

- Ogola, John Joseph

CO-OPERATIVES AND ARBITRATION:

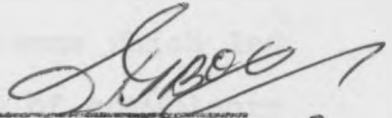
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FOR  
THE DEGREE OF MASTER OF LAWS  
O F  
THE UNIVERSITY OF NAIROBI

BY  
J.J. Ogola

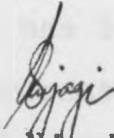
JUNE 1979

This Thesis is my original work and has not been presented for a degree in any other University.



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This Thesis has been submitted for Examination with my approval as University Supervisor.



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P R E F A C E

Sections 70, 72 and 80 of the Co-operative Societies Act, 1966 provide for reference of disputes to arbitration. The purpose of this thesis is:

- (i) to find out the reasons which led to the introduction of compulsory arbitration in co-operative legislation in Kenya;
- (ii) to establish whether those reasons are justified either in theory or in practice;
- (iii) to determine the exact scope of the above sections and, in particular, the relationship between disputes falling under Section 70 and those falling under section 80;
- (iv) to examine how the settlement of co-operative disputes has been conducted under the present law; and
- (v) to suggest how the current legislation could be improved.

A few comments on Chapter I and II appear to be necessary at this stage.

Chapter I contains the Introduction in which I have surveyed and analysed some definitions of a "Co-operative Society" which have been given by some well known authors. The survey and analysis are primarily intended to supply relevant background material, to emphasis the principles which underly the Kenyan concept of Co-operation and to examine briefly the extent to which those principles are reflected in Co-operative Legislation in Kenya.

In Chapter II, I have endeavoured to provide the reader with the Government's Co-operative Development policy only in so far as that policy influenced, or is thought to have influenced, the incorporation into the Co-operative Societies Act of the Sections providing for compulsory arbitration. It is in furtherance of this objective that I have relied mainly on the speeches which the then Minister for Co-operative Development made to Parliament when he was introducing the Co-operative Societies Bill.

This dissertation is not a treatise on Co-operative Law, and it does not seek to examine the potentialities of Co-operative Law as an instrument of government sponsorship of Co-operative Societies in Kenya.

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## CHAPTER I

### INTRODUCTION

#### 1. What is a "Co-operative Society"?

A somewhat remarkable feature of co-operative studies in Kenya is the fact that the statute that is primarily applicable to co-operatives does not contain a definition of a "Co-operative Society". Even though the statute is entitled the "Co-operative Societies Act, 1966",<sup>1</sup> the phrase "co-operative society" is not defined therein. Section 2 of the Act, however, defines a "registered society" as a society registered as a "co-operative society" under the Act, but it does not state what a "co-operative society" is.

In the writer's view the existence in the Act of a definition of a "co-operative" or a "Co-operative Society" could have facilitated a legal study of Kenyan co-operatives, especially if the definition spelt out clearly the major principles that underly the co-operative legislation.<sup>2</sup>

The need for such a definition becomes even more obvious when it is remembered that Kenyan co-operatives, unlike West European Co-operatives,<sup>3</sup> are institutions of the Law.<sup>4</sup>

The writer now proposes to refer to a few definitions of "Co-operatives" which have been given by some well known authors as it is hoped that this will : -

- (a) facilitate the reader's appreciation of the basic principles that underly the Kenyan Concept of Co-operation;
- (b) reveal the ideological link which exists between Kenyan co-operatives and co-operatives which exist in other countries; and
- (c) indicate the basic differences between co-operatives and other business associations existing in Kenya.

## 2. Definitions of "Co-operative Society"

According to C.R. Fay, a co-operative society is "an association for the purpose of joint trading, originating among the weak, [emphasis my own] and conducted always in an unselfish spirit, [emphasis my own] on such terms that all who are prepared to assume the duties of membership may share in its rewards in proportion to the degree in which they make use of their association".<sup>5</sup>

The writer is, however, dissuaded by the underlined words from registering his concurrence with this

definition. It is felt that to claim that co-operative organisations are associations "originating among the weak" is to initiate a somewhat controversial line of investigation. It is also submitted that the definition does not help us demarcate the major areas of difference between "co-operatives" and other business associations like companies and partnerships which also exist "for the purpose of joint trading".

Although history indicates that those who initiated the formation of co-operatives during the last century were usually the relatively poor members of society<sup>6</sup> it would be patently illogical to postulate poverty or economic weakness as a precondition for co-operation. It is submitted that any group of legally qualified individuals can form a co-operative society irrespective of their economic strength or weakness, provided that they are drawn together in consequence of their desire to conduct the venture under contemplation in accordance with co-operatives principles.

Secondly, Fay's assertion that the affairs of a co-operative are conducted "always" in an unselfish manner is undoubtedly unwarranted. The Kenyan experience has shown numerous instances when those

entrusted with the management of co-operatives have so conducted the affairs of those organisations as to substantially further their own selfish interests. Speaking in the House of Representatives during the debate on the Co-operative Societies Bill the then Minister for Co-operatives and Social Services had this to say:

"The co-operative movement<sup>7</sup> is suffering from some serious problems, which have prompted me into bringing this new bill to this House ... There have been very many cases of misappropriation of funds and misapplication of society funds in different areas... a single co-operative society since independence has lost Shs. 700,000/- since 1963, as a result of this very sad situation which is going on in some of the co-operative societies."<sup>8</sup>

Although Fay's statement may be regarded simply as a genuine expression of a strong ideal or desire by a committed co-operator, it must be stressed that such ideals are not the monopoly of co-operators but are shared equally by those associating in companies<sup>9</sup> and partnerships.<sup>10</sup>

While the statement that members of a co-operative may "share in its rewards in proportion to the degree in which they make use of their association" emphasizes a basic principle to which reference will be made later, it does not furnish the criteria for

ascertaining the essential nature of co-operatives whether as sociological or business entities.

Dr. G. Mladenatz has defined co-operatives as "associations of persons, small producers or consumers, who have come together voluntarily to achieve some common purpose by a reciprocal exchange of services through a collective economic enterprise working at their common risk and with resources to which all contribute".<sup>11</sup>

Although the reference to "small" producers or consumers reiterates, albeit indirectly, the common belief that it is the weak, small, or poor members of society that are driven into co-operation by sheer necessity we can ascertain from the definition the fact that a co-operative is essentially a business organisation.

Is it platitudinous to refer to co-operatives as associations of "persons"? After all, it is only persons (legal or human) who can associate together for the purpose of joint trading. The justification for such reference is sometimes stated in these words:

"As all lacked a sufficiency of capital, capital could not be the basis of association. The only other basis was the human individual, and accordingly the first principle of co-operation is that members join as human persons and not as capitalists".<sup>12</sup>

Legal persons cannot, therefore, become members of a co-operative society. This "principle of co-operation" has been given statutory effect by s. 16 of

of the Kenya Co-operative Societies Act, 1966, which provides that no company incorporated or registered under the Companies Act shall be entitled to become a member of a registered society unless the Commissioner for Co-operative Development has consented in writing to the proposed membership.

However, a registered co-operative society (which is itself a "legal person")<sup>13</sup> may join another co-operative society since s.2 of the Act defines "member" as including "a person or registered society joining in the application for the registration of a society, and a person or registered society admitted to membership after registration in accordance with the by-laws".

It should be emphasized that the "principle of co-operation" restricting membership of co-operatives to human persons has not been abrogated in Kenya but has, in the writer's view, been modified by the provisions of the Co-operative Societies Act which empower the Commissioner for Co-operative Development to admit legal persons to co-operative membership in appropriate circumstances.

The writer will conclude the survey of the nature of co-operatives by referring to Helm's definition of "co-operation". According to F.C. Helm,<sup>14</sup> "Co-operation

could be defined in the widest sense as a voluntary organisation of economic units, based on equality, carrying out an allocated or self-given economic objective. The co-operative society in its nature is neither capitalistic nor socialistic but a neutral means of organisation which can serve various aims and economic systems."

What Mr. Helm apparently seeks to convey is the idea of co-operatives as business organisations which, while not being "capitalistic" (presumably like registered companies and partnerships) are also not "socialistic but non-aligned (presumably because they have an ideology which is dissimilar to socialist ideology). In view of the fact that the words "capitalist" and "socialist" are more ideological than technical the writer wishes to confess that any attempt on his part to evaluate the merits of the statement that "the co-operative society in its nature is neither capitalistic nor socialistic" would be futile and not commensurate with the intellectual energy expended with a view to such evaluation. It is probably more useful to confine ourselves to the observation that co-operatives in fact exist in both the "capitalist" countries (of Africa, Western Europe, America, etc.) and the "socialist" countries (of Eastern Europe, etc.).

What emerges from the definitions considered above is the fact that a co-operative society is basically or



primarily an association for the purpose of joint economic enterprise. In the writer's view it differs from other associations with similar purposes mainly because in the conduct of its affairs it is governed by the principles which are known as "co-operative principles".

For legal purposes a co-operative society could therefore be defined as an association registered under the Co-operative Societies Act for the purpose of promoting the economic interest of its members in accordance with co-operative principles.<sup>15</sup>

It should be noted that Section 5 of the Co-operative Societies Act, 1966 makes it a condition precedent to a society's registration that its objects must be the promotion of the economic interest of its members "in accordance with co-operative principles".

### 3. The "Co-operative Principles

The writer finds it necessary at this stage to embark on a brief explanation or discussion of the "co-operative principles". According to the 1966 Report of the International Co-operative Alliance, co-operative principles are: "those practices which are essential, that is absolutely indispensable, to the achievement of the co-operative movement's purpose".<sup>16</sup>

Regarding this "purpose" the report said:

"This purpose has been described in various ways at different stages of the Movement's historic development. The Rochdale Pioneers, like some of the co-operators who preceded them, declared their aim to be the establishment of communities supporting themselves by their own labour on their own land... The common element at all times has been that co-operation at its best aims at something beyond promotion of the interests of the individual members who compose a co-operative at any time. Its object is rather to promote the progress and welfare of humanity. It is this aim that makes a co-operative society something different from an ordinary economic enterprise and justifies its being tested, not simply from the standpoint of its business efficiency, but also from the standpoint of its contribution to the moral and social values which elevate human life above the merely material and animal."<sup>16</sup>

The International Co-operative Alliance has used these co-operative principles to frame the conditions or qualifications which determine eligibility for its membership (which is limited to bona fide co-operative societies). Article 8 of the membership rules states:

"Any association of persons, irrespective of its legal constitution, shall be recognised as a co-operative society provided it has for its objects the economic and social betterment of its membership by means of the exploitation of an enterprise based upon mutual aid, and that it conforms to the principles of Rochdale, particularly as regards -

- (i) Voluntary Membership
- (ii) Democratic Control
- (iii) Distribution of the surplus to members in proportion to their participation in the social services of the Association
- (iv) Limited Interest on Capital...<sup>17</sup>

The writer will attempt in the paragraphs which follow to explain briefly each of these principles and examine the extent to which they are reflected in the Kenya Co-operative legislation.<sup>18</sup>

(i) Voluntary Membership

According to Bonner, the principle of voluntary membership means that the society is not exclusive, but it must be open to all to whom it can be of service. Accordingly, "every consumer has not merely the duty of being a co-operator but also the right to be one."<sup>19</sup>

Although there is specific reference to "consumers" as potential co-operators the writer feels that there is no compelling reason for confining the application of the voluntary or open membership principle to consumer co-operative societies.

This view seems to be strengthened by Rule 12 of the Co-operative Societies Rules, 1969 which apparently seeks to keep a society's membership "open" by preventing the society from fixing any limit to the number of its members. The Rule is not expressly limited in its application to consumer co-operatives and could therefore be applied to any co-operative society.

However, it would appear that this principle of co-operation has been reduced to a pious fiction by the provisions of the model and officially approved by-laws of nearly all the co-operatives in Kenya. The said by-laws state that "members shall be admitted by the Managing Committee subject to confirmation by the next General Meeting ... The Committee shall be entitled to refuse membership to any person without giving a reason."<sup>20</sup>

Although there is provision in some cases for an appeal to the General Meeting against a refusal by the Committee to admit an applicant to membership it is submitted that the General Meeting in such cases has rights which at least are co-extensive with those of the Committee, and can consequently refuse membership to an applicant without giving a reason for its decision. Since the general meeting is in fact the final "appellate" body under the by-law in question it becomes exceedingly difficult to uphold the existence and validity of the "open membership" principle - at least so far as societies with similar by-laws are concerned.

It may be relevant at this stage to refer to the following comment on this issue by the (1966) I.C.A. Commission on Co-operative Principles:

"It is a mistake to interpret the rule of "open membership" in the sense that all co-operatives are obliged to enrol all persons

who may apply to join them. Open membership has never meant that. The Rochdale Pioneers at no time attempted to apply such a rule, for one very good reason that their society, witness the celebrated "Law First", was conceived as something more than a retail distributive enterprise; it was a community in embryo; its growth and success would depend greatly on internal harmony which might easily turn to discord, as earlier experiments had shown, through the admission of bad characters, irresponsible individualists or trouble-makers." 21

While it is generally agreed that a refusal of membership to an applicant solely on the "co-operative grounds indicated by the Commission would not usually amount to an infringement of the open membership principle it is submitted <sup>that</sup> the said by-laws constitute an infringement of that principle, in so far as they go further than is necessary for the protection of the society from membership detrimental to its interests. An even more serious objection to those by-laws is that they render it legally possible for a group of selfish members of a co-operative society to turn their society into a "closed shop" like a private company for the purposes of furthering their own interests. Since they are under no obligation to indicate the reasons for their refusal it is possible for them to refuse membership to an applicant on "non-co-operative grounds".

The existence of the said by-laws tends to suggest to the writer that there is, at least in theory, no

application of the open membership principle here in Kenya. To vindicate that principle it would appear necessary to amend the said by-laws by specifying the "co-operative grounds" as being the only grounds that would justify a society's committee or general meeting in refusing membership to an applicant.

It would in any case appear that the open membership principle could have been more convincingly demonstrated by the adoption of by-laws which impose on the Committee a duty to admit to membership all persons who had applied to join a society in the belief that the membership thereof would be beneficial to them. If their subsequent conduct as members rendered their continued membership undesirable steps could be taken under the by-laws to expel them from the society.<sup>22</sup> It is submitted that the "open membership" principle cannot be relied upon as a defence by a member whose expulsion from the society is proposed or intended.

It should also be borne in mind that the mere fact that a person has been irresponsible, individualistic, troublesome, etc. does not necessarily imply that he will become an irresponsible, individualistic or troublesome member.

(ii) Democratic Control

The co-operative principle of democratic control is also known as the principle of democratic administration. It seeks to ensure that a society's members are consulted as a body so as to enable them to express their views on major decisions to be taken by the society's management or committee.

According to Bonner,<sup>23</sup> "a co-operative society is an association of persons with an undertaking in common for specific purposes. Control of the undertaking by the persons associating is necessary if the specific purposes are to be served and served efficiently. Such control is democratic control [emphasis my own]. Except in the case of very small societies the control cannot be exercised directly, so the members elect a committee or board to do it for them... It is necessary that every member should be able to exercise influence upon the management and 'one member one vote' is essential to this."

While this principle of co-operation is apparently recognised by section 19 of the Kenya Co-operative Societies Act, 1966, which gives each member of a registered society a right to one vote only in the affairs of the society irrespective of the number of shares he holds and by Rule 24 of the Co-operative Societies Rules, 1969 which provides that the supreme authority of a society shall be vested in the general meeting of members at which every member shall have the right to attend and vote on all matters, it would appear

that the principle does not apply fully in Kenya. The Co-operative Societies Rules, 1969, virtually make the Commissioner for Co-operative Development the supreme authority of Kenya registered societies by precluding the committee or the members of a society from making major decisions or exercising important powers unless the Commissioner's prior consent or approval has been obtained.<sup>24</sup>

Rule 32(2) however gives a majority of members present and voting at a general meeting of a society the power to elect, suspend or remove a member of the Committee.

