. It is therefore crucial to work towards avoiding disputes at the first instance. Nevertheless, disputes do occur in any social setting and when they do the need of a speedy, efficient and cost effective dispute resolution mechanism cannot be gainsaid.

Consequently, it is to be noted that the contract negotiation stage is of the greatest importance since it is during this stage that parties agree on the dispute settlement method to be applied in the event of a dispute. If the parties agree in the contract to adopt certain procedures in the event of a dispute arising, one party cannot insist on the use of other procedures, or even other methods of implementing agreed procedures, without the consent of the second party.[7]

2.0 An Overview of the Conflict Management Mechanisms

In the widest sense conflict management mechanisms include any process which can bring about the conclusion of a dispute ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive intervention from external sources, to a full court hearing with strict rules of procedure.[8] The following conflict management mechanisms exist in Kenya;

[6] See, Clause 20 of the FIDIC Conditions of Contract for Construction, First Edition 1999; Clause 45.0 of The Joint Building Council, Agreement and Conditions of Contract for Building Works, 1999 Edition and Clause 31.0 of The Kenya Association of Building and Civil Engineering Contractors, Agreement and Conditions of Sub- Contract for Building Works, 2002 Edition.

[7] See generally, Dispute Resolution Guidance at http://www.ogc.gov.uk/documents/dispute resolution.pdf, accessed on 19/08/2011.

[8] Sourced from, <http://www.buildingdisputestribunal.co.nz/.html> accessed on 24/08/2011.

Negotiation

Negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.[9] In negotiation the parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation.[10] Its advantages, *inter alia,* are that it is fast; cost saving; confidential; preserves relationships; provides a range of possible solutions and there is autonomy over the process and the outcome. Its disadvantages are inter alia that, it requires the goodwill of the parties; endless proceedings; can create power imbalances; it is non-binding unless parties reduce the agreement into writing; creates no precedents and it is not suitable when one party needs urgent protection like an injunction.

If the parties do not reach an agreement through negotiation, they will need to consider what other method or methods of dispute resolution would be suitable. However, it will still be possible or may be necessary to continue with negotiations as part of or alongside other forms of dispute resolution.[11]

Mediation

Mediation is a voluntary, non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution.[12] It has all the advantages of conventional negotiation as set out above but the involvement of the neutral third party can make the

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[9] See *Dispute Resolution Guidance* op. cit.

[10] Peter Fenn, "Introduction to Civil and Commercial Mediation", op. cit, p. 14.

[11] Ibid

[12] Peter Fenn, "Introduction to Civil and Commercial Mediation", op. cit, p.10

negotiation more effective. It should be seen as the preferred dispute resolution route in most disputes when conventional negotiation has failed or is making slow progress.[13]

Conciliation[14]

This process is similar to mediation save that the third party neutral can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation save that the conciliator can propose solutions making parties lose some control over the process.

Med-Arb[15]

It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator.

Arb-Med[16]

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator.

[13] See *Dispute Resolution Guidance* op. cit.

[14] Peter Fenn, "Introduction to Civil and Commercial Mediation", op. cit, p.14

[15] Ibid, p. 15

[16] See *Dispute Resolution Guidance* op. cit.

Dispute Review Boards

Dispute Boards are normally set up at the outset of a contract and remain in place throughout its duration to assist the parties, if they so desire, in resolving disagreements arising in the course of the contract and make recommendations or decisions regarding disputes referred to it by any of the parties.[17]

Early Neutral Evaluation[18]

A private and non-binding technique where a third party neutral (often legally qualified) gives an opinion on the likely outcome at trial as a basis for settlement discussions.[19] The aim of a neutral evaluation is to test the strength of the legal points in the case. It can be particularly useful where the dispute turns on a point of law.

Expert Determination[20]

This is where the parties submit their dispute to an expert in the field of dispute for determination. The expert determinant gives his decision based on his expertise e.g., accountants valuing shares in a company, a jeweler assessing the carat content of a gold bracelet etc[21]

Mini Trial (Executive Tribunal)

This is a voluntary non-binding process where the parties involved present their respective cases to a panel comprised of senior members of their organisation assisted by a neutral third party and has decision making powers.[22] After hearing presentations from both

[17] Sourced from http://www.buildingdisputestribunal.co.nz/DRBS.html, accessed on 24/08/2011

[18] Peter Fenn, "Introduction to Civil and Commercial Mediation", op. cit, p. 15

[19] Ibid

[20] Ibid, p. 16

[21] ibid

[22] Ibid, p.16.

sides, the panel asks clarifying questions and then the facilitator assists the senior party representatives in their attempt to negotiate a settlement.