(iii) Dividend on Purchases

The rule regarding payment of dividend on purchases appears to be one of the most important principles and distinctive features of co-operative enterprises. It is usually stated as the division of surplus<sup>25</sup> amongst the members in proportion to their transactions with the society. The International Co-operative Alliance has stated it as the division of surplus among the members "in proportion to their contribution to the operations of the society - whether by purchase, deliveries of produce, or labour". This principle could in fact be made applicable to all forms of genuine co-operative enterprises. It is especially important because it



enables the enterprise to operate in such a way that no member can make a profit out of the rest. It was in fact invented and introduced as a method by which an enterprise could be conducted without profit-making. In the words of Professor Munkner, "this practice may be characterized as an attempt to realise the idea of service at cost in retrospect at the end of a financial period and to repay to the members what they had been charged by the co-operative enterprise in excess of actual costs"<sup>26</sup>

(iv) Limited Interest on Capital

The principle of limited interest on capital may be stated as a rate of interest on capital fixed by rule. It is in fact closely related in purpose to the principle of dividend in proportion to business done with the society, for the objective is the same - to prevent profit going to capital. Co-operators generally regard interest on share capital as an expense of the undertaking.<sup>27</sup>

This principle of limited interest on share capital is expressly adopted by s. 44(3) of Co-operative Societies Act which prohibits a registered society from paying a dividend exceeding the maximum rate prescribed under the Act (the maximum rate must not at the moment exceed ten per centum per annum). To ensure that this fundamental rule is not violated by co-operatives it is expressly stated that no dividend shall be paid by a registered society unless the Commissioner for Co-operative

Development has consented in writing to the proposed payment.<sup>28</sup>

Although the foregoing co-operative principles seem to be the only ones expressly enshrined in the Kenya Co-operative Legislation it is submitted that Kenyan co-operatives are ideologically bound, in pursuance of Section 5 of the Act, to follow all the practices that the Co-operative Movement may, through the International Co-operative Alliance, define and recommend for its members.<sup>29</sup>

#### 4. KENYA LAW AND CO-OPERATIVES

In Kenya legal provision is made for the formation, registration, management, supervision and dissolution of co-operatives by the Co-operative Societies Act, 1966 and the Rules made thereunder. Although the Act does not, as has been observed, define "co-operatives" it makes provision for the following types of "registered societies" :-

- (a) Primary Society, which is a registered society membership of which is restricted to individual or human persons;
- (b) Co-operative Union, which is a registered society the membership of which is restricted to primary societies;

- (c) District Co-operative Union, which is a co-operative union membership of which is restricted to primary societies having their headquarters in a particular district;
- (d) Ape Society, which is a registered society the membership of which is restricted to co-operative unions, and including a society established to serve the co-operative movement by the provision of facilities for banking, insurance, and the supply of goods and services.

## 5. CO-OPERATIVES COMPARED TO OTHER BUSINESS ASSOCIATIONS

The legal position in Kenya is that a co-operative organisation cannot exist unless it is registered under the Co-operative Societies Act, and to be registrable thereunder it must be one which in pursuance of section 5 of the Act, has for its objects the promotion of the economic interests of its members in accordance with co-operative principles.

As any business organisation must primarily exist for the purpose of promoting the economic interests of its members it is submitted that the statutory requirements that a co-operative organisation must do so in accordance with "co-operative principles"

is what constitutes the basic legal difference between co-operatives and other business organisations.

The following is a list of the main differences between co-operatives and other business organisations. The first difference is that co-operatives are owned and controlled by their members, who are also the users of the services provided. In other business organisations, the owners are usually a small group of individuals or a large group of shareholders, who are not necessarily involved in the day-to-day management of the organisation.

Another important difference is that co-operatives are not-for-profit organisations. This means that any surplus generated by the organisation is used for the benefit of the members, rather than being distributed to a few individuals. In other business organisations, the primary objective is usually to generate profit for the owners.

A third difference is that co-operatives are usually democratically controlled. This means that each member has an equal say in the management of the organisation, regardless of the amount of capital they have invested. In other business organisations, control is usually exercised by those who have invested the most capital.

Finally, co-operatives are usually more socially responsible than other business organisations. This means that they are more likely to take account of the needs and interests of the wider community, as well as their members. In other business organisations, the primary concern is usually to maximise profit.

## CHAPTER II

### ARBITRATION AS A MODE OF ADJUDICATION

#### 1. What is "Arbitration"?

Although sections 70(1)(d), 72(1)(k) and 80(4) of the Co-operative Societies Act, 1966 contain provisions which are designed to put the arbitration machinery at the disposal of disputing co-operators the Act has not, unfortunately, given a definition of "arbitration". The writer therefore feels obliged to resort to other sources in search of an authoritative definition.

According to the Concise Oxford Dictionary, arbitration means "settlement of a dispute by an arbiter", and an "arbiter" is defined as "judge" or "one appointed by two parties to settle dispute".

However, Soper has given the following definition:-

"Arbitration may be defined as a method of settling disputes and differences between two or more parties, by which such disputes are referred to one or more persons, nominated for the purpose, for determination after a hearing in a quasi-judicial manner, either instead of having recourse to an action at law, or by order of the court, after such action has been commenced."<sup>30</sup>

#### 2. Classical Reasons for Arbitration

Although it might not be unreasonable to assume that a decision of a court of law arrived at after a full judicial inquiry in accordance with the established

rules of evidence would be the only decision acceptable to the parties to a dispute, arbitration practice in some countries, and England in particular, tends to disprove such assumption.

Commentators on the English law and practice of arbitration have generally agreed that in certain cases arbitration has certain advantages over an action at law. The following reasons have usually been given as the advantages of arbitrations conducted in England:

- (i) Disputes can be more speedily brought to trial and determined than by action at law;
- (ii) An arbitration may be less costly than an action at law;
- (iii) The time and place of hearing in an arbitration can be arranged to suit the convenience of the parties;
- (iv) If thought desirable, it may be expressly provided in the arbitration agreement that the arbitrator shall view property which may be the subject of dispute;
- (v) Since special arbitrators are appointed, the dispute can be settled quickly, whereas if it went to a court of law, it would have to take its turn in the queue and might be held up for a long time;

- (vi) An arbitration is private, whereas a court hearing is public and may attract publicity which neither of the parties to the dispute might want;
- (vii) If technical questions are involved in the dispute, the arbitrator appointed can be a technically - qualified man, who will not need expert evidence to help him to decide the case as a judge would; this reduces both the money and the time spent in deciding the dispute.<sup>31</sup>

Poser says that although arbitrations in England are now governed by the Arbitration Act of 1950, they were originally governed by the rules of Common Law, having had a very ancient origin, even before 1697, in the practice adopted by merchants and traders. According to this practice the merchants and traders referred disputes arising upon matters of account or other trading differences for settlement to persons specifically selected for the purpose. While originally only disputes relating to personal chattels or personal wrongs could be referred to arbitration, the ground has been considerably extended, and disputes as to real estate, interests in land and many other matters are now frequently referred.<sup>32</sup>

The object of an arbitration is the determination of a dispute that has actually arisen, after hearing evidence and conducting a quasi-judicial inquiry. As far as Kenya co-operatives are concerned the intention that arbitration proceedings should approximate to judicial proceedings is reflected in Rule 54 of the Co-operative Societies Rules 1969, which requires the proceedings before an arbitrator to be conducted, as nearly as possible, in the same manner as proceedings before a court of law.

Perhaps it may be appropriate at this stage to ask why the Co-operative Societies Act, 1966 provides compulsory arbitration for Kenya co-operatives and their members in certain situations. No confident answer to this question can be given. It might be said that the British colonial administration in Kenya were aware of the aforementioned advantages of arbitration practice in England and so decided, through the Co-operative Societies Ordinance of 1945, to introduce compulsory arbitration for Kenya Co-operatives and their members. In which case the Co-operative Societies Act of 1966 could be regarded as simply continuing a policy that was adopted by the colonial government. On the other hand it may be said that the Co-operative Societies Ordinance 1945



and the Co-operative Societies Act, 1966 were based either on the Indian Co-operative Societies Act of 1912,<sup>33</sup> or on the 1946 Model Co-operative Societies Ordinance of the British colonial office.<sup>34</sup> Since it is the British colonial administration who introduced compulsory co-operative arbitration in India it would still follow that they favoured arbitration for Indian Co-operatives and their members because of the advantages which arbitration practice in England had manifested.

The writer sees no compelling reasons for concluding that co-operative arbitration was introduced in Kenya because of the abovementioned advantages that arbitration practice had manifested in England. However, it is suggested that an examination of the government's co-operative development policy will show that the Kenya government, in an attempt to implement that policy successfully, asked Parliament to incorporate into the Co-operative Societies Act, 1966 those provisions precluding the courts from settling some co-operative disputes. It is to those policy considerations that reference will now be made.

### 3. The Government's Co-operative Development Policy:

#### (a) The Policy of Accelerated Development

It is now a politically accepted fact that the improvement<sup>35</sup> [emphasis my own] of the economic,

social and educational conditions of her people is one of the primary responsibilities of a government. This is particularly true for a government of a newly independent country like Kenya. Although the term "development" is vague and not susceptible to a dogmatic analysis it is essentially a relative concept which implies an approximation to some standard which is regarded, usually politically, as the ideal one. The Kenya Development Plan 1974-78 has in this respect stated:-

"Our average levels of income are still low by world standards"<sup>26</sup> [italics mine]

It is the subjectiveness of the concept of "development" that has militated against its uniform formulation and has led each country to define and formulate its own development plans or programmes. As Sessional Paper No. 10 on African Socialism and its application to planning in Kenya has noted :-

"Different societies attach different weight and priorities to these objectives, but it is largely in the political and economic means adopted for achieving these ends that societies differ. These differences in means are, however, of paramount importance because ultimate objectives are never fully attained. Every time one target is attained a new one becomes necessary. Indeed, we forever live in transition."<sup>27</sup>

As far as Kenya is concerned "development" envisages the reduction or elimination of poverty, ignorance and disease. In order to achieve these goals and also

attain social justice, economic independence and an improved standard of living for all Kenyans the Kenya Government launched the third Five-Year Plan. The Plan emphasizes rural development. The Harambee spirit will be nourished and the local communities will be called upon to be more actively involved in the development of their areas.

In its endeavours to accelerate rural development the Government acknowledged the need to involve co-operatives in that exercise,<sup>38</sup> mainly because it believed that the existence of a co-operative society serves as an incentive to farmers to produce more for the market; co-operatives have an 'opening up' function for a money economy; co-operatives serve as educational instruments by helping small-holders to understand and benefit from economies of scale in buying and marketing, and that co-operatives may also provide a framework for extending production, credit and contact for extension service to promote technological innovations for increased production.<sup>39</sup>

This involvement of co-operatives in the acceleration of rural development was facilitated by the fact that by 1970 the co-operative movement had been in existence in Kenya for about twenty-five years as an officially recognised movement<sup>40</sup> and was growing very rapidly

under the guidance of the Department for Co-operative Development. By June, 1969 1,850 co-operative societies had been registered.

Since this network of co-operatives in the country covered nearly all the aspects that were intended to benefit mainly the people of small means who had pooled together their means to attain greater participation in the economic pattern of the country the Government found it imperative to introduce a new Co-operative Societies Act in 1966. In the words of the then Minister for Co-operatives and Social Services :-

"The co-operative movement is suffering from some serious problems which have prompted me into bringing this Bill to this House. The problems are growing, they are like growing pains particularly the problems of management, problems of organisation and problems of financial control... I have also known very serious losses mostly due to some serious loopholes that were not considered in 1945 when the first Act on the co-operative movement was enacted... The Development Plan of Kenya, together with Sessional Paper Number 10, urges exhilarated (sic) development. It urges efficiency and effectiveness in whatever we do, particularly in the field of economic planning and growth. This is why it has been very necessary, realising the weakness of the 1945 Co-operative Law [italics mine] to bring forward this Bill so that we may make the changes. The changes are very urgent and... are intended to curbe the malpractices and... any further deterioration of the co-operative movement in the country."<sup>41</sup>

The basic policy behind the Act was, therefore, to accelerate the development of the rural areas through the promotion of viable co-operatives that were not beset with problems of mismanagement and lack of proper

financial control. This acceleration of development through co-operatives had to be done by removing the weaknesses of the 1945 Co-operative Law. The Minister did not, however, state in what way the weaknesses in the 1945 Act had contributed to the problems of management, organisation and financial control.

(b) The Policy of Efficiency and Effectiveness

Although the acceleration of the rate of economic and social development through co-operatives was a commendable and somewhat pious objective it was realised that it would not be achieved unless the co-operatives undertook and discharged their duties efficiently and effectively. It was accordingly agreed that it was the government's duty to initiate appropriate measures and introduce the legislation necessary to secure the efficient and effective performance of co-operative duties. The government sought to achieve these aims by, inter alia, improving the educational facilities in the co-operative movement, and the training as well, so as to enable the committee members of the co-operatives to have the necessary know-how. The assumption or belief that the government has not only a right to use the co-operative movement but also a duty to help it become efficient and effective is implicit from this policy statement of the Minister :-

"Since the present government wants to use the co-operative movement more effectively to effect the efficiency and effectiveness [italics mine] and use it as an instrument

which will give us successful prosperity and economic pattern in the country... the government has this policy of increasing their guidance and supervision in the co-operative movement. It is change of outlook."<sup>42</sup>

Although many people would be of the opinion that co-operatives, as business organisations, should be left alone to run their own affairs without government assistance or control it should be borne in mind that the role of the co-operative movement appears to have undergone a radical transformation in Africa. It seems that Kenyan Co-operatives are not merely aimed at eliminating the exploiting middle-man but have apparently also political and ideological role to play,<sup>43</sup> [italics mine] in so far as they are controlled and used by the Kenya Government in implementing its rural development policies.

Because they are regarded by the Government as "socialist"<sup>44</sup> they have politically become the government's most appropriate and reliable institutions for the development and socialisation of the rural people who in fact constitute not only the bulk of the population but also the majority of voters. The success of the Co-operative Movement in Kenya could with some justification be regarded as a reliable indicator of the government's own success in fulfilling its obligations to the people.

Hence the desire of the Kenya Government in 1966 to initiate new legislation seeking to regulate the constitution, operations and management of the co-operative societies in an attempt to ensure their success by improving their efficiency and effectiveness. Although the government viewed its role as merely that of assistance it also acknowledged the futility of seeking to assist co-operatives without having the power to control them. It is to this aspect of government policy that we now turn.

(c) The Policy of Increased Government Control

Although the previous legislation gave the government (through the Commissioner for Co-operative Development) some powers of control over the affairs of co-operatives, these powers were relatively modest. The practical consequence was that co-operatives retained, and indeed exercised, substantial powers in the conduct of their day-to-day affairs. But apparently this freedom was not properly used by them, so that in 1966 the then Minister for Co-operative and Social Services felt compelled to make this statement to the National Assembly during the Second Reading of the Co-operative Societies Bill :-

"The Government's present policy for the co-operative movement is therefore one of increased government control [italics mine] ... During the colonial days the colonial government had a very different outlook towards co-operative societies. They gave them almost every freedom that they wanted. For the committee members<sup>45</sup> they sat around, although they did not have the know-how, made decisions, passed resolutions and these resolutions were carried in most cases, not checked properly, therefore, things were not as efficient as we would like them to be [italics mine] now during independence..."<sup>46</sup>

From this statement by the Minister it becomes clear that the primary motivation for the government's decision to intervene in the affairs of co-operatives was the latter's inability to transact their business efficiently. Such a state of affairs constituted a fundamental constraint on the achievement of the avowed policy of accelerating the development of the rural areas through co-operatives and had to be rectified immediately.

The writer however is inclined to the view that the Minister was basing the government's policy on a fallacy when he ascribed the then prevailing inefficiency to the "excessive freedom" given by the colonial government to co-operatives. Surely the poor performance of the then existing co-operatives was caused by the vesting of management duties and responsibilities on committees which, as the Minister himself rightly says, did



not have the know-how. A more appropriate response would appear to have been an all-out government endeavour to provide the requisite know-how to these committee members in order to equip them with the skills necessary for the satisfactory and improved performance of their management duties. The acceleration of development would then follow automatically.

To control an inefficient management of an organisation does not necessarily guarantee its efficiency unless the persons controlling it carry their control to the point where in effect they themselves become the managers of the organisation. If this were to be done by the government over co-operatives then co-operatives would become mere appendages of the government.

But whether this new policy of increased government control based on a fallacy or not appears now to be of academic relevance only. The fact is that this control has been legally secured through the Co-operative Societies Act, 1966.

Writing on some aspects of this control a learned writer has said :-

"The Registrar<sup>47</sup>/Minister can refuse to register a society, compulsorily amend its by-laws, dissolve the committee and set up his own supervisors and managers, order the compulsory amalgamation..., dismiss employees of a society, cancel the registration of a society and make rules<sup>48</sup> for the conduct of societies. A further

series of control is available through the financial provisions. Finally, we look at some more powers of control vested in the government. The Registrar, either on his own initiative or at the request of the majority of the committee members, or not less than one-third of the members, may cause an enquiry to be made into the constitution, activities and financial affairs of a society. He can also order an inspection of the books of the society, if requested by a creditor of the society, so long as the sum owing to the creditor has become due and payment has not been made to him despite demand... In addition, the results of the inquiry/inspection may provide the basis of a surcharge which the registrar can levy upon a member or officer, past or present, if it is revealed that he has made or authorised an unlawful payment or has by negligence or misconduct caused a deficiency or a loss or a failure to bring into account or caused damage to property of the Society."<sup>49</sup>

Although these overwhelming powers vested in the government constitute a fundamental violation of the basic co-operative principles of democratic control, autonomy, initiative and self-reliance of the members they are viewed by the Kenya Government as inevitable but essentially transitory measures. In the words of the then Minister for Co-operatives and Social Services, the late Mr Ronald Ngala,

"These sterner measures, in my view, are very necessary at this stage of co-operative development. They are necessary because if we do not take these measures now, we might as well pack up the co-operative movement in this country... I hope that we all, in this House, agree that the co-operative societies must grow to the height of ability, where the government will feel that it is obliged to give them further responsibilities such as the functions which are

being carried out by the statutory boards of government, and also, in future make them as capable as possible in order to withdraw, gradually, the closer supervision that we envisage at this stage."<sup>50</sup>

From the above discussion it appears that the government's view was and still continues to be, that the ultimate control [italics mine] over co-operatives has to be exercised by the government and not by the members of a co-operative society or the courts. The government's main consideration was not to safeguard or protect the traditional autonomy of the co-operatives but rather to control so as to be able to use co-operatives as agents for accelerated development. [italics mine].

4. The Government's Reasons for Co-operative Arbitration:

(a) Promotion of Good Personal Relations Among The Members

In the course of his speech in Parliament spelling out the Government Co-operative Development policy the then Minister for Co-operative Development alluded to certain reasons which, in the writer's view, constitute the basis of the Kenya Government's position regarding Co-operative disputes. The Minister stated, inter alia, that if a dispute arose in a co-operative society the Government intended

"to settle the problem... and clear it before taking it to court [italics mine] and the relations are spoilt"<sup>51</sup> [italics mine]

The government's intention in seeking to prevent co-operators from going to court over disputes affecting them as members of co-operative societies was apparently the fear that litigation would facilitate and precipitate the destruction of the amicable personal relationship that exists between the members of a co-operative society [italics mine] to a point where all hope of future co-operation between them is precluded. The paramount aim was, and still is, for the government officers to strive to uphold amongst the members of the various co-operative societies in the country a personal relationship that would meet the demands of practical co-operation within each co-operative society. It was feared that litigation would frustrate this objective and render it impossible for the government to use co-operatives for the development of the rural areas.

(b) Avoidance of Chaos within Co-operatives:

Another reason given by the Minister for the Government's desire to oust the courts was their belief that

"If we allow our (sic) members to sue co-operative societies as they want and at any time they wish there would be such chaos that the co-operative societies would not be able to work smoothly". [italics mine]

When the Bill was in the Committee stage the Minister stated that to achieve the above objectives the Government expected the Commissioner and his officers

"To co-ordinate and help public relations between the members and the officials and the society as a whole [italics mine] and before we come to the final resort, we feel that we should help the co-operative societies not to get into bad relations with each other or between the members of co-operative societies, [italics mine] and the co-operative societies themselves. This is why we would like this matter to be handled by the Commissioner."<sup>52</sup> [italics mine]

## CHAPTER III

## REFERENCE OF DISPUTES TO ARBITRATION

1. What is a "Dispute"?

Sections 70, 72 and 80 of the Co-operative Societies Act, 1966 provide for the reference of disputes [emphasis mine] either to arbitration or to the Commissioner for Co-operative Development. Before embarking on an examination of the category of disputes envisaged by the said sections it appears necessary to ascertain, as far as possible, the precise meaning of the word dispute [emphasis mine]. This is because some doubts about the meaning of the word have been precipitated by the fact that the Co-operative Societies Act, 1966 has not defined it. The doubts were mainly whether the word was intended to convey its ordinary meaning, or whether it was intended by the legislature to convey a technical meaning for the purposes of those sections of the Co-operative Societies Act, 1966 in which it had been used.

The question was considered by the High Court of Kenya in 1970 in the case of Gatanga Coffee Growers Co-operative Society Ltd v Gitau,<sup>53</sup> the facts of which

were as follows.

The appellant, the Gatanga Coffee Growers Co-operative Society Limited, deducted from sums due to the respondent, a member of the society, the sum of Shs.2,186/07 being one-half of a deficiency in the society's funds for for which it held the respondent and his successor in the office of Treasurer to be responsible.

The respondent sued the society for this amount in the Resident Magistrate's Court in Nairobi, where he filed a claim for the balance due in respect of coffee sold and delivered by him to the appellant. The society pleaded lack of jurisdiction, on the grounds that since the case was between a society and its member it had to be referred to the Commissioner as required by the Co-operative Societies Act. This plea was argued as a preliminary point. After deciding the plea against the society the magistrate proceeded to give judgment for the respondent.

It was against that judgment that the appellant appealed, solely on the grounds of jurisdiction and relying on the provisions of s. 80(1) and (2) of the Co-operative Societies Act, 1966.

During the hearing of the case in the magistrate's Court the appellant society had denied, in its defence, liability on the ground that it had rightly set-off against his claim the loss for which it held the respondent responsible. However, the magistrate held that as this loss could not be pleaded by way of set-off there was no defence on the pleading to the plaintiff's claim. Accordingly there was no dispute, section 80 was not applicable and the case was therefore properly before him. On the other hand it was strongly contended on behalf of the Plaintiff that there was no dispute within the meaning of section 80 since the appellant had admitted the facts giving rise to the claim.[emphasis mine]

However, on appeal the High Court held that even if the facts giving rise to the claim had been admitted by the defendant (the appellant) there was still a dispute [emphasis mine] within the meaning of the section. In the words of Simpson, J.:

"There may be no dispute as to the facts on which the claim is based but clearly there is a dispute as to liability to pay"<sup>54</sup>

The learned Judge went on to observe that the mere filing of the plaint raised an inference that there was a dispute between the plaintiff and the Society.



Regarding the meaning of the word "dispute" the learned judge had this to say -

"The word 'dispute' is not defined in the Act. It is not a technical term and must be given its ordinary, natural meaning... In Wakiro and Anor v Committee of Eurisu Co-operative Union <sup>55</sup> Russell, J., considered this expression: "It appears, however, to be generally accepted", he said "that even though the words must be strictly construed as s. 68 of the Act <sup>56</sup> ousts the jurisdiction of the courts the word 'dispute' includes all matters which would form the subject of civil litigation [italics mine]. ... A dispute within the meaning of sub-section (1) includes a claim for an unadmitted debt or demand [italics mine] and sub-section (2) must be read not as restricting the meaning of sub-section (1) but as extending it to include claims for admitted debts and demands due by a member to a society" [italics mine]

Delivering his judgment in the same case Harris, J., stated that he did not see any reason for ascribing to the word 'dispute', which is not defined in the Act and is not a term of art, a meaning in any way less general than it receives in current usage, which meaning is certainly wide enough to embrace a controversy. [italics mine]

It is somewhat surprising that when section 80 of the then Co-operative Societies Bill was being debated in Parliament, no Honourable Member found it necessary to seek clarification regarding the meaning of the word 'dispute' as used in the Bill. This failure on the Honourable Members' part to ask for clarification lends credence to the High Court's view, in the Gatanga case, that the word has to be given its ordinary meaning.

The Honourable Members of Parliament presumably assumed that everybody was conversant with the meaning of the word. Perhaps the meaning that was in the minds of the Honourable Members is borne out by this statement of the then Leader of the Opposition :-

"The best thing in this simple matter is to let them, immediately they disagree [italics mine] sue the society if they wish to do so".<sup>57</sup>

Mr Odinga regarded a dispute simply as a disagreement. [emphasis mine] This appears to the writer to be the most appropriate meaning to be assigned to the word, at least as one of its ordinary meanings. It is also submitted that to refer to a dispute as a controversy [emphasis mine] as Harris, J. did in the Gatanga case, simply expresses the speaker's personal opinion as to the intensity or seriousness of the disagreement. It should be noted that the Concise Oxford English Dictionary has given difference of opinion [emphasis mine] as one of the meanings of the word dispute.

## 2. The Categories of Co-operative Disputes

It appears necessary at this stage to examine the type of disputes that may be referred to the Commissioner or referred to arbitration. In the writer's view they may be considered under two broad headings, namely:

- (a) Disputes arising while the society is a going concern and which pertain to the

society's business, (i.e. disputes governed by Section 80 of the Co-operative Societies Act, 1966), and

- (b) Disputes arising during the liquidation of a registered society (i.e. disputes governed by sections 70(1)(d) and 72(1)(k) of the Co-operative Societies Act, 1966).

Disputes Pertaining to the Society's Business

It was held in the Gatanga case, above, that the phrase business of registered society [emphasis mine] used in Section 80 of the Co-operative Societies Act, 1966 is not confined to the internal management of the society but covers every activity of the society within the ambit of its by-laws [emphasis mine].

What then, are the possible categories of disputes that would come under section 80 of the Co-operative Societies Act, 1966? The writer feels that no list or catalogue of such disputes can be compiled with confidence. This is because the Co-operative Societies Act, 1966 is a relatively recent piece of legislation and as such only a few disputes arising under its various provisions, including those arising under section 80, have come before the Kenya courts for consideration.

Given the limited judicial exposition on the scope of section 80 of the Act the following suggested list [emphasis mine] of the categories of disputes that may fall under the section should not be regarded as authoritative or exhaustive :-

- (i) Disputes regarding expulsion of members from their society (e.g. the dispute between Wilfred Rukenya Iguna and Magumoni Farmers Co-operative Society Limited);<sup>58</sup>
- (ii) Disputes regarding societies' refusal to accept members' produce (e.g. the dispute between Benjamin Njeru and Kiriani Farmers Co-operative Society Limited);<sup>59</sup>
- (iii) Disputes regarding money demanded by a Co-operative Society from another Co-operative Society (e.g. the dispute between Wendani Farmers Co-operative Society Limited and Bayete Farmers Co-operative Society Limited);<sup>60</sup>
- (iv) Disputes regarding money demanded by a member or members from the society, e.g.
  - (a) claims for dividends;
  - (b) claims for bonuses;
  - (c) claims for interest accrued on deposits held by the society;
  - (d) claims for deposits held by the society;

(e) claims for proceeds of coffee, etc. sold by a society on behalf of a member;<sup>61</sup>  
or

(v) Disputes regarding money demanded by a registered society from a member, e.g.

(a) claims made by a registered society against a member in respect of a fine imposed on the member under section 31 of the Co-operative Societies Act, 1966 for a breach of any of the society's by-laws or rules made by the society's committee (such fine are, under subsection 2 of the said Section 31, a civil debt due to the society), or

(b) claims made by a registered society against a member for liquidated damages under section 30(1) of the Co-operative Societies Act, 1966 for a breach of the obligation to dispose of produce to or through the society. (section 30(1) of the Act declares such claims to be debts due to the society).

The disputes listed as (i) to (iii) above came to the writer's attention when he was perusing the various files maintained in the office of the Commissioner for Co-operative Development. They are dealt with in detail in Chapter IV.<sup>62</sup>

Regarding the claims listed in (v) above it should be noted that section 80, sub-section 2 specifically states that they constitute disputes within the meaning of section 80(1) whether the claims are admitted or not admitted [emphasis mine]. Although there is no express provision to the same effect as far as claims listed in (iv) above are concerned it has been judicially stated that the said claims also constitute disputes whether admitted or not admitted. Delivering his judgement in the case of Gatanga Farmers Co-operative Society Ltd v Gitau, Simpson, J., stated:

"I am of opinion that the main if not the sole object of the legislature in adding sub-section two of Section 80 was the removal of any doubts which might be thought to exist that claims by a registered society [emphasis mine] for a debt or demand admitted by a member [emphasis mine] were disputes within the meaning of sub-section (1). It was apparently considered unnecessary to make similar provision [emphasis mine] for the benefit of members in respect of debts or demands admitted by the society" [emphasis mine]<sup>63</sup>

While the dispute between Wendani Farmers Co-operative Society Limited and Bayete Farmers Co-operative Society Limited constitutes a practical illustration of the kind

of dispute that may arise between one society and another society the writer finds it difficult to visualise other instances or examples. It might be that the type of disputes likely to arise under the provisions in question will depend on whether one society is a member of the other society [emphasis mine]. It would however appear from the wording of section 80(1)(c) that membership of a registered society is not essential to constitute a claim against it by another registered society a dispute under that section. However, it is suggested that:-

(a) Where one society is a member of the other society the referable disputes would in practice be substantially the same as those that may arise between an individual person and a primary society of which he is a member, i.e. disputes pertaining to those discussed above.

But it appears rather strange that Section 80(2) declares admitted claims by a registered society against a member to be disputes but does not declare admitted claims by a registered society against another registered society to be disputes, especially where none of the societies is a member of the other. [emphasis mine]

(b) Where a society is not a member of the society against which it has a claim, the claim would nevertheless be a dispute under Section 80(1)(c). For example,

a claim by one primary society against another primary society; a claim by a Co-operative Union against another Co-operative Union or a claim by a primary society against a co-operative union of which it is not a member, being claims arising out of, for example, services rendered or goods sold and delivered but not paid for.

But it is not clear whether claims in tort [emphasis mine] made by any of the aforesaid parties against the other would also be disputes under section 80(1)(c) of the Co-operative Societies Act, 1966. An example would be where one society is seeking compensation from another society in respect of damage done to one of its lorries as a result of the alleged negligence of the driver of the other society's vehicle.

Disputes which do not concern the Business of Registered Societies:

As has already been stated, an exhaustive list of disputes which are likely to fall under section 80(1) of the Co-operative Societies Act, 1966 cannot be compiled with confidence. However, the scope of Section 80(1) may be better understood after an examination of the disputes that have been judicially held, or appear, not to fall under it. These are:



- (a) Disputes between a society and a member in an outsider capacity, [emphasis mine] and
- (b) Constitutional disputes, or disputes regarding the legality of something the society has done or proposes to do in the course of its business.

Disputes which do not Affect Members "Gua Members":

According to Section 80(1) of the Co-operative Societies Act, 1966 disputes intended to be referred to the Commissioner are those disputes between :-

- (a) members inter se (or persons claiming through members);
- (b) members and the society; and
- (c) a registered society and another registered society.

A practical and basic question which has arisen with regard to these disputes is whether they must have arisen among the members in their capacity of members, and between society and the members in the members' capacity of members, in order to render them referable to the Commissioner.

The first case known to the writer in which this question was considered is the case of Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto.<sup>64</sup>

In that case the appellant, a co-operative society registered under the Co-operative Societies Act, 1966 employed the respondent as its manager. The respondent was also a member of the society. The respondent was dismissed and paid one month's salary in lieu of notice.

The respondent sued for damages for, inter alia, failure to give proper notice. The appellant society argued that the court had no jurisdiction to hear the claim by reason of section 80(1) (b) of the Co-operative Societies Act, 1966. The High Court on this point held that it had jurisdiction to hear the claim, and the society appealed to the Court of Appeal for East Africa.

The Court of Appeal, however, unanimously upheld the ruling of the High Court of Kenya, since the dispute was between the appellant and the respondent as an employee [italics mine] of the appellant, and not as a member. The Court held that in order to fall under Section 80

"The dispute ... must be between the society and a person in his capacity as a member."<sup>65</sup>  
[italics mine]

Dealing with the same point Duffus, President, said -

"The evidence establishes that the respondent was employed by the society as a farm manager. He was an employee of the society and therefore

he was not affected by the provisions of s.55<sup>66</sup> of the Act<sup>67</sup> [emphasis mine]

The court stated that although the respondent was a member of the society the particular dispute was between him as an employee of the society and the society. The dispute had nothing to do with his membership and his membership was not relevant to the dispute which was only in relation to his position as an employee. Consequently, the provision of section 80 did not apply to the dispute. A dispute between a member and another member or a dispute between a member and his society which has nothing to do with the member's membership, but affects him as an outsider or non-member, can therefore be litigated in the courts.

Another very recent case which shows the practical application of this principle is the case of Mwangi Gakuo v Iyego Farmers Co-operative Society Limited.<sup>68</sup> The plaintiff in this case alleged that under an oral agreement between the plaintiff and the society it was agreed that the Plaintiff would allow the defendant society to dig a trench on his land in order to take water from a nearby river to the society factory. The Defendant was alleged to have agreed to pay the plaintiff three hundred shillings monthly as long as he continued to use the trench. However, the payment was not made and the plaintiff sued the defendant society in the

High Court of Kenya for the sum of Shillings twenty thousand one hundred and sixty.

The submission by the society's advocate that since the plaintiff was also a member of the society the proceedings were not properly before the court were rejected and judgment was entered for the plaintiff.<sup>69</sup> In the course of his judgment Chanam Singh, J. stated:

"Section 80 of the Co-operative Societies Act, 1966 also does not help the defendant (society). The plaintiff's claim against the defendant has nothing to do with his membership of it" [emphasis mine]

Notwithstanding the fact that the digging of the trench was an act concerning the business of the registered society it was held that it did not fall within section 80 of the Act, because the claim was not based on the Plaintiff's membership of the society. The plaintiff, though a member of the society, was suing the society as an "outsider" or non-member, i.e. as a landowner. His rights were based on his ownership of the land in question and not on his membership of the society. Even if he terminated his membership of the society he would still have retained his rights to the said piece of land.

It may therefore be stated that disputes affecting members as non-member, as illustrated in the two cases discussed above, are not governed by section 80 and can

therefore be litigated in the courts.

### Constitutional Disputes

What course of action is open to a member who contends that :-

- (a) A contract which the society is proposing to enter into is against the society's by-laws and therefore ultra vires [emphasis mine] the society?
- (b) Certain resolutions passed at the society's special general meeting are invalid on the grounds that less than fifteen days clear notice of the intention to pass the resolution was given to the members, contrary to the Co-operative Societies Rules, 1969<sup>70</sup> and the societies by-laws?<sup>71</sup>
- (c) Certain resolutions passed at the society's special general meeting are invalid on the grounds that notice of the meeting had not been given to all the members as required by the society's registered by-laws?<sup>72</sup>
- (d) Certain officers elected at the society's annual general meeting are not qualified to hold office as they lack the qualifications that are laid down in the Co-operative Societies Rules 1969<sup>73</sup> and the society's

by-laws?<sup>74</sup>

- (e) A fine imposed on him by the society is illegal and irrecoverable because he was not given notice of the intention to impose the fine as required by section 31 of the Co-operative Societies Act, 1966?
- (f) His purported expulsion from the society is invalid because the society has no powers under its by-laws to expel members who refuse to contribute money for harambee projects initiated by the society?<sup>75</sup>

Is the member precluded by section 80 from going to court for a declaration or injunction? To the writer's knowledge none of these questions has been discussed or decided by the Kenya Courts. Although the dispute between Wilfred Rukenya Iguna and Magumoni Farmers Co-operative Society Limited and the dispute between Magu Waichua and Mathira Farmers Co-operative Society Limited were disputes concerning expulsion of members from the Society it cannot be confidently stated that such disputes must be referred to the Commissioner merely because those particular disputes have actually been referred to the Commissioner. The question has yet, in the writer's view, to be decided by the High Court of Kenya.