Adjudication

Adjudication is defined under the CIArb (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.[23]Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract)[24], flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation.[25]

Arbitration

Arbitration in Kenya is governed by the Arbitration Act, 1995, the Arbitration Rules, the Civil Procedure Act (Cap. 21) and the Civil Procedure Rules 2010. Section 59 of the Civil Procedure Act provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules. Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference. Arbitration arises where a third party neutral is

[23] The CIArb (K) Adjudication Rules, Rule 2.1

[24] Ibid, Rule 23.1.

[25] Ibid., Rule 29

appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. The Arbitration Act, 1995 defines arbitration to mean "any arbitration whether or not administered by a permanent arbitral institution." This is not very elaborate and regard has to be had to other sources. According to Khan[26], arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution. It is an adversarial process and in many ways resembles litigation.

Its advantages are that parties can agree on arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.

Litigation

This is an adversarial process where parties take their claims to a court of law adjudicated upon by a judge or a magistrate. The judge/ magistrate gives a judgment which is binding on the parties subject to rights of appeal. The judicial authority in Kenya is exercised by the courts and tribunals.[27]

Conflict Avoidance

It has been suggested[28] that due to the expense and disruption caused to any contract when a dispute arises and the damage to the relationship of the parties the importance of dispute

[26] Farooq Khan, Alternative Dispute Resolution, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

[27] See Article 159 of the Constitution of Kenya, Government Printer, Nairobi.

[28] See *Dispute Resolution Guidance* op. cit.

avoidance techniques cannot be over-emphasized. Conflict avoidance in the construction industry can take various dimensions:

1. Firstly, the contractual parties must ensure a clear wording in the contract that reflects the intention of the parties. The wording of the contract should include provision for the appropriate dispute resolution techniques to be applied in the event of a dispute arising, with suitable arrangements for escalation. [29]
2. Secondly, once the contract is in place good contract management is essential. Contract management techniques should include monitoring for the early detection of any problems where parties should give at the earliest possible warnings of any potential dispute and regular discussions between parties including reviews of possible areas of conflict.[30] This may include meetings to resolve issues such as change orders, extension of time to contractors and assessment of liquidated damages payable.
3. Thirdly, when a contract is initially established the parties should bear in mind how the expiry of the contract is to be managed (especially if there is a need for ongoing service delivery, not necessarily by the contractor) should be borne in mind and reflected in the contract.[31]

Whenever a dispute arises it is important to manage it actively and positively and at the right level in order to encourage early and effective settlement. There are various techniques that can be used either consciously or end product to avoid disputes. According to Fenn[32] these techniques include: risk management to ensure that risks are identified, analyzed and managed;

[29] Ibid

[30] Ibid

[31] Ibid

[32] Peter Fenn, "Introduction to Civil and Commercial Mediation", op. cit, p.14

procurement strategies to ensure that risks are appropriately allocated and contractual arrangements to allow sensible administration.

3.0 Dispute Settlement Clauses in Standard Form Contracts

Clause 20.4 of the FIDIC Conditions of Contract for Construction[33] provides that if a dispute arises either party may refer it to a Dispute Adjudication Board, amicable settlement and arbitration as the dispute settlement avenues. This clause envisages a dispute of any kind whatsoever arising in connection with, or arising out of the contract or the execution of the works, any dispute as to any certificate, determination, instruction, opinion or valuation of the engineer. According to clause 20.5 amicable settlement is resorted to by a party dissatisfied by the decision of the Dispute Adjudication Board and before the commencement of arbitration.[34]

The Agreement and Conditions of Contract for Building Works[35] provides that in the event of a dispute between the Employer or the Architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the Works, the dispute shall be referred to an arbitrator agreed upon by the parties. Where the parties fail to concur on the appointment of the Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of The Architectural Association of Kenya or by the Chairman or Vice Chairman of The Chartered Institute of Arbitrators, Kenya Branch, on the request of the applying party. The clause further provides that the arbitral proceedings shall not commence unless an attempt has

[33] Conditions of Contract for Construction, FIDIC, First Edition 1999.

[34] Ibid

[35] The Joint Building Council, Agreement and Conditions of Contract for Building Works, 1999 Edition.

been made to settle the dispute amicably. Moreover, the award of the arbitrator is final and binding upon the parties[36] and thus an aggrieved party has no further recourse.