However, a reference to some English cases might assist our consideration of the question whether disputes about the legality of something done by a co-operative society also fall under section 80 of the Kenya Co-operative Societies Act, 1966. The case of Judson v Ellesmere Port Ex-Servicemen's club Ltd.<sup>76</sup> lays down the rule that a dispute as to whether a member has been properly expelled [emphasis mine] from his society is not a dispute between the society and a member of it as such.[emphasis mine]

In that case the rules<sup>77</sup> of the Ellesmere Port Ex-Servicemen's Club Ltd provided, inter alia,

- (i) That all disputes should be referred to an arbitrator appointed by the Club;
- (ii) That no member, unless convicted of an offence in a court of law, should be suspended or expelled without first being summoned before the Club's committee to explain his conduct and opportunity given to advance a defence; and
- (iii) That a member suspended or expelled should have the right to appeal only to the arbitrators under rule 28(2) of the Club's rules. Without being summoned before the Committee, Mr. Judson was informed by the Chairman of

the Club that he had been suspended for breach of rule 29 prohibiting gambling on the premises and thereafter he was refused admission to the Club premises. He therefore instituted proceedings in Court, claiming, inter alia,

- (a) an injunction to restrain the Club's Committee, their servants, or agents, from enforcing his suspension, and
- (b) a declaration that he was still a member.

The Defendant club<sup>78</sup> applied for an order that all proceedings be stayed pursuant to Section 4 of the Arbitration Act, 1889, and Section 49(1) of the Industrial and Provident Societies Act, 1893, but the county court judge refused to make an order. On appeal by the Club it was held by the Court of Appeal that, the dispute being whether the Plaintiff was a member or not, it was not a dispute between the Club and a member of it as such, within the meaning of section 49(1) of the Act of 1893, and so determinable by arbitration in accordance with the rules of the Club. The jurisdiction of the Court was therefore not ousted and the decision of the county court was correct.



Delivering his judgment in this case Somervell,  
L.J., said <sup>79</sup>

"... There is, therefore, as appears, a dispute whether the plaintiff has been properly suspended or expelled ... The question is whether the dispute as it appears in the particulars of claim is <sup>80</sup> within the words of Section 49(1) so that it must be determined by arbitration in accordance with the rules quoted... I will now consider the three decisions under the Friendly Societies Acts. The first is Prentice v London. In that case the society was maintaining that the plaintiff had never become a member. In the latter cases, as in the present case, the plaintiff was admitted to be a member and the dispute arose whether he had been properly deprived of his membership. In considering whether an arbitration clause applies, there is obviously a difference in principle between these two different circumstances ... Brett, J., in Prentice v London said - "a dispute as to whether a party is a member or not clearly is not a dispute between the society and the plaintiff as a member. That being so, rule 30 does not oust the jurisdiction."

Continuing with his judgment the learned judge  
said:

"The issue came before this Court in Palliser v Dale. By that time section 22 of the Friendly Societies Act, 1875, had been amended by an Act of 1895 which extended s. 22 to apply to every dispute between any person aggrieved who had not more than six months ceased to be a member of a society. The first argument, which was rejected, was that this provision overruled the principles as laid down in Willis v Wells. The Court then went on to consider the construction of the words of s. 22. The earlier cases to which I have referred to were expressly approved. Lord Esher, M.R., said: 'it was correct to say that a dispute as to whether a person is a member of the society or not is not a dispute between the society and a member of it as such' ... The words of s.22 have been judicially construed in this sense..."

The learned judge went on to stress the importance of the precise words of the arbitration clause which might be in question. He explained that the words in s. 49(1) of the Act were not "any dispute arising in respect of membership", or "with regard to the relations between a member and the society", which words would have been wide enough to include a dispute as to whether a member had been properly suspended or expelled by the society [emphasis mine]. It should be noted in this respect that section 80 of the Kenya Co-operative Societies Act is limited in its operation as 49(1) of the Industrial and Provident Societies Act, 1893 on which the Judson case was based.

The learned judge also pointed out the difference in wording between section 49 of the Industrial and Provident Societies Act, 1893 and s. 68(8) of the 1908 Friendly Societies Act. He said that Section 68(8) of the Friendly Societies Act 1908 specifically provides that the expression "dispute" includes "any dispute arising on the question whether a member or person aggrieved is entitled to be or to continue to be a member or to be reinstated as a member". He went on to observe that although there had been a number of Acts amending and adding to the statutory provisions relating to industrial and provident societies, no amendment corresponding to Section 68(8) of the Friendly Societies

Act, 1908 had been made to the statutory provisions relating to industrial and provident societies.

The same observation could, in the writer's view, be made for the Kenya Co-operative Societies Act, 1966 because the Act has not defined "dispute" in the same way as the English Friendly Societies Act, 1908, s.68(8).<sup>81</sup>

Although Kenya courts are no longer bound by decisions of English Courts<sup>82</sup> they might nevertheless adopt the interpretation given in the Judson case and hold that subsections 1(a) and 1(b) of Section 80 do not cover disputes as to whether a member has been properly expelled<sup>83</sup> [emphasis mine] from his society. Such disputes would therefore be litigated in the courts.

The next question that merits some consideration is whether disputes relating to the election of the society's committee [emphasis mine] would also be disputes falling under the arbitration provisions of section 80. For example, Surridge and Digby say that -

"if any member considers that the method of election of the committee was not in accordance with the Law and the Rules, [emphasis mine] he is entitled to refer the matter to the Registrar for decision. He is not entitled to apply to the Courts."<sup>84</sup>

The learned writers have not, however, cited any authority in support of this proposition. The case of Andrews and others v Mitchell<sup>85</sup> seems to suggest that a member who is faced with a situation similar to that anticipated by the learned writers would have a right to apply to the court for relief. In that case a member of a friendly society who had been duly summoned before an arbitration committee for a breach of the rules of the society was in his absence expelled from the society by a resolution of the committee upon the different charge of fraud and disgraceful conduct of which no written notice had been given to him as required by the rules of the society [emphasis mine]. Notwithstanding section 68 of the Friendly Societies Act, 1896, which enacts that every dispute between a member of a friendly society and the society shall be decided in manner directed by the rules of the society, and that the decision so given shall be binding and conclusive on all parties without appeal, the member successfully applied to the court for a declaration that the arbitration committee's decision was null and void. Delivering his judgment in that case Lord Robertson said<sup>86</sup>:-

"The Act of 1896 has not given carte-blanche to tribunals of these societies to pronounce decisions which shall be exempt from examination in courts of law. The decisions which are exempted from review [emphasis mine] are constitutional decisions - decisions pronounced according to the rules, [emphasis mine] which, as we know, are registered under the Friendly Societies Acts".

It is submitted that the Co-operative Societies Act, 1966, has not given carte-blanche to registered societies, their committee or a majority of their members "to pronounce decisions which shall be exempt from examination in courts of law". In the writer's view the only societies which can avail themselves of the arbitration provisions of the Act are those societies which have acted intra vires or constitutionally. It should be remembered that Section 80 talks of disputes "concerning the business of registered society". An ultra vires activity cannot be regarded as a "business of registered society" since no society is authorised to break its own by-laws, the Act or Rules as part of its business.

It is submitted that where the election of a Society's committee has not been conducted in accordance with the Act, Rules or the by-laws, and also in every case where a society, its committee or a majority of its members have acted ultra vires, a member of the society would be entitled to apply to the High Court <sup>87</sup> for relief. <sup>88</sup>

The opinion expressed by SurrIDGE and Digby is, in the writer's view, incorrect simply because neither the Commissioner nor an arbitrator appointed by him would have power to grant the only relief that would be

required in such circumstances. This can only be granted by the High Court of Kenya.<sup>89</sup>

Section 64 of the Act gives the Commissioner powers to remove a committee that "is not performing its duties properly". It clearly does not give him power to prevent an unconstitutionally elected committee from taking office, and it would be futile in such circumstances to apply to him for relief. The Co-operative Societies Act does not, in this respect, have provisions corresponding to sections 17 and 18 of the Societies Act, 1963<sup>90</sup> which require a society registered thereunder to notify the Registrar within fourteen days of any "change of officers". If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which he is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, he may by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society. Until this is done the elected officers are precluded by section 24 from taking office or acting on behalf of the society.

An analysis of section 80, subsection 11, which talks of "an award for a sum [emphasis mine]...", suggests that only disputes in the nature of claims which can be satisfied by pecuniary awards [emphasis mine] were contemplated by the section. It is difficult to conceive a dispute on the legality of a particular transaction undertaken by or on behalf of a registered society<sup>91</sup> being settled by a pecuniary award.

#### Disputes Arising During A Society's Liquidation

What categories of disputes are likely to arise during a society's liquidation? It is suggested that they are disputes which fall under sections 80(1)(b), 70(1)(d) and 72(1)(k).

It is <sup>also</sup> suggested that disputes between the liquidator (as the society's representative) and a society's member in the latter's capacity as member [italics mine] are governed by section 80(1)(b), and are referable by the liquidator to the Commissioner [emphasis mine].

A possible objection that could be raised against this suggestion would be that section 80(1)(b) only deals with disputes between members and the society, its committee or any officer of the society and does not cover disputes between members and the liquidator since

a liquidator is neither the committee nor an officer of the society.<sup>92</sup> But it is submitted that although section 72(1)(k) mentions disputes between a liquidator and any third party such disputes as may arise during a society's liquidation are legally disputes between the society and the third party. A liquidator is merely a representative of the society charged by law with the duty of collecting the society's assets, discharging its liabilities and then distributing the surplus assets among the persons entitled thereto, and it is not consistent with established legal principles to state that a dispute can legally exist between him personally and a society's member or third party. For example, section 70(1)(b) gives him power to institute and defend suits "on behalf of" [emphasis mine] the society. This acknowledges that in such cases he would - as he must also in all other cases - be acting in a representative capacity<sup>93</sup> even though the society has, under section 67, ceased to exist as a corporate body.<sup>94</sup> The writer sees no satisfactory reason for suggesting that a liquidator acts on behalf of the society when instituting and defending suits but acts personally or in a non-representative capacity when exercising his other statutory powers.

A dispute arising during a society's liquidation and to which a society's member is a party in his capacity



as member<sup>95</sup> [emphasis mine] would therefore be a dispute between a member and the society within Section 80(1)(b) and consequently referable, as suggested above, to the Commissioner. [emphasis mine]

What should now be considered is the position of the other disputes that may arise during a society's liquidation but do not technically fall under section 80(1) (b). These may be disputes between -

- (a) the liquidator/registered society and a person who is not a member [italics mine] of the society; and
- (b) the liquidator/registered society and a member seeking to enforce an "outsider" right. [emphasis mine]

Are these disputes also to be referred to arbitration? Although the cases discussed earlier in this chapter have established the rule that a member seeking to enforce an 'outsider' right against his society<sup>96</sup> or a non-member<sup>97</sup> having a claim against a registered society are free to resort to litigation in order to enforce the right or claim it would appear from the provisions of section 70(1)(d), that this rule applies only when a society is a going concern. Once a liquidation has commenced those parties who might previously have sued the society must also submit to arbitration. This is

because section 70(1)(d), gives the liquidator a wide power to refer "disputes" to arbitration. The disputes which the liquidator can refer to arbitration are not confined to those "concerning the business of registered society" but are, it is submitted, wide enough to embrace disputes between a society and any other party.

What, then, is the relationship between the powers conferred on the liquidator by section 70(1)(d) and the power conferred on the Commissioner by section 72(1)(k)?

Section 72(1)(k) gives the Commissioner power to refer any subject of dispute between a liquidator and any third party to an arbitrator

"if that party consents in writing to be bound by the decision of the arbitrator."

This means that the Commissioner cannot compel an unwilling third party to submit to arbitration. In which case such party would apparently be free to sue the society (or the liquidator as the society's representative) after shunning the Commissioner's attempt to refer the dispute between him and the society to arbitration. But it is suggested that when such a situation obtains the liquidator would and indeed should

- step in and refer the dispute to arbitration under section 70(1)(d)<sup>98</sup>.

This Section states -

"The liquidator shall, subject to this Act, have the following powers -

(d) to refer disputes to arbitration."

Except for those disputes in respect of which other modes of reference have been provided by the Act,<sup>99</sup> the section gives to the liquidator power to refer all other disputes to arbitration. His powers have not been limited by the need to obtain any party's prior consent in writing (or otherwise) to be bound by the decision of the arbitrator [emphasis mine]. In this respect he has a power which the Commissioner does not have, namely, the power to compel an unwilling party to submit to arbitration.

This strange result highlights the unsatisfactoriness of these provisions of the Act : that an officer appointed by the Commissioner has been given power to do what the Commissioner himself cannot do. However, it might be argued that these provisions which the writer regards as unsatisfactory are not unreasonable since section 72(1)(k) merely confers on the Commissioner a discretionary power [emphasis mine] to refer the

specified disputes to arbitration if the requisite consent is obtained while section 70(1)(d) imposes on the liquidator a duty to refer the same disputes to arbitration. The Commissioner need not act since the liquidator has full powers to act.

The use of the word "may" at the end of sub-section (1) of section 72 appears to indicate a statutory intention that the ultimate power to refer to arbitration disputes arising during a society's liquidation was to be vested in the liquidator, and that the Commissioner was to be given discretionary powers which he could exercise if for one reason or another the liquidator had failed to refer a particular dispute to arbitration. Section 72(1)(k) states:

"The liquidator shall exercise his powers subject to the guidance and control of the Commissioner and to any limitations imposed by the Commissioner, who may [emphasis mine]... refer any subject of dispute between a liquidator and any third party to an arbitrator or arbitrators (in this section referred to as the arbitrator) if that party consents in writing to be bound by the decision of the arbitrator."

It is the writer's opinion that where a liquidator inadvertently fails to refer a particular dispute to arbitration the Commissioner should instruct him to refer the dispute to arbitration, and that where the liquidator deliberately refuses to do so then the Commissioner should remove him from office and appoint a new liquidator under s. 72(1)(b). Such an exercise

would have greater chances of achieving the desired result than any attempt that the Commissioner might himself make to refer a dispute to arbitration. It is most unlikely that a prudent claimant would ever commit himself in advance to abide by any decision of an arbitrator - a fact which appears to have been adequately demonstrated by Waira Kamau's claim against Githunguri Farmers Co-operative Society Limited which is reported in the next chapter.

The writer observes that section 72(1)(d) gives the Commissioner power to "limit the powers of the liquidator conferred by section 70 of this Act". It might therefore be argued that the Commissioner can divest the liquidator of the power that has been conferred on the latter by section 70(1)(d) to refer disputes to arbitration, and that once this has been done the reference of liquidation disputes shall be the Commissioner's sole responsibility. But it should be borne in mind that the effect of such a limitation of the liquidator's powers would be to render the society vulnerable to litigation, since the limitation of the liquidator's powers would not operate as an extension of the Commissioner's power to refer disputes under section 72(1)(k). Litigation would then, in the writer's view, be the only course of action left open for those third parties who had not consented to the Commissioner's proposal to refer their dispute with the society to arbitration.

## CHAPTER IV

THE DISPUTES THAT HAVE BEEN SETTLED UNDER THE EXISTING  
LEGISLATION

The writer's intention in investigating the disputes that the Commissioner for Co-operative Development has actually referred to arbitration has been to ascertain: --

1. the nature and frequency of those disputes;
2. the time taken between the reference by the Commissioner and the making of the award;
3. the reasons for the awards made; and
4. the costs incurred.

In the course of the investigation the facts and awards have in some instances been reported in detail. Since the said disputes have not been recorded in any official reports [emphasis mine] but exist in the form of numerous letters in different files in the Ministry of Co-operative Development which are not accessible to members of the public the writer felt it necessary to record them in detail in the hope that this thesis would constitute an authentic record which might be

useful to future scholars or researchers. It is also hoped that after studying the disputes as recorded in this chapter the reader will be placed in a better position to appreciate the suggestions made in the next Chapter for improving the law applicable to co-operative disputes.

An analysis of the disputes studied and incorporated herein has suggested the desirability of their classification into the following categories :-

1. Expulsion of members from their Society;
2. Refusal to accept members' produce;
3. Claims for demands due; and
4. Claims arising during a society's liquidation.

It is proposed to deal with them in the above order.

1. Disputes Regarding Expulsion of Members from their Society:

- (a) The Dispute between Wilfred Rukenya Iguna and Magumoni Farmers Co-operative Society Limited;<sup>100</sup>

Facts of the Dispute

At a meeting held at Ruguti Coffee Factory on an unknown date between the Chief of the Location in

which the society is situated, some Councillors from Meru County Council, the Factory committee of Ruguti Factory and some members of Magumoni Farmers Co-operative Society Ltd it was resolved that certain members of Magumoni Farmers Co-operative Society Limited would be asked to offer part of their land for the construction of a road leading to the society's coffee factory at Ruguti. The meeting also resolved that any member who refused to release his land would not be allowed to bring his coffee to the society's coffee factory at Ruguti.