The dispute settlement clause under the Kenya Association of Building and Civil Engineering Contractors, Agreement and Conditions of Sub-Contract for Building Works, 2002 provides for similar avenues in the event of a dispute between the contractor and the sub-contractor. A model dispute resolution clause should include all avenues i.e. negotiations in good faith, mediation, adjudication, arbitration and litigation, within time frames on when each mechanism is to be tried to facilitate timely project implementation and delivery.

4.0 Challenges Facing the Conflict Management Framework in Kenya

There are various challenges facing the conflict management framework in Kenya. The mediation process has been criticised as being indefinite, time consuming and does not encourage expediency.[37] This is a big challenge in project implementation and delivery owing to the fact that projects are time bound and thus require a speedy, efficient and cost effective dispute resolution mechanism. Kenya does not as yet have a comprehensive and integrated legal framework to govern the application of mediation in the resolution of disputes. The mediation framework in existence has largely been derived from international law and practice and reduced into guidelines by institutions undertaking mediation in Kenya. However, the constitution[38] and the Civil Procedure Act[39] provide for court annexed mediation, where mediation is used as an alternative to litigation. This way mediation becomes plagued by the shortcomings of the court

[36] Ibid, Clause 45.10.

[37] Tim Murithi & Paula Murphy Ives, Under the Acacia: Mediation and the dilemma of inclusion, *Centre for Humanitarian Dialogue*, April 2007, pg. 77.

[38]Article 159 (2) (c) of the Constitution of Kenya, Government Printer, Nairobi, 2010.

[39]See Section 81 (2) (ff) of the Civil Procedure Act and Order 46 Rule 20 of the Civil Procedure Rules 2010.

process and as such not an effective mechanism in settling disputes arising out of projects which are normally time-bound.

Kenya does not have an Act dealing with Construction Adjudication and parties rely on the Construction Adjudication Rules framed by the Chartered Institute of Arbitrators. There is need to expand the scope of the Civil Procedure Act and entrench adjudication as a means of dispute resolution. There is also need for a constitutional provision on court ordered adjudication to avoid a situation where attempts to order adjudication by court are thwarted by constitutional references. These Adjudication Rules provide for the basic procedure for adjudication and for adjudication to be applicable, the subject construction contract must have an adjudication clause.[40] This is because at present, adjudication cannot be imposed by the law even where the contract in question is ideal for it. In any case, given that adjudication is not legislated for in Kenya, there is no provision for stay of proceedings for parties to undertake adjudication as provided for in the case of arbitration under the Arbitration Act 1995. Rule 29 of the CIArb Adjudication Rules makes it feasible to refer the matter to arbitration or litigation. The effect is that whether or not a dispute will be referred to adjudication in Kenya presently depends on the parties' willingness to participate in the process. This reality has hindered the application and attainment of full potential of adjudication as a mechanism for dispute resolution in Kenya.[41]

Arbitration, as practiced in Kenya, is increasingly becoming more formal and cumbersome as lawyers enter the practice of arbitration applying delay tactics and importation of

[40] See generally, Kariuki Muigua, Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: It's Development and Lessons for Kenya, A Paper presented at Nairobi Club on 23rd September, 2008.

[41] Ibid.

complex legal arguments and procedures into the arbitral process.[42] The Civil Procedure Act does not help matters as it leaves much leeway for parties bent on frustrating the arbitral process to make numerous applications in court. It is hardly feasible to describe arbitration in Kenya as an expeditious and cost effective process which can be used in settling disputes arising out of the construction contracts where project implementation and delivery is at the heart of the contract. In essence arbitration is really a court process since once it is over an award has to be filed in court and thus the shortcomings of the court system apply to the arbitration process.

Litigation in Kenya is characterized with many problems related to access to justice for instance high court fees, geographical location, complexity of rules and procedure and the use of legalese. The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.'[43] As a result litigation may take several years before settlement of disputes hence hampering the effective implementation and delivery of projects which are justice in environmental issues to be inaccessible to many people. This is due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice, litigation is so slow and too expensive and it has largely lost commercial and practical credibility necessary in project implementation.

5.0 Opportunities Offered by Various Dispute Settlement Mechanisms in Project Management

1. **Negotiation:** Negotiation can be, and usually is, the most efficient form of conflict resolution in terms of time management, costs and preservation of relationships. It should

[42] See Kariuki Muigua, "Overview of Arbitration and Mediation in Kenya"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011.