Mr Iguna was one of the members through whose land the proposed road was to pass. However, he refused to abide by the above resolution unless he was compensated for the conversion of his private land into a public road. His objections to the proposal were well known to the society's factory committee and in inviting the Chief to attend the meeting held at the factory the society apparently wanted official or administrative pressure to be brought to bear on him and other members who had not accepted the society's proposals. Nevertheless, he did not change his mind.

On 14th April, 1969 the Committee of Magumoni Farmers Co-operative Society Limited met and passed



a resolution that Mr Iguna should not take his coffee to the society's factory at Ruguti. On 24th April, 1969 Mr Iguna received a letter from the society informing him that with effect from 5th April, 1969 his coffee would not be accepted by the society.

When the matter was referred to the district co-operative officer for the area the officer entered into discussions with the society's committee on the possibility of their acceptance of the members' coffee at the society's factory. On 29th September 1969 the officer wrote to the Society's Chairman informing him that a resolution passed at a meeting in the society's factory could not be binding on the whole society, since it was not passed at a Society's General or Special General Meeting. He also warned the society's Chairman that it was illegal for a society to refuse its members from delivering their coffee to the society's coffee factory. Such action on the part of the society's committee could not only ruin the individual member concerned but was also not in the interest of the society and the public at large. He concluded by advising the Chairman to reconsider his decision and suggested that if the members concerned did not violate any of the society's regulations they

should be allowed to deliver their coffee to the society's factory. He also informed the society's chairman that he was ready to discuss the matter with him at any time.

This letter was, however, disregarded by the society as was the advice of the District Officer, Chuka. Consequently, the matter was referred to the Commissioner as a dispute under Section 80(1) of the Co-operative Societies Act, 1966. An arbitrator was appointed on 23rd June, 1971 and the terms of reference were:

"The illegal and unconstitutional refusal by Magumoni Farmers Co-operative Society Limited to accept delivery of Mr Wilfred Iguna's Coffee produce to the Society's Factory on or about 4th April, 1969".

The dispute was heard on 25th October 1971 at the Meru North Co-operative Union's Conference room and details of the award were communicated to the Commissioner on 27th October, 1971.

Holding the action of the society in refusing to accept Mr Iguna's coffee at their factory to be contrary to the society's by-laws 42, 43 and also to be contrary to natural justice the arbitrator observed that the

action of the society was a very serious offence which must be discouraged, taking into consideration that some committee members in the Republic were acting knowingly contrary to their respective by-laws and the Co-operative Societies Act, 1966 without consulting their respective co-operative officers. He therefore directed that the Magumoni Farmers Co-operative Society Limited was to pay to Mr Wilfred Iguna Rukenya Shillings Eleven Thousand Nine Hundred and twelve (Shs.11,912/-), arbitrator's fee inclusive, breakdown as below :-

Damage of Mr Iguna's coffee		
29180 lbs at /40 per lb. ...	11,672-00	
Arbitrator's fee: private car		
60 miles at 1/- per mile		
going and back ...	240-00	101
	<u>11,912-00</u>	
Shs.	11,912-00	
	*****	

The by-laws referred to by the arbitrator are reproduced below :-

"42(a) The Society shall market only such types of produce as shall be decided by the general meeting;

(b) The Committee may direct the kind and amount of produce which shall be delivered by each member and need not accept such produce unless it is of the standard required and is delivered at the time and place directed;

(c) Unless exempted in writing by the Commissioner a receipt for all produce delivered to and accepted by the society shall be issued on behalf of the society at the time of delivery;

(d) The committee shall make rules as they think fit regarding the kinds of produce to which a pooling system shall be applied and shall decide on the periods of such pools.

#### BINDING RULE

43. No member shall, without first obtaining the written consent of the Committee, sell or otherwise dispose of any of his produce (of a kind scheduled as falling within this section by the general meeting) to any company, society or person other than the society. Any member judged by the committee to be guilty of infringing this by-law, shall pay into the Reserve Fund of the society, a fine not exceeding 50 per cent of the value, as estimated by the Committee, of the produce so disposed of. Payment of such liquidated damages shall in no way preclude the imposition of a fine under by-law 46".

The arbitrator was a District Co-operative Officer and the member was represented by an advocate. What would be mentioned here is the fact that the award did not include the member's legal costs and disbursements amounting to Shs.3,931/00 (three thousand nine hundred and thirty one shillings)[emphasis mine].

On 7th September, 1972 notice of appeal by the society was lodged with the Commissioner, and the appeal was heard by two arbitrators, (also co-operative officers) on 30th October, 1973.

The grounds of appeal were, inter alia, that the arbitrator had erred in accepting the figure of 29,180 lbs as Mr Iguna's loss without getting proof in support. The society's appeal on this point was upheld after it was found (on estimates) that Mr Iguna's loss was only 2,200 kilograms.

When giving their award the arbitrators said:-

"We have therefore decided that owing to the foregoing facts and noting that Magumoni Society had no right to expel Mr Iguna in the manner they did Mr Iguna be compensated as follows :-

- (a) Loss of 2,200 kg at an average price of cents /65 per kg. .. 1,430.00;
- (b) Costs incurred by Mr Iguna upto the time of hearing of the arbitration to be met by the society. These costs to be submitted to the Commissioner by Mr Iguna before the final award is made;
- (c) The Society should also meet the costs of the arbitration (Shs.240/-) plus all other costs which the society has incurred in this matter."

Neither the society nor Mr Iguna appealed against this ruling, but on 1st November 1973 the society's Chairman wrote to Mr Iguna and informed him that at a special general meeting of the society which was held on 31st October 1973 it was resolved to expel him from the society because he had worked contrary to

by-law 10(b) of the society's by-laws. The Chairman concluded his letter as follows:

"Therefore with effect from 31st October 1973 as per minute number 65/73, I am directed to write you and inform you that you are no longer a member of this Co-operative society limited".  
[emphasis mine]

On receipt of this notification from the society the member immediately reported the matter to the Co-operative Officer in charge of his area. That officer made some determined efforts to secure a reversal of the general meeting's decision to expel Mr Iguna from the society. When these efforts failed to achieve the desired result the Co-operative Officer reported the matter to the headquarters in Nairobi.

On 6th February, 1974 the Commissioner for Co-operative Development sent a senior officer from Nairobi who visited the society and had a discussion with the society's chairman. In the course of their discussion the chairman was advised to call a general meeting and convince the members to change their mind and restore Mr Iguna to membership. In the words of this officer,

"I pointed out the likely consequences since the expulsion of Mr Rukenya was unconstitutional. My advise was that Mr Iguna's case be reviewed by the management committee of the society immediately."

A special general meeting was subsequently held on 24th May, 1974 to reconsider the expulsion of Mr Iguna. But according to the Assistant Co-operative Officer of Meru South,

"the meeting unanimously resolved to expel the ... member from the society due to bad behaviour and poor relationship with other members. Mr Iguna was allowed to defend himself but all in vain."

As a practical gesture of their disapproval of what they apparently considered to be an unwarranted and officious intrusion by the Commissioner into what to them was essentially a domestic affair, the members also passed the following resolution :-

"That if the Commissioner returns this man to the society by force, we shall resign from the society and leave the Commissioner to be with Wilfred Iguna without us."

Although the members might still have demonstrated their anger by couching it in a more diplomatic language appropriate to a resolution of an honourable society's general meeting, their seriousness in the matter cannot be doubted. That they had become thoroughly fed-up with Mr Iguna is indicated in their reference to him as "this man".

Confronted with such a situation, the Assistant Commissioner for Co-operative Development (Eastern

Province) wrote to the Commissioner to this effect:-

"We have done our best to save this member but it is the wish of the members of Magumoni Society to expel Mr Iguna. The only alternative left to Mr Iguna is to file a dispute with the Commissioner."

Given the absence of an elaboration on the allegations made by the other members against Mr Iguna the writer is inclined to the inference that Mr Iguna was being expelled from the society because he had declared a dispute with the society and had won an order for damages against the society. It should be noted that the special general meeting at which the decision to expel him was taken was held on the day following that on which the Society's appeal was heard and dismissed. It is therefore not unreasonable to infer that the meeting had been convened in anticipation of the outcome of the society's appeal. This inference is also supported by the fact that in its memorandum of appeal the society had categorically stated -

"(7) The Co-operative Society Limited during the coming Special General Meeting will or may consider by-law number 10(b) for the welfare of its members".

The said by-law empowers the committee or the general meeting to expel a member who acts in any way against the interests of the society.



Comments

1. Although the arbitrator stated that the society had violated by-law 42 and by-law 43, it should be noted that those by-laws do not in fact deal with the facts that were in issue.
2. In trying to force Mr Iguna to agree to its proposal to construct a road through his land without paying him any compensation and then refusing to accept his coffee for processing after his refusal the society and its officers violated the spirit of section 75(1) of the Kenya Constitution. That section states -

"No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where... provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation".

Secondly, the society also acted beyond the ambit of its by-laws and was rightly held liable in damages to Mr Iguna. Neither the Co-operative Societies Act, the Co-operative Societies Rules, nor the registered by-laws gave the society power to refuse to accept a member's produce under any circumstances. On the contrary, by-law 43 specifically binds all members to sell their produce to the society and empowers the committee to impose fines on those members who have violated that by-law. This imports an obligation

on the society to accept member's produce delivered to it for marketing. A member who has violated any of the provisions of his society's by-laws may however be expelled from the society, but only after such expulsion would he be disqualified from delivering his produce to the society for marketing. In the instant dispute the society refused to accept Mr Iguna's coffee even before his expulsion from the society [emphasis mine].

3. Although the arbitrators who heard the society's appeal found the society liable to Mr Iguna on the grounds that the society had no right to expel Mr Iguna in the manner they did [emphasis mine] they do not appear to have based their decision on an interpretation of the by-laws. It would therefore appear that they were simply basing their decision on what to them appeared to be just, fair or reasonable [emphasis mine].

4. The letter addressed by the Assistant Commissioner for Eastern Province to the Commissioner recommending that the expulsion of Mr Iguna from the society should be referred to arbitration assumes that disputes pertaining to members' expulsion from their societies are governed by section 80(1) of the Co-operative Societies Act, 1966. However, the writer has referred in the last chapter to the case of Judson v Ellesmere

Port Ex-Servicemen's Club<sup>102</sup> which lays down the rule that a dispute as to whether a member has been properly expelled from his society is not a dispute between the society and a member of it as such.

(b) The Dispute between Magu Waichua and Mathira Farmers Co-operative Society Limited<sup>103</sup>

Facts of the Dispute

The dispute between Magu Waichua and Mathira Farmers Co-operative Society Limited was precipitated by the refusal of Mathira Farmers Co-operative Society Limited on 10th January 1969 to accept Mr Waichua's coffee for marketing, and by his subsequent expulsion from the society by the society's annual general meeting which was held on 4th October 1971.

In his letter dated 11th June 1970 addressed to the then Minister for Co-operative Mr Waichua stated, among other things:

"I am a coffee farmer in the Mathira Division of Nyeri having 260 coffee trees in my farm. I am a member of the Mathira Farmers Co-operative Society Limited having five shares in the society. According to procedure all farmers' coffee is sold through the society.

Being a member of the society together with six other members complained to the said society in respect of a circular issued to members containing details of coffee gross sales in Mathira Division whose figures had

wrong parts. This circular was reference MFCS/CIRC/2/VOL.1/10PNH/279 dated 31st May, 1969. The matter of the errors was discussed by the society's committee and errors corrected".

The member went on to tell the Commissioner that owing to their having criticised the circular, this hatched a grudge which caused a serious dispute between them and the other members of the society. As a consequence they received a letter from the society dated 10th June, 1969 stating that their coffee had been banned by the society and that the society would not accept their coffee for sale from that date. However, after some time the ban on the other six members was lifted but his deliveries of his coffee remained banned. As a result of this action by the society the member's coffee produce had been spoilt in the farm as he had no other way of putting it to the market. The member also stated that he had never been satisfactorily provided with reasonable grounds for the ban on his coffee.

Mr Waichua explained that he had been compelled to write to the Commissioner for help because he had tried to have the problem solved by the society and had sought the intervention of the co-operative officers but without any success. Nevertheless, he maintained

that:-

- (i) as a member of the society he and the other six members had every right to question the accuracy of the gross sales circular, the document which hatched the dispute;
- (ii) the society, in conjunction with the provincial and district co-operative officers, had failed to get a solution to the dispute;
- (iii) owing to the long period he had stayed without selling his coffee, he had sustained great loss and the wellbeing of his family had been very greatly damaged;
- (iv) further prolonging of the unreasonable ban of his coffee was detrimental to the economic development of the country.

The society's version of the facts leading to the ban on the member's coffee was as follows (as contained in their letter dated 11th November, 1971 to the member's advocates):

"We would like to advise you that your client was expelled from the society as a result of a letter distributed by him and six other people acting against the interest of the

members in pursuant to Society's by-law number 10(b). He refused to apologise to the Committee as six other people did.

However, in our annual general meeting held on 4th October, 1971 the case of your client was referred to the general meeting but he failed to apologise to them. It was therefore resolved as per minute number AGM/5/71 that Mr Magu be expelled from the society as per by-law number 11. (The member was actually expelled under by-law number 10(b)).

The matter has now been referred to the Commissioner for Co-operative Development through a copy of the minutes of the Annual General Meeting held on 4th October, 1971."

The following is an extract of the relevant portion of the minute of the annual general meeting in question which according to society's records was attended by approximately, 6,500 members:-

"MINUTE AGM/5/71: MR MAGU WAICHUA'S APPEAL

The Chairman informed the members that Mr. Magu was expelled by the Committee after failing to apologise for the circulars distributed aiming to cause confusion among the members. Mr Magu's accomplices apologised to the committee but he himself refused and as a result he was expelled by the committee from the society.

After the Chairman stated the case of Mr Magu to the members, it was proposed by Mr Johana Muu and seconded by Mr Gacumani that he should say to the members because of his misdeed. He was called at the dais to apologise but he said he will never apologise. Consequently Mr Christopher Gacanja seconded by Mr Francis Maina proposed that Mr Magu be expelled from the society and it was unanimously resolved by all members by a show of hands."

/sorry

The District Co-operative Officer, Nyeri was appointed arbitrator with instructions to make an award within one month from the date of the order. However the arbitrator wrote to the Commissioner on 19th April, 1972 objecting to his appointment and stating -

"I would like to bring it to your notice that having been acquainted with this dispute since its start and having tried at committee meetings, in my office and in your office before the matter was referred to the annual general meeting held on 4th October 1971, I personally feel that I am not the right person to be appointed but instead an independent officer from neighbouring districts who does not know Mr Magu Waicua or the officials of the society in question would have been appointed. I am quite sure that Mr Magu Waicua would not like me to settle the dispute. I am familiar with it."

This objection was not accepted and so the arbitrator apparently decided not to do anything about the dispute. By another order dated 6th September 1973 the Commissioner appointed the District Co-operative Officer, Kirinyaga District to be the new arbitrator - the terms of reference remaining the same as in the previous appointment.

Before the arbitrator could commence the arbitration the Commissioner wrote to him on 19th September 1973 instructing him to stay execution of the Commissioner's order dated 6th September 1973 referring the

above dispute to him for arbitration, until further notice. He was informed that the Assistant Commissioner for Co-operative Development, Central Province, was holding separate discussion with Mr Magu Waicua and Mathira Farmers Co-operative Society with a view to getting them resolve their differences in an attempt to avoid arbitration proceedings.

On the 24th September 1973 the said Assistant Commissioner wrote to Mr Magu Waicua informing him that the Commissioner for Co-operative Development had directed that the deliveries of his coffee produce were to be resumed forthwith. The directive had come about as a result of the inquiry which was carried out in the society some months back. He also stated that correspondence received from the Commissioner's office indicated that Mr Waicua was intending to sue the society for damages, and before the Commissioner's directive could be implemented it would be appreciated if he would arrange to see the Assistant Commissioner for further discussions.

Although the proposed discussions were subsequently held they did not achieve the desired result, and as a result of this the Assistant Commissioner informed the



Commissioner on 29th September 1973 that his discussions with Mr Waicua on the question of Mr Waicua resuming deliveries of his coffee to the society without any claim on the loss of his coffee for the period it was rejected by the society had been unsuccessful. He was also of the opinion that since Mr Waicua had remained firm on his stand to sue the society he did not see any alternative but "to allow an arbitration to proceed".

After receipt of this letter the Commissioner wrote to the arbitrator on 12th October 1973 instructing him to proceed with the arbitration and make his award within one month of the date of the Commissioner's letter. However, the arbitrator actually made his award on 10th December 1973.

Although the award and the reasons therefor were not available to the writer (there being no copy of the award in the Commissioner's office) it was noted that Mr Waicua's advocates on 9th February, 1974 lodged an appeal with the Commissioner against the arbitrator's award. The grounds of appeal were that -

1. The arbitrator had erred in concluding that Magu Waicua was lawfully and rightly stopped from selling his coffee to the society. The

advocate contended that the society's action in stopping Magu Waicua from selling his coffee to the society was unlawful, against the society's rules and totally against the principles of natural justice;

2. Mr Magu Waicua was justified in referring the matter to the Commissioner for Co-operatives Development and to other members of the society;
3. The Society's action in demanding apology from Magu Waicua prior to accepting his coffee was unwarranted, unethical and unlawful;
4. The society's action in expelling Magu Waicua from the society's membership was unlawful and against all principles of natural justice. No general meeting was properly convened so as to allow Magu Waicua to oppose the question of his being expelled from the membership of the society. The said expulsion never became final;
5. The arbitrator erred in not granting order for damages to Magu Macua.

The advocates were therefore asking the Commissioner to alter or vary the arbitrator's decision, to the extent as stated in the grounds of appeal.

Before the appeal was heard an inquiry into the by-laws, working and financial condition of the society had been conducted by the Commissioner. The inquiry was conducted under section 61(1) of the Act which states -

"The Commissioner may, on his own accord, and shall on the direction of the Minister or on the application of a majority of the Committee of the society, or of not less than one-third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry, or direct some person authorised by him in writing to hold an inquiry, into the by-laws, working and financial condition of any registered society".

When conducting the inquiry the officers concerned also investigated the circumstances of the dispute between Mr Waicua and the society, and their views were that Mr Waicua was wrongfully expelled from the society and could therefore be justifiably considered for compensation in respect of his crop that he lost.

The Commissioner, on the basis of these views, instructed the society to readmit Mr Waicua as a full member of the society and to accept any coffee that he might deliver to the society. The arbitrator had also ruled in his award that with effect from the date of the award (i.e. 10th December 1973) Mr Waicua was to deliver his coffee to the society, and that the society should accept the coffee so delivered. He also ordered

that the society was to accept Mr Waicua back as a member without insisting on an apology as a pre-condition for readmission.

The society on its part decided to comply with the Commissioner's directive and restored Mr Waicua to full membership. In view of these developments it became unnecessary to deal with grounds 3 and 4 of the appeal and the issues that should have been considered during the hearing of the appeal were -

- (a) Whether Mr Waicua was entitled to any compensation from the society in respect of non-acceptance of his coffee, and, if so,
- (b) The quantum of damages.

But it would appear that Mr Waicua's grounds of appeal were not argued or considered at length on their merits during the consideration of the appeal. The appeal, which was considered by the Deputy Commissioner for Co-operative Development, merely summarised the facts which had precipitated the dispute and the ruling of the arbitrator.

The Deputy Commissioner referred to Mr Waicua's Memorandum of Appeal dated 9th February, 1974 in respect of the award by the arbitrator in the dispute between

himself and the Mathira Farmers Co-operative Society Limited. He stated that the memorandum of appeal had received due consideration by him. He also stated that the proceedings of the arbitration had also been carefully looked into. In his view the crux of the matter was that Mr Waicua was alleged to have behaved rudely to the officials of the Mathira Farmers Co-operative Society Limited management committee by spreading among the general members malicious rumours aimed at creating hatred between the management committee and the general members of the society. The management committee had, in his view, substantiated their allegation by producing a copy of a letter purported to have been written by Waicua and circulated to members of the co-operative society.

He noted that although the management committee asked Mr Waicua to withdraw the letter and apologise he refused to do so. Consequently the management committee with the approval of the general meeting, decided to expel him from the society. This action led to the refusal by the society to accept Mr Waicua's coffee. The management committee had exercised this power under by-law number 10 of their by-laws which Mr Waicua had accepted to abide by when he joined the society as a member. The Deputy Commissioner nevertheless agreed that Mr Waicua suffered a loss when he did not have

anywhere to deliver his coffee for processing.

He concluded his letter by stating:

"After studying the developments which created the situation I allowed your application and referred the dispute to an arbitrator. The arbitrator, to my mind, took great pains in looking for facts on which he based his award. There is nothing he has left out. I uphold his award. You have been allowed to deliver your coffee to the society and yet the society has agreed not to press on with their demand for an apology. Taking all these things into account I consider the award in this dispute to be very fair and therefore disallow your appeal."

#### Comments

1. The Deputy Commissioner's decision to disallow the appeal is indeed surprising. He admitted that the member had "suffered a loss" but has failed to award him damages to compensate him in respect of that loss. It is submitted that by disallowing the appeal the Deputy Commissioner violated the fundamental legal principle that equity will not suffer a wrong to be without a remedy .
2. Although by-law number 10(b) states that the Committee or the general meeting may expel a member who acts in any way against the interests of the society [emphasis mine] it is felt that by writing the letter pointing out the errors in the society's circular to members giving details of coffee gross sales in Mathira

Division Mr Waicua could not be regarded as having acted "against the interests of the society". On the contrary he was probably acting in the best interest of the society.

3. The statement that the arbitrator "took great pains in looking for facts on which he based his award" and that there was nothing he had "left out" is not easy to justify. In his memorandum to the Deputy Commissioner dated 12th February 1974 the Co-operative Officer (Legal Section) had informed the Deputy Commissioner that -

"This dispute was mentioned in the proceedings of the enquiry and the views of the enquiry officers were that Mr Waicua was wrongly expelled from the society and that he could justifiably be considered for compensation for his crop that he lost. I personally feel that the finding of the inquiry officers on this matter should have been considered by the arbitrator."

Why did the arbitrator - and the Deputy Commissioner - disregard these views? The inquiry officers had conducted a full inquiry "in to the by-laws, working and financial conditions" of the society and it is most unlikely that they would have formed an opinion without basing it on proper facts.

4. "Audi Alteram Partem" - Although Mr Waicua's appeal was submitted to the Commissioner by his advocates it is rather interesting to note that -

- (a) the appeal decision was communicated directly to Mr Waicua and not to his advocates; and
- (b) the advocates were not allowed to appear before the Deputy Commissioner to argue their client's case at length on merits, despite the fact that they had specifically requested to be allowed to do so. The question that now arises for consideration is whether Mr Waicua had a right to be represented by his advocates at the hearing of the appeal. Section 80(4)(ii) of the Co-operative Societies Act, 1966 states that

"Where any of the parties insist upon being represented by an advocate, the Commissioner may refuse to act under this section, in which case the dispute shall be determined by a single arbitrator in accordance with the Arbitration Act".

This appears to mean that a party wishing to be represented by an advocate during the arbitration proceedings must indicate that wish to the Commissioner at the time of referring the dispute to the Commissioner and not later. This will then enable the Commissioner to decide whether to "act under section 80" or not.



If any of the parties insists on being represented by an advocate while the Commissioner feels that that is undesirable, the effect will be that the Co-operative Societies Act will not govern that dispute and the Commissioner will not "refer it for determination to an arbitrator" under Section 80(4)(ii). The "single arbitrator" who will hear the dispute under the Arbitration Act must either be appointed by the concurrence of the parties themselves, or by the High Court under section 12(a) of the Arbitration Act after an application to do so has been made by one of the parties to the dispute.

The award made by the arbitrator is, under section 17 of the Arbitration Act, final and binding on the parties and the persons claiming under them respectively. No appeal lies to the Commissioner.

Where a party does not initially insist on being represented by an advocate and thereby allows the Commissioner to refer the dispute to an arbitrator appointed by him under section 80(4) of the Co-operative Societies Act, 1966, it is submitted that that party cannot subsequently change his mind and insist on being represented by an advocate at the hearing of the appeal. The Commissioner cannot act and "refuse

to act" at the same time. The party in question may then only be represented by an advocate if the Commissioner allows him to be so represented.

Since in the instant dispute Mr Waicua had not insisted on being represented by an advocate at the time he referred the dispute to the Commissioner it is submitted that he had lost that right of representation and could not therefore insist on it at the appeal stage.

Does the fact that Mr Waicua was not entitled to be represented by an advocate during the hearing of the appeal imply that he was also not entitled to appear personally before the Deputy Commissioner? It is submitted that he was entitled to appear in person before the Deputy Commissioner and that by refusing him from so appearing the Deputy Commissioner misconducted the proceedings. This was fatal to the award which he made.

It is necessary to point out here that on 11th February, 1974 Messrs Shah & Parekh, Advocates, wrote to the Commissioner as follows :-

"We refer to the Memorandum of Appeal filed by us on behalf of Magu Waicua on 9th February 1974.

We shall be obliged if you give us time, in due course, to appear before you in the presence of the respondent so that appeal could be argued at length on merits."

The Co-operative Officer (legal section) wrote this memo to the Deputy Commissioner regarding the advocates' letter -

"We should, as much as possible, avoid representation by lawyers. In my folio 28 herein I have suggested we should not hold a hearing".

To this memo the Deputy Commissioner gave the following reply on 28th February, 1974:

"Agreed. Make a suitable reply".

Apparently the reply was not made since the advocates wrote to the Commissioner on 5th June 1974 stating, inter alia -

"We are surprised to learn that you have communicated the decision of appeal directly to our client when in fact appeal was filed by us. We are further surprised to know that you never permitted us to make verbal submissions to you".

The Deputy Commissioner, acting on the advice of the Co-operative Officer (Legal) had disposed of the appeal without holding a hearing.

In Re An Arbitration between M. Jaffer and Kunverji Karsandas & Sons<sup>104</sup> it was stated that if a party to an arbitration wishes to be heard, he must

be given an opportunity. To refuse him a hearing, as had happened in that case, is a denial of natural justice and amounts to misconduct on the part of the umpire; and although the umpire may have been acting from the best of motives (as he no doubt was in that case) the failure to allow the applicant an opportunity to be heard, especially after he had asked to be heard, was fatal to the award he made. The Court held that as the umpire had been guilty of misconduct (albeit without any moral stigma attaching to him, as he made an honest mistake in interpreting the Arbitration Rules annexed to the contract) the only proper course open to it was to set aside the award.<sup>105</sup>

In that case the umpire had made an award in favour of the respondent without hearing evidence despite the fact that the applicant had intimated to him that he wished to give evidence. The umpire had decided to dispense with a hearing because, as he said

"The arbitrators had informed me of the matters in dispute and handed me the correspondence file between the parties, which I perused before making the award. I also perused the contracts between the parties. It was not necessary for me to call the parties to take their evidence as the facts of the case were not in dispute"

The court stated that while the umpire had power under paragraph 5 of the Arbitration Rules to exclude advocates from appearing before him he had no power to dispense with a hearing.

It is submitted that the High Court would have set aside the Deputy Commissioner's award if Mr Waicua had applied for setting aside of the award.

When hearing Mr Waicua's appeal the Deputy Commissioner was in exactly the same position as the umpire in the Jaffer Arbitration.

2. Disputes Relating to Societies' Refusal to Accept Members' Produce:

(a) The Dispute between Benjamin Njeru and Kiriani Farmers Co-operative Society Ltd. <sup>106</sup>

During the hearing of the above dispute Mr Njeru informed the arbitrator that he was a member of Kiriani Farmers Co-operative Society Limited. He also stated that he had referred the matter to the Commissioner because he wanted compensation for the loss he had suffered [emphasis mine] when the society refused to accept his coffee for processing and marketing. He told the arbitrator that the action of the society was unjustified because his coffee shamba was maintained at the required standard and in accordance with the

advice given to him by the officials of the Department of Agriculture. On 18th February, 1969 the member had received a letter from the society informing him that his coffee would not be accepted for processing in any of the society's factories. This was because he had refused to sign a letter authorising the society to deduct the sum of two cents per pound of cherry delivered by him to the society. The money so deducted would be used in various Harambee projects in Kiriani.

As a result of the society's refusal to accept his coffee the member alleged that all the cherry produced by five hundred coffee trees in his farm during the 1968/69 season were spoiled.

The witnesses called by the member testified to the fact that the society's committee had instructed the Cherry Clerk (the clerk at the factory where cherry is delivered) not to accept the member's coffee unless the member signed vouchers authorising the society to deduct two cents per pound from the proceeds of his coffee sales, these being the member's contributions towards the construction of Kiriani Harambee Secondary School. They also stated that the decision to effect these deductions from members' dues was not made by the society's general meeting, and the society's members

had not been consulted over the issue. The meetings authorising the deductions had been held at the Chief's camp and at the Kiriani Harambee Secondary School compound. Because some of the Society's members were present at those meetings the society's officials had claimed that they were therefore general meetings of the society.

The society was represented by its Chairman at the hearing before the arbitrator. He as well as the other witnesses for the society denied the member's allegations and claimed that they had no knowledge of the member's coffee having been rejected.[emphasis mine] The Society's Chairman told the arbitrator that he had no knowledge of Mr Njeru's complaints against the society, and that he knew nothing about the rejection of his coffee. He stated that the power to reject farmers' coffee rests with the Department of Agriculture and claimed that Mr Njeru had neither reported to him that his coffee had been rejected at the factory nor had he ever reported to a committee member representing his area who in turn could bring his complaints to the society's full management committee. The chairman observed that the question of farmers running away from Kiriani Society to join other societies did not arise as members were free to transfer to

any society of their choice, provided the transfer was in accordance with the society's by-laws. He also disagreed with the member's allegations that no special general meeting had been held to pass the resolution for the deductions. After hearing the parties and their witnesses the Arbitrator concluded - that -

1. evidence given by witnesses appearing for both the member and the Kiriani Farmers Co-operative Society Limited revealed that members had been forced into making Harambee contributions;
2. meetings deciding the first contributions of -/2 per pound of cherry and Shs.400/- per member were held at illegal places [emphasis mine] (i.e. Chief's Camp and School compound) and were therefore not meetings of the society;
3. the contributions, even if contributed on <sup>members with</sup> voluntary basis, were high. He noted that more coffee paid more by way of -/2 per pound of cherry and the minimum contribution of Shs. 400/- per member were unreasonable and a little too much;
4. the society appeared to be run by Mr Aliphas Njue, Treasurer of the society who was also the Headmaster of Kiriani Primary School and an initiator, strong supporter and Chairman of the



- proposed Kiriani Harambee Secondary School;
5. letter ORG/7/1/385 dated 11th June, 1970 addressed to all coffee farmers of Kiriani Farmers Co-operative society limited, signed by Mr Nkonge on behalf of the Chairman and letter rubber stamped by the society's rubberstamp dated 18th February 1970 which had been produced to him as an exhibit proved that some members' coffee had been rejected at Barago and Kiriani Factories of Kiriani Farmers Co-operative Society Limited, and that the ban on those members' coffee was still in operation at the date of hearing the dispute;
  6. evidence given by the society's witnesses (who were also all committee members) was contradictory and unreliable.
  7. the Plaintiff's claim for compensation for loss of 12,000 lbs of his lost coffee was, in his view, an exaggerated figure if compared with his production from 1963/64 to 1970/71 during which period his highest coffee harvest reached 8,476 lbs for crop one and two in 1964/65;
  8. he had personally called for a special general meeting to be held on 27th November 1971 to discuss the complaints by members on their rejected coffee and notices displayed at the society's notice board and other notice boards

had been removed. Reports reaching his office indicated that the removal of these notices was organised by the Treasurer of the Society;

9. There was sufficient evidence to prove that no elections had been carried out for several years and that the treasurer had always devised tricks to boycott all meetings called for the purpose of electing new society officials.

He was therefore making the following award :-

"After carefully examining evidence given by all witnesses appearing for both the plaintiff and the accused, I am satisfied that Mr Benjamin's coffee was rejected by the society and as such he must have lost some of his coffee as a result of the society's decision for which he ought to be compensated.

Payment of this compensation is to be based on four year average production from his coffee farm, i.e. 1967/68 - 1970/71 and to be made at the rate of -/50 cents per pound.

The average production for four years as extracted from the society's records is 3,921 lbs at -/50 per lb is Shs.1,960/50 (one thousand nine hundred sixty shillings and cents fifty only) ...

In addition to this the society is to meet expenses incurred by the arbitrator for trips made to Chuka to hear evidence and an amount of Shs.360 is to be paid to the Government."

Both the member and the society appealed to the Commissioner against the arbitrator's award. The member appealed on the basis of the inadequacy of the damages awarded and claimed to be paid Shs.13,620/- .

The society on the other hand alleged that the arbitrator had erred in finding the society liable and sought to have the award set aside.

The Commissioner communicated his decision to the parties on 26th September 1972 and when so doing stated that he had compared the evidence given by the parties to the dispute and on balance found that Mr Njeru's version of the incident of alleged victimisation was true. He therefore, supported the arbitrator's findings in that respect. He also observed that the society had failed to challenge and break up Mr Njeru's and his witnesses' evidence and also failed to call the material witnesses directly implicated in the affair. Even relevant minutes of meetings which imposed the ban were not made available to the arbitrator. Evidence of the Chairman, the main witness for the society was mostly denials of everything. The Commissioner further observed that the society's chairman himself had agreed that the meetings which voted for levy of Harambee Projects donations were improperly held at illegal places.

There was therefore no doubt Mr Njeru's coffee having been rejected arbitrarily. However, it was not established how much coffee was lost through such

rejection and the arbitrator felt that Mr Njeru's claim of 12,000 lbs of lost coffee was much an exaggerated figure.

The arbitrator's award based on four best years average yields was fair and therefore the award should be confirmed for implementation. The society's appeal was accordingly dismissed and he was ordering that the society pays the said sum within a month from the date of the letter. He was also ordering that the society pays the sum of Shs.360/-, being the costs of arbitration, within the period of one month from the date of the letter.<sup>107</sup>

The society's secretary wrote to the Commissioner on 28th January, 1974 informing him that the management committee had at its meeting held on 28th January 1974 "considered the dispute to be ended by paying Mr Njeru Shs.1,960/50 and also the arbitration fee to the Commissioner." There was no further correspondence received from Mr Njeru and it may therefore be assumed that he too accepted the Commissioner's decision.