[43]Jackton B. Ojwang,"The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), p. 29.

be seen as the preferred route in most disputes arising out of construction contracts owing to the fact projects are time bound and thus need timely implementation and delivery. It prides itself on speed, cost saving, confidentiality, preservation of relationships, range of possible solutions and control over the process and outcome which attributes are vital in ensuring the expeditious handling of disputes and the overall management and implementation of the project. Moreover, even if parties are unable to achieve a settlement through negotiation, it will still be possible or may be necessary to continue negotiating as part of or alongside other forms of dispute resolution.[44]

2. **Mediation** It should be seen as the preferred conflict resolution route when conventional negotiation has failed or is making slow progress.[45] It is a cost effective, flexible, speedy, confidential process that allows for creative solutions, fosters relationships, enhances party control and allows for personal empowerment and hence suitable in settling disputes to ensure effective project management and implementation. Mediation is particularly useful in projects because of the need to preserve the ongoing relationship between the parties.[46]

[44] See *Dispute Resolution Guidance* op. cit.

[45] Ibid.

[46] Sourced from< http://www.buildingdisputestribunal.co.nz/.html>accessed on 24/08/2011.

3. **Adjudication:** Adjudication is an informal process, operating under very tight time scales, flexible, fast and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The adjudicator is supposed to reach a decision within 28 days or the period stated in the contract.[47]To guarantee impartiality and neutrality of the adjudicator, the Rules provide that s/he must not be involved in implementation or administration of the contract under which the dispute arises; be knowledgeable and experienced in the matter in dispute, preferably a construction expert and be well versed in dispute resolution procedures.[48] The CIArb Adjudication Rules provide for procedural fairness, natural justice, courts procedures, jurisdiction of the arbitrators, definition of construction adjudication, scope of the adjudicators powers, timeframe and extension of time, enforcement of adjudication awards, stay of court proceedings pending adjudication, appointment of adjudicators, misconduct of adjudicators and other ethical issues, adjudication fees per scale or as agreed by the parties, recognition of adjudication awards, correction of slips or errors, points of law, extent of court intervention, failure to adjudicate and adjudication agreement.[49] Since adjudication is flexible, fast, expeditious, cost effective and informal, it may be the way to go if effective project implementation and delivery is to be realized in the construction and building industry in Kenya.
4. **Early Neutral Evaluation:** a private and non-binding technique where a third party neutral (often legally qualified) gives an opinion on the likely outcome at trial as a basis

[47] Adjudication Rules, Rule 23.1.

[48] See Kariuki Muigua, Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: It's Development and Lessons for Kenya, op. cit.

[49] Ibid

for settlement discussions. Although settlement is not the primary objective, the purpose of early neutral evaluation is to promote settlement discussions at an early stage in the litigation process, or at the very least to assist parties avoid the significant time and expense associated with further steps in litigation of the dispute[50]. The opinion can then be used as a basis for settlement or for further negotiation. It would save time and costs that would be expended in dispute settlement and hence effective project implementation and delivery.

5. **Expert determination:** this is a fast, informal and cost efficient technique which is applicable where there are disputes of a technical nature for example between the contractor and the architect or employer. It has become a popular method of resolving disputes in the building and construction industry involving qualitative or quantitative issues, or issues that are of a specific technical nature or specialized kind, because it is generally quick, inexpensive, informal and confidential. Expert determination is an attractive method of resolving disputes in building and construction contracts as it offers a binding determination without involving the formalities and technicalities associated with litigation and arbitration; and at the same time it assists in preserving relationships where litigation would not[51]. Expert determination can be used in disputes related to; measure and value claims; variation claims; value of additional building and civil works; the standard of work completed i.e. concrete finishes, stopping, painting and specialist finishes, flooring, tiling, waterproofing etc.; extension of time claims; delay and disruption claims etc.

[50] Building Disputes Tribunal, New Zealand<http://www.buildingdisputestribunal.co.nz/.html>accessed on 24/08/2011.

[51] Ibid.

6. **Arbitration:** even though closely related to litigation, there are certain salient features of arbitration which make it an important and attractive alternative to litigation. In arbitration the parties have autonomy over the choice of the arbitrator, place and time of hearing, and as far as they can agree, autonomy over the arbitration process which may be varied to suit the nature and complexity of the dispute.[52]
7. **Litigation:** where the contract between the parties does not stipulate for a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation it is possible to bring an unwilling party into the process and the result of the process is enforceable without further agreement.[53] The constitution postulates that the courts and tribunals shall do justice to all irrespective of status; justice shall not be delayed; alternative forms of dispute resolution shall be promoted and justice shall be administered without undue regard to procedural technicalities.[54] With such a reformed judiciary litigation may become an efficacious process once again and parties to a contract may resort to it. Litigation should not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary.