### Comment

Although the arbitrator and the Commissioner did not engage in an elaborate analysis of the by-laws to support their findings against the society it is the

writer's view that the final decision is not unreasonable. The society's officials had no power under the by-laws to force individual members [emphasis mine] to contribute money towards Harambee projects.

Contributions to these projects are governed by s.47 of the Co-operative Societies Act which states -

"Any registered society may, with the written authority of the Commissioner, after such allocation has been made to the reserve fund as may be required by or under this Act or the by-laws of the society, apply an amount not exceeding ten per cent of the remaining net balance to any charitable purpose".

This section only authorises a society to donate its own funds [emphasis mine] for Harambee projects.

(b) The Dispute between Joseph Njeru Njue and Kyeni Farmers Co-operative Society Limited.<sup>108</sup>

The background to this dispute is that on 11th August, 1966 a special general meeting of Kyeni Farmers Co-operative Society passed a resolution that "anybody who will not care for his coffee shamba, coffee assistant and field committee will close his shamba". The resolution also stated that if a member had two shambas and one of them was well looked after while the other was not, then no coffee delivered by the member from the well-looked-after shamba would be accepted by the society for processing.<sup>109</sup>

On 16th September, 1966, pursuant to this resolution, the society sent notices to all its members requiring them to weed, manure, prune, bench terrace and remove suckers from their coffee trees. The notice warned them that anyone who failed to do the work which was required to be done would be dealt with under by-law 10 which authorises the society's committee or general meeting to expel a member who -

- (a) is convicted in a court of an offence of dishonesty;
- (b) acts in any way against the interests of the society; or
- (c) trades on his own account in any produce scheduled by the society under by-law 42 of the society's by-laws.

On 15th April, 1967 Mr Joseph Njeru Njue wrote to the Assistant Co-operative Officer at Embu informing him that the factory supervisor of Gakwegori Coffee Factory (one of the society's factories) had informed him the previous day that his coffee would no longer be accepted by the society for processing at any of the society's coffee factories. He was therefore asking for the officer's help as it was possible that the society's decision not to accept his coffee was motivated by "fitina". And so started

this rather extraordinary dispute that has been going on for twelve years and is still going on at the time of writing this thesis in June 1979.

After the society's refusal to accept the member's coffee on 15th April, 1967 the member sought the assistance of various Government Officers in his area to secure the society's acceptance of his coffee, and it was not until 23rd June, 1967 that the coffee he delivered to the society was accepted.

Mr Njue alleged that as a result of the society's refusal to accept his coffee between 15th April 1967 and 23rd June 1967 he had lost eighty nine thousand six hundred pounds of coffee worth forty two thousand two hundred and seventy seven shillings and forty cents, which sum he wanted the society to pay him as compensation.

However, at a special general meeting held on 11th August, 1967 the society refused to accept the member's claim. According to the available correspondence between the member, the society and the Commissioner's office it would appear that the member did not take any action against the society until 3rd November 1969 when

he informed the Commissioner of the Society's refusal to accept his claim for compensation and asked him to refer the dispute to an arbitrator as provided by the Co-operative Societies Act, 1966, s. 80(4).

The Commissioner's response was a letter dated 11th November, 1969 informing Mr Njue that there was very little he could do about his case since the matter had been discussed by the society's committee and also at a special general meeting which was specifically convened at Mr Njue's request. He was therefore of the opinion that a dispute was not there since Mr Njue was one of the twenty five members who had bad shambas. He was therefore advising Mr Njue to honour his society's committee and special general meeting's decisions.

Although Mr Njue received the Commissioner's letter in November 1969 it was only in October 1971 that he instructed an advocate who on 29th October 1971 wrote to the Commissioner requesting him to refer to arbitration the dispute that existed between his client and the Kyeni Farmers Co-operative Society. The lawyer also wrote to the society and informed it that he had instructions to institute legal proceedings against them if he did not hear from the Commissioner



within ten days. The letter concluded -

"It would therefore be in your own interest to approach Commissioner for Co-operative Development immediately and request him to refer the matter to arbitration, failing which a case shall be filed against the society and consequently the society shall be saddled with a lot of expense".

On 2nd March 1972 the Commissioner wrote to the District Co-operative Officer, Embu District, informing him that since the dispute had been referred to him by Mr Njue who wanted to be represented by an advocate the dispute would have to be settled in accordance with the provisions of the Arbitration Act (Cap. 49). The Commissioner's decision was based on the Co-operative Societies Act, 1966, s. 80(4) (ii) which states that where any of the parties insist upon being represented by an advocate, the commissioner may refuse to act under the section, in which case the dispute shall be determined by a single arbitrator in accordance with the Arbitration Act, as though the reference under subsection (1) of the Act were a submission within the meaning of the Arbitration Act.

Nothing appears to have been done about this dispute until 16th September 1974 when the Commissioner finally decided to refer the dispute to arbitration.<sup>110</sup> The order of reference stated the particulars of the dispute to be -

- "(a) Closure of the member's two coffee shambas; and  
 (b) loss of coffee estimated at 89,600 lbs and compensation therefor."

Three arbitrators were appointed and they were, including the writer,

1. Mr J.C. Mukule, a lecturer in Co-operative Law at the Co-operative College of Kenya;<sup>111</sup>
2. Mr K.C. Gautama, Advocate of the High Court of Kenya.

Mr Gautama was appointed after Mr Njue had written to the Commissioner stating that he wanted Mr Gautama to be his arbitrator.

The first hearing of the dispute was held in Nairobi on 31st January, 1975. It should however be noted here that it took almost four and a half months before the hearing of the dispute could begin. The reason was that the hearing dates had to fall on the days when all the three advocates were not engaged in the High Court. This turned out to be a very difficult thing to arrange.

The other hearings were also held in Nairobi on 28th February, 1975; 1st March, 1975; 30th April, 1975 and 26th May, 1975 after which date there was an adjournment for an indefinite period because -

- (i) Mr Njue had been admitted to hospital on 15th May, 1975 for a major operation and it was not known when he would be physically able to attend the proceedings; and
- (ii) Mr Gautama was to proceed overseas on leave during the court vacation.

In the course of the hearings of the dispute the Society conceded that it had stopped Mr Njue from delivering his coffee to the society's factory at Gakwegori but submitted that this was in accordance with the powers vested in the Committee under the society's by-laws. The society also alleged that Mr Njue had not complied with the notice requiring him to weed, manure prune, bench terrace and remove suckers from his coffee trees in one shamba.

Mr Njue on the other hand denied all these allegations and asserted that his shambas had always been properly looked after and the question whether he had taken any steps to comply with the notice of 16th September, 1966 did not therefore arise.

Four witnesses were called by Mr Njue and four by the society. After hearing the advocates' submis-

sions and consulting one another the arbitrators unanimously agreed (on 26th May, 1975) that the member's shamba had been wrongfully closed by the society and as such the member was entitled to compensation in respect of the loss alleged to have been suffered.

The arbitrators stated however that they would give their reasons for finding the society liable after hearing evidence relating to the quantum of damages.

The hearing was then adjourned sine die to enable the parties to obtain the records and documents bearing on the quantum of damages.

The next hearing took place in Nairobi on 25th November 1975 when it was decided that, in view of the difficulties faced by the parties in transporting the society's relevant records to Nairobi, future hearings would be held in Embu Town (which was near to both parties).

The arbitrators and the society's advocate travelled from Nairobi to Embu on 10th December, 1975. After the resumption of the proceedings Mr Njue produced to

the arbitrators certain records relating to the quantity of coffee he alleged he had delivered to the society during the years preceding the refusal of the society to accept his coffee on 15th April, 1967. He also produced similar records for the period 1st July 1967 to 30th June 1968 (i.e. one year after the resumption of coffee deliveries to the society). The records were intended to provide figures establishing the "average" quantity of coffee that the member would have delivered to the society had he been allowed to do so.

However, the society objected to most of the records produced by the member and alleged that the member had forged them. After examining some of these records and consulting with the parties advocates the arbitrators decided to adjourn the proceedings again. In their letter dated 10th May, 1976 addressed to the Commissioner and copied to the parties' advocates the arbitrators stated that they had heard the parties to the dispute, their witnesses and counsel and that they had also carefully considered and weighed the evidence before them. They were of the opinion that the closure of Mr Njue's Shamba by the Society was wrongful. They had accepted the evidence of the then District Agricultural Officer, Mr Hinga; the then Assistant Agricultural Officer Mr Mutinda and

the then Coffee Inspector, Mr Njagi, all of whom had impressed them as reliable witnesses, and who had testified to the effect that although some parts of the claimant's farm needed some weeding, the claimant's coffee farm was as good as the other coffee farms in Kyeni Division. They stated that they were not impressed by the evidence and demeanor of the Society's witnesses who had in fact given them the impression that they were concealing and holding back facts. They had therefore no hesitation in preferring the evidence of the claimants' witnesses who impressed them as men of integrity who were competent in their work and impartial.

They however, expressed the view that, even if it was lawful for the society to refuse to accept the claimant's coffee, the circumstances leading to such refusal were neither just nor reasonable [emphasis mine]. They further held that as a consequence of the wrongful closure of the claimant's shamba by the society, the claimant had suffered loss and damage in respect of which he was entitled to compensation by the society. They awarded the costs of the arbitration to the claimant against the society. But they felt unable at that stage to assess the quantum of damages suffered by the claimant for the following reasons :-

- (i) There were allegations and counter-allegations by the society and the claimant which, in their view, might disclose criminal offences;
- (ii) Both Counsel for the Society and the Claimant had submitted that in view of those allegations and counter-allegations the arbitrators could not determine the quantum of damages on documents and records that were challenged and had asked them to stay the proceedings.

They concluded by informing the Commissioner that since they had already determined the question of liability and costs thereon and made their award they had unianimously agreed to refer the question of the allegations and counter-allegations to him for his decision. They however, recommended that the society's books and records pertaining to the claimant's coffee deliveries to the society for the years 1964 - 1968 (inclusive) be thoroughly investigated. They further recommended that the five bundles of receipts which had been produced by the claimant as exhibits should be investigated thoroughly by an auditor appointed by the Commissioner for that purpose.

At the time of writing this thesis in June 1979 the arbitrators had not been informed by the Commissioner of the result of the investigation that they had strongly recommended. No date had, therefore, been fixed for the resumption of the hearing.

### Comments

1. This dispute is likely to be a landmark in the history of Kenyan Co-operative arbitration in that -
  - (a) it is the only dispute known to the writer which has so far subsisted for just over twelve years without being finalised;
  - (b) for the first time co-operative officers were not appointed arbitrators; and
  - (c) the parties to the dispute were represented by senior advocates of the High Court of Kenya and one of the arbitrators was also a Senior advocate of the High Court of Kenya.
  
2. But it is also likely to go on record as the most expensive dispute between a registered society and its member. The advocate who was one of the arbitrators was charging Shs.1,000/- per day. By the time the



proceedings were adjourned his fees alone had amounted to Shs.5,000/-.<sup>112</sup>

The parties' advocates were also charging the same scale of fees as they would have charged for an appearance in the High Court.<sup>113</sup>

3. Disputes Regarding Claims made by a Registered Society Against a Member or Members:

The Dispute between Turbo Munyaka Farmers' Co-operative Society Limited and Mugumo Dairy Farmers Company and others<sup>114</sup>

Turbo Munyaka Farmer Co-operative Society was registered in 1964 as a farm purchase society and at the time this dispute was referred to the Commissioner for Co-operative Development it had eighty members.

The society's accounts had not been audited for some time and this led to discontent among some members who felt that the failure of the society's management to produce proper and audited accounts tended to establish that financial irregularities were being perpetrated by the said management.

When those members failed to get a satisfactory response from the society's management, fourteen of them on 1st July 1972 registered Mugumo Dairy Farmers

Company under Registration of Business Names Act. Their intention in registering the "Company" (the business was, in fact, a partnership) was to market their milk through the firm and so prevent the sale proceeds from being handled by the society.

In response to this action of its dissatisfied members the society engaged a firm of advocates who on 5th May 1973 wrote to the Commissioner asking him to intervene in the matter and settle the dispute.

On 11th March, 1974 the society engaged another firm of advocates who wrote to the fourteen dissatisfied members informing them that by forming the Magumo Dairy Company they had betrayed the trust bestowed upon them by the society and were therefore not worthy of remaining in the society. The society was therefore giving them thirty days within which to quit the society's farm together with their livestock, property, effects, etc. In the meantime they were to collect from the society whatever was due to them. They were also warned that failure to comply with the stated conditions would lead to legal proceedings being instituted against them for eviction.

After an exchange of a number of letters between the Commissioner's office and the parties concerned the

dispute was referred to arbitration on 7th August, 1974. The District Co-operative Officer, Uasin Gishu District, was appointed arbitrator. The order appointing the arbitrator stated the dispute to have arisen from the refusal by the named members to obey society's resolution removing them from membership and the firm. [emphasis mine] The following facts were stated by the arbitrator to be the main reasons for the dispute :-

(i) A resolution was passed in 1970 by the general meeting of the society allowing each member of the society to graze three heads of cattle on the co-operative farm and deliver his/her own milk to the society whereby the society would charge him the society's commission for services rendered to him/her by the society. However, the members who had formed the Mugumo Farmers Dairy Company had refused to deliver their respective produce through the society and were using the society's farm as their place of business without the consent of the society.

(ii) At one of the society's special general meetings the members had resolved that each member would be granted a piece of land where he/she could cultivate maize and deliver the same to the society for marketing [emphasis mine] but the discontented members had not abided by this resolution and had sold about 3,800 bags of maize without paying the levy at the rate of Shs.2/50 per bag to the society. As a result the society realised

a loss of about Shs.9,500/-. [emphasis mine]

(iii) The members who had withdrawn from the society had also refused to pay for the grazing fee [emphasis mine] which had been fixed by the society at Shs.2/50 per head of cattle. Since it had been proved that the members in question owned about ninety heads of cattle the society had realised a loss of Shs.2/50 per cattle since January, 1972.

The arbitrator also informed the Commissioner that -

- (i) during his inquiry, which took place on 19th September, 1974 the sixteen members of the so-called Mugumo Company had voluntarily dissolved their company [emphasis mine] which was operating on the farm owned by Turbo Munyaka Co-operative Society;
- (ii) the members of the said company who were also members of the Turbo-Munyaka Farmers Co-operative Society had agreed to channel all their produce through the society and the Kenya Co-operative Creameries Limited at Kitale would be informed by the District Co-operative Officer, Kitale to pay the members through the society;
- (iii) the Mugumo Farmers Dairy Company was no longer in existence and would not be in operation any longer as from 1st October, 1974.

The arbitrator's award stated, inter alia,

"In pursuance of the provision of the Co-operative Acts (Cap. 490) of 1967 (sic), in exercise of powers conferred by sections 80(4) and 80(6) of the very Act, I therefore make AN AWARD of K.Shs.7,000/- in favour of Turbo-Munyaka Co-operative Society Limited, to be paid by the members of dissolved Mugumo Dairy Company, who are at the same time members of Turbo Munyaka Farmers Co-operative Society Limited, as the expenses incurred by the society when pursuing the matter of the dispute."

The arbitrator further ordered that if <sup>the</sup> award was not paid within two months' time as from the date of the order, the Commissioner for Co-operative Development was to take the necessary steps he deemed fit to enforce the award in accordance with Co-operative Society Act, 1966, section 87(3).

After the arbitrator made his award the society wrote to the Commissioner on 30th October 1974 objecting to the award. The society's main reasons for objecting to the award was that the award of Shs.7,000/- was very unfair since the company had voluntarily accepted to pay them:-

- (i) Shs.15,600/- for loss of milk delivery through the society;
- (ii) Shs. 9,500/- commission on sales of maize;
- (iii) Shs. 6,975/- for grazing cattle on the firm;
- (iv) Shs. 1,000/- travelling expenses; and

(v) Shs. 7,967/- advocate and court fee.

The total amount thus stated to have been admitted as being due to the society was Shs. 41,042/-.

Although the available correspondence does not provide details regarding the admission of Shs.7,967/- as advocate and court fees it would appear that the society had filed a suit against the members of Mugumo Dairy Farmers Company in the High Court at Eldoret (apparently on 9th August, 1974) and had made the following payments:

(a)	Advocate	...	...	...	Shs. 6,500.00
(b)	Court fees	...	...	...	Shs. 1,467.00.

When a copy of the society's letter of objection was received by the arbitrator he wrote to the Commissioner on 20th December, 1974 stating, inter alia,

"The fact is that, information which was given by both sides were not upto date [emphasis mine]. The District Co-operative Officer, Kitale being very new in the area by then could not be able to exhaust all the facts. For this reason, I would suggest that, the matter be looked upon again under Co-operative Societies Act, section 73."