6.0 Recommendations and Way Forward

Projects are time bound thus the conflict resolution procedure selected should be one that can manage conflicts in an expeditious, transparent, impartial, objective and constructive manner within the projected timelines. The mechanism should be easily accessible by the contractual parties from project planning, implementation and completion and where possible the

[52] Ibid

[53] See *Dispute Resolution Guidance* op. cit.

[54] See Article 159 (2) of the Constitution of Kenya 2010, Government Printer, Nairobi.

mechanism should not interfere with the progress of the project. This is the need for early dispute settlement and application of dispute avoidance techniques in project implementation. It should be predictable allowing actions taken in response to complaints to be efficiently monitored and timely reported to the disputants. The following recommendations are essential in settling disputes in project management:

1. **Constructing a Dispute Resolution Clause**

It has been said that the inclusion of an alternative dispute resolution clauses in a contract allows the settlement process to begin at an early stage and obviates the frequent problem of persuading the other party to the dispute to engage in an ADR process thus saving on time. A model dispute resolution clause should include all avenues i.e. negotiations in good faith, mediation, adjudication, arbitration and litigation. Such a dispute resolution clause should provide timelines within which each mechanism is to be tried so as to avoid a scenario whereby the projected timeframes for completion are jeopardized.

2. **Improving the Legal and Institutional Framework for Managing Conflicts in Project Management**

There is a need to restore speed, flexibility and public confidence in the existing legal and institutional mechanisms. The legal system has been criticized for being too slow and expensive and has thus lost commercial and practical credibility necessary in project implementation. The flexibility, speed and cost effectiveness of ADR techniques such as negotiation, mediation and adjudication is what can lead to expeditious settlement of disputes in projects and thus these mechanisms need formal incorporation in the legal system. Kenya does not yet have an Act dealing with Construction Adjudication and parties rely on the Construction Adjudication Rules

framed by the Chartered Institute of Arbitrators. An Adjudication Bill should be introduced in parliament to provide the legal framework for the application of adjudication in construction contracts in Kenya. There is a need to have a comprehensive and integrated framework providing for mediation in Kenya in the resolution of disputes as mediation has been linked to the court process and hence subject to the shortcomings of litigation.

3. **Working as a Team to Achieve Project Goals**

Need for transparency and open communication through continuous dialogue and focused site meetings between the contractors and the employers; sub-contractors and contractors etc to facilitate early dispute resolution and avoidance of disputes.

4. **Need for Conflict Avoidance**

It is important to manage disputes actively and positively and at the right level in order to encourage early and effective settlement. Good risk management techniques to ensure that risks are identified analyzed and managed; procurement strategies to ensure that risks are appropriately allocated and contractual arrangements to allow sensible administration should be in the party's contemplation while contracting. Such techniques may include Strategic Impact Assessments and Environmental and Social Impact Assessments before the projects are undertaken and regular audits in the course of the projects.

5. **Use of Scientific Technology for Certainty**

This may involve coming up with a critical path analysis of the project and represent this in gant charts. A critical path is a project-management technique that lays out all the activities needed to complete a task, the time it will take to complete each activity and the relationships between the activities. A critical path analysis can help predict whether a project can be

completed on time and can be used to reorganize the project both before starting it, and as it progresses, to keep the project's completion on track and ensure that deliverables are ready on time.[55] A critical path can thus be useful in handling disputes as it takes into the account the eventualities that may arise in the course of the contractual performance.

7.0 Conclusion

There is a need to have an efficacious conflict management mechanism in the course of projects in order to ensure effective project implementation and delivery. It is not possible to achieve efficient implementation in the face of unresolved disputes. There is a need to put in place mechanisms for effective management of conflicts. Kenya will benefit from a legal and institutional framework that is flexible, speedy, cost effective, and efficacious to ensure that conflicts arising out of projects are disposed expeditiously. Since conflicts consume a lot of time, are expensive and may destroy the relationship of parties, the need of an effective mechanism is crucial.

[55] Sourced from <http://www.investopedia.com/terms/c/critical-path-analysis>accessed on 26/08/2011.