On the 5th February, 1975 a letter from the Co-operative Officer, Nairobi (legal section) to the District Co-operative Officer, Kitale informed him that

he had heard the society's appeal on 4th January, 1975 but he was unable to make a final decision because he was still in search of more information regarding the dispute. In the meantime, he was asking the District Co-operative Officer to ensure that:-

- (i) the accounts of the society were audited and the balance sheet prepared without delay;
- (ii) an annual general meeting of the society was convened so that the accounts will be read to members and elections of the management committee done; and
- (iii) before the election of the members of the committee he was to announce on behalf of the Commissioner that the sixteen members who were in dispute with the society had been reinstated immediately and were also eligible to participate in all the activities of the society, and that the said members had disbanded their company which had been alleged to be operating from the farm of the society. The members in question were however to be warned that if they persisted in operating their company from the society's farm they would be evicted by the Commissioner's office.

The District Co-operative Officer wrote to the Commissioner on 2nd May, 1975 informing him that although the society's annual general meeting had been held, the audited accounts read to the members and elections of committee members carried out the sixteen members were still "relentlessly recruiting more members into their company" [emphasis mine] and had not heeded the Commissioner's call to wind-up their company.

The dispute was, therefore, continuing unabated despite the arbitrator's award.

#### Comments

1. Despite the fact that the existence of the dispute was reported to the Commissioner on 5th May, 1973 no action had been taken to settle the dispute by 11th March 1974 when the dissentient members were given notice of expulsion from the society. Although it is not the writer's intention to overlook the commendable and determined efforts that the Commissioner's office subsequently made to solve the dispute, it is felt that the failure to take any official action for eleven months after a request for such action had been made by the society's lawyers [emphasis mine] can justifiably be regarded as the main reason for the failure of the subsequent efforts made to end the dispute. By the time those efforts were being made the dissentients had gone so far



with their activities in the "company" that it was not going to be easy for them to respond positively to any calls to them to disband their company.

The delay is even more surprising in view of the fact that in the case of Republic v The Commissioner for Co-operative Development, Ex parte Kabuthi and others<sup>115</sup> the High Court of Kenya had warned the Commissioner against unwarranted delay in attending to the disputes that have been referred to him. In that case a dispute had been referred to the Commissioner in August 1967 but he had not taken any steps to refer it to arbitration by July 1968 when the matter was brought before the court. The court regarded the delay for a year as indefensible, great and unwarranted.

Although it is not for the courts to tell the Commissioner when to refer disputes to arbitration it is felt that it is the duty of the Commissioner to heed warnings by the court and to avoid recurrence of the circumstances that gave rise to the warning. It looks as if this has not been done, or at least it was not done in this particular dispute.

2. The award of Shs.7,000/- made by the arbitrator seems to be so much at variance with the facts as stated by him [emphasis mine] that the writer

feels the Commissioner should have intervened and asked the arbitrator to state the grounds upon which the award was based. This would not have been irregular since the award was in fact contained in a letter addressed to the Commissioner. It should also be remembered that the arbitrator was a relatively junior co-operative officer with no legal training or arbitration experience and as such some form of supervision over the manner in which he conducted the proceedings would appear to have been desirable.

In any case the arbitrator's failure to submit a record of the evidence adduced before him, as required by Rule 54(b) of the Co-operative Societies Rules, was in itself sufficient to warrant the Commissioner's request to him to state the reasons for the award.

3. Although the arbitrator stated that the dissatisfied members had sold about 3,800 bags of maize without paying the levy at the rate of Shs.2/50 per bag to the society in consequence of which the society had lost about Shs. 9,500/- (shillings nine thousand five hundred) it is not clear why he did not award this sum to the society as damages.

Secondly, from the arbitrator's statement that the dissentient members owned about 90 heads of cattle

and that the society was realising a loss of Shs.2/50 per cattle since January 1972 it would appear that the society was entitled to a further sum of Shs.7,425/- by way of damages for loss of grazing fee at the date of the award (i.e. 27th September, 1974).

4. The award of Shs.7,000/- was stated by the arbitrator to be in respect of the expenses incurred by the society when pursuing the matter of the dispute [emphasis mine] but the exact nature of those expenses was not indicated. It might probably have been in respect of the "advocate and court fees" referred to in the society's letter to the Commissioner dated 30th October, 1974 (although the said letter stated the amount to be Shs. 7,967/-).

5. In arriving at his award the arbitrator was apparently more concerned with promoting a reconciliation [emphasis mine] between the disputing parties rather than according to them their strict legal rights. This is borne out by his reference to the dissentients voluntarily dissolving their company, [emphasis mine] and he in turn <sup>ruling</sup> that they were to remain in the society as they had agreed to channel all their produce through the society. [emphasis mine] The writer feels that the approach of the arbitrator and the approach of the Commissioner's office when dealing

with the society's appeal have a lot of merit and should be encouraged in future disputes.

4. Disputes Regarding Claims Made by a Registered Society Against Another Registered Society:

The Dispute between Wendani Farmers Co-operative Society Limited and Bayete Farmers Co-operative Society Ltd. <sup>116</sup>

Facts of the Dispute

Wendani Farmers Co-operative Society Limited and Bayete Farmers Co-operative Society Limited were registered under the Co-operative Societies Act, 1966 as farm-purchase co-operatives having their area of operation within Uasin Gishu District. Bayete Society found a farm to buy but did not have enough money to pay to the vendor. It therefore approached Wendani Farmers Co-operative Society to agree to their purchasing the farm jointly. This request was accepted and the farm was bought jointly by the two societies and their members then settled on the farm. But it may be mentioned at this state that Wendani Society contributed more money towards the purchase of the farm than Bayete Society contributed.

The following is a summary of the events that followed the purchase of the farm as contained in the Commissioner's letter dated 21st January, 1974

addressed to the Attorney-General :-

1. The members of the two societies had not been in good terms for various reasons, but the main reason was rivalry for leadership. This state of affairs had led to the poor utilisation of the farm.
2. In order to save the situation the Department of Co-operative Development decided to take up the matter with the District Agricultural Committee and the District Land Control Board at Eldoret and the farm was divided into two equal portions.
3. An agreement was made between the two co-operatives to equalise their financial contributions for the purchase of the farm. Bayete Farmers Co-operative Society was to pay Wendani Co-operative Society a sum of money which would make its contribution for the purchase of the farm equal to that paid by Wendani Co-operative Society.
4. Bayete Society had failed to pay the agreed sum in full.

Although the letter did not state how much money Bayete Society had to pay to Wendani Society, a

perusal of the correspondence pertaining to the dispute establishes that the sum in question was fifteen thousand shillings out of which only four thousand shillings had been paid.

On 20th August, 1973 a firm of advocates acting for Wendani Farmers Co-operative Society had written to the Commissioner informing him that a dispute existed between their client and Bayete Farmers Co-operative Society Limited. They alleged that Bayete had refused and/or neglected to pay the sum of Shs.11,000/- despite request for payment [emphasis mine]. They were therefore asking the Commissioner to order Bayete Society to pay to their client:

- (i) The sum of Shs.11,000/- being the money owing in respect of the purchase of the farm;
- (ii) Interest on the amount claimed and their costs.

They also asked as an alternative to payment of money, for the sub-division of the parcel of land proportionately to respective contributions. [emphasis mine].

Having been satisfied under section 80(4) that a dispute existed between the two societies the Commissioner on 26th September, 1973 referred the dispute for

determination and making an award within one month. The order of reference to arbitration stated the disputed facts to be the payment of Shs.11,000/- plus interest, [emphasis mine] but did not indicate who was being asked to make the payment in question. The District Co-operative Officer, Uasin Gishu District was appointed as the arbitrator.

Having conducted a hearing into the dispute the arbitrator on 23rd November 1973 wrote to the Commissioner informing him that he had established that Bayete Farmers Co-operative Society owed Wendani Farmers Co-operative Society an amount of K.Shs.8,317/20. He concluded -

It is therefore natural that the defendant owes the Plaintiff an amount of Shs.2682/80 for it is known that one should seek justice with clean hands. I have further directed that the Plaintiff should be paid K.Shs.2,682/80 less 914/55 as per exhibit II (whose relevant receipts I have scrutinised) i.e. K.Shs.1,768/25. The amount of K.Shs.914/55 is the loss Bayete F.C.S. incurred as expenses when pursuing this matter as per the accusations of the Plaintiff. [emphasis mine] Had the Plaintiff been less stubborn, such a loss would not have been incurred by the defendant for there would have been a peaceful and earlier settlement of this dispute.

I therefore make an award of K.Shs.1,768/25 in favour of the plaintiff who is Wendani Farmers Co-operative Society Limited, to be effected instantly. In order to enable the District Land Control Board to effect sub-division of the farm".

This award was received by the Commissioner on 28th November, 1973.

Bayete Farmers Co-operative Society Limited accepted the arbitrator's award and sent a cheque for Shs.1,768/25 to Wendani Farmers Co-operative Society. However, on 23rd January 1974 Wendani Society returned the cheque stating that they did not understand the reason why they should be paid that amount. But it was not until 25th March 1974 that they notified the District Co-operative Officer of Eldoret of their intention to appeal against the arbitrator's findings.[emphasis mine]

On 30th March, 1974 a letter was written on behalf of the Commissioner informing the Co-operative Officer at Eldoret that the appeal by Wendani Farmers Co-operative Society was too late [emphasis mine] and that they could not, in the circumstances, appeal against the decision of the arbitrator.

It should be mentioned here that an earlier letter written by the Commissioner to the Co-operative Officer which was dated 11th February, 1974 had directed that both parties had to comply with the award and that Bayete Farmers Co-operative Society had to pay Shs.11,000/- to Wendani Farmers Co-operative Society together with the arbitration costs. Although in that same letter the Commissioner had informed the District



Co-operative Officer, Eldoret, that he had endorsed the award by the arbitrator [emphasis mine] it would appear that when writing the second letter on 30th March 1974 the actual terms of the award had been forgotten or overlooked. This is because although the Commissioner had ruled that Bayete would pay Shs.11,000/- and costs [emphasis mine] the award itself was for Shs.1,768/25, with no order for costs.

A somewhat surprising development took place on 21st November 1974 when the Co-operative Officer (Legal Section) wrote to the Assistant Commissioner for Co-operative Development, Rift Valley Province, requesting him to visit these two societies and carry out a very comprehensive investigation into the dispute and to let the Commissioner have his opinion on which the Commissioner would be able to give a final ruling. This letter also stated that the arbitration proceedings and the award were not very explicit and that the communication of the award to the parties had been done verbally. [emphasis mine].

No reply to this letter appears to have been received by the time the writer completed his research in September 1975.

Comments

1. The award in this dispute appears to be so unreasonable that the writer is inclined to the view that the arbitrator was not competent to hear the dispute. A more senior Co-operative Officer should have been appointed arbitrator.

2. Although the arbitrator stated that it was eventually discovered that Wendani Farmers Co-operative Society owed Bayete Farmers Co-operative Society Shs.8,317/20 and accordingly deducted this (by way of set-off) from the amount that was due to the former society the circumstances and facts of the alleged debt were not specified. It is therefore impossible to assume that the set-off was properly made.

3. The arbitrator regarded the act of Wendani Farmers Co-operative Society in referring the dispute to the Commissioner as a demonstration of stubbornness [emphasis mine]. He accordingly ordered the society to pay Shs.914/55 to Bayete Society in respect of expenses they had incurred in the dispute. It is felt that this ruling of the arbitrator was illegal. This is because section 80(8) of the Co-operative Societies Act, 1966 states that "the arbitrator shall have the same powers as the High Court to award costs" [emphasis mine].

The Civil Procedure Act states that the costs of a suit shall follow the event [emphasis mine] i.e. costs are to be awarded to a successful party unless there are special circumstances which demand a different decision. But the High Court has no power to order a successful party to pay costs of the unsuccessful party.<sup>116a</sup>

5. Disputes Arising During a Society's Liquidation: The Dispute Between Waira Kamau and the Liquidator of Githunguri Constituency Ranching Co-operative Society Limited.<sup>117</sup>

Facts of the Dispute

Githunguri Constituency Ranching Co-operative Society Limited was registered on 30th August, 1968. The members having decided to convert the business into a limited liability company known as Githunguri Constituency Ranching Company Limited passed on 11th May, 1969 a special resolution for voluntary winding up. The society's registration was accordingly cancelled on 23rd May 1969 and a liquidator appointed under section 69 of the Act which states that where the registration of a society is cancelled the Commissioner may appoint one or more persons to be liquidator or liquidators of the society.

During the society's liquidation Mr Waira Kamau submitted a claim for forty eight thousand shillings (Shs. 48,000/-) in respect of his salary which he alleged had not been paid by the society for thirty-two

months. He stated that besides being the society's chairman he had also been appointed by the society as the society's manager with effect from 1st October 1968 at a salary of one thousand five hundred shillings (Shs.1,500/-) per month.

After this claim was rejected by the liquidator the Commissioner appointed an arbitrator to conduct a hearing into the dispute that had arisen between Mr Kamau and the liquidator. On 16th March, 1972 the arbitrator wrote to Mr Kamau asking him to confirm in writing that he would be bound by whatever decision he (the arbitrator) would make. This course of action was necessitated by section 72(1)(k) of the Co-operative Societies Act which makes a reference of a dispute between a liquidator and any third party dependent upon that party's prior consent in writing to be bound by the decision of the arbitrator. [emphasis mine].

But this request was declined by Mr Kamau who stated that in his view there was no dispute between him and the liquidator since it was a fact that he had been the society's manager and was accordingly entitled to the sum of money claimed.

Several attempts were made by the Commissioner's office to make Mr Kamau surrender his claim but he

refused to do so. The Commissioner eventually ordered the liquidator to pay Mr Kamau the amount he was claiming.

In the writer's view the significance of the dispute lies neither on the merits of Mr Kamau's claim nor on the liquidator's rejection of it but rather on the attention it does focus on those provisions of the Co-operative Societies Act, 1966 and the Co-operative Societies Rules 1969 providing for the procedure to be followed [emphasis mine] when dealing with disputes that have arisen during a society's liquidation.

The question that may now be considered is the procedure to be followed by the liquidator if he wishes to refer disputes to arbitration. The consideration of this question appears to be necessary in view of the provisions of s.70(1)(d) which require the liquidator to refer disputes to arbitration in the prescribed manner. [emphasis mine] What appears to be the prescribed manner is contained in Rule 53(4) of the Co-operative Societies Rules, 1969. However, the writer is of the opinion that the purported prescription of the mode of reference by Rule 53(4) is invalid [emphasis mine] first, because it has incorrectly assumed that a reference to arbitration [emphasis mine] is synonymous with a reference

to the Commissioner [emphasis mine]. Secondly, because it has derogated from the Act by purporting to impose limitations on the power that the Act has vested without such limitations [emphasis mine]. With regard to the second point Rule 53(4) and Form X purport to render the reference to arbitration by the liquidator dependent upon the third party having consented in writing to be bound by the decision of the arbitrator [emphasis mine]. As there is no such requirement, limitation or condition in s. 70(1)(d) of the Act [emphasis mine] the position is that, until such time as the correct mode of reference will have been prescribed either by the Co-operative Societies Act, 1966 or by the Co-operative Societies Rules, the liquidator can refer the disputes in question in any manner: [emphasis mine] orally (although this would be undesirable), in writing or partly orally and partly in writing.

It is submitted that s.70(1)(d), confers a substantive power on the liquidator while Rule 53(4) merely provides or has purported to provide the manner of exercise of that power. The irregularity or invalidity of that Rule does not abrogate the substantive power conferred.

The other point for consideration is whether the liquidator has power to refer disputes to arbitration [emphasis mine] or whether he has power only to refer disputes to the Commissioner [emphasis mine]. The writer's view that the liquidator has also got powers under the Act to refer disputes to arbitration (not to the Commissioner) would appear to be reinforced by the corresponding provisions in the Uganda Co-operative Societies Act, 1970. Section 63(c) of the Act states -

"A liquidator appointed under section 62 of this Act shall... have the following powers, ... (c) to refer disputes to arbitration [emphasis mine] in the manner prescribed by regulations made under this Act."

The power conferred by sub-section (c) is identical with that conferred by s. 70(1)(d) of the Kenya Act, namely, the power "to refer disputes to arbitration". The only difference is that whereas the Uganda Act has added the words "in the manner prescribed by regulations made under this Act," the Kenya Act has simply used the words "in the prescribed manner". It is submitted that the effect of these sections is the same, i.e. they have conferred a power on the liquidator to refer disputes to arbitration [emphasis mine].

Rule 45(1) of the Uganda Co-operative Societies Rules, 1971 then provides as follows :-

"Where, in pursuance of the provisions of paragraph (c) of section 63 of the Act, a liquidator decides to refer a dispute to arbitration such decision shall be embodied in an order of reference under his hand". [emphasis mine]

Rule 45(3) also provides that -

"where the liquidator decides to refer a dispute to more than one arbitrator, such reference shall be to three arbitrators, of whom one shall be nominated by each of the parties to the dispute and the third shall be nominated by the liquidator and shall be the Chairman".

Finally, Rule 46(3) directs the arbitrator, upon the completion of the proceedings, to forward to the liquidator the file of the proceedings and the award he has made.

It is submitted that the Uganda Co-operative Societies Rules are consistent with the Act and have not confused a reference to arbitration with a reference to the Registrar (i.e. the Commissioner).

The writer wishes to emphasize that whether a liquidator has to refer disputes to the Commissioner or to an arbitrator will depend solely on the powers conferred on him by the statute in question. [emphasis mine]. Where the statute states, as the Kenya and Uganda Acts have stated, that the liquidator shall have power to refer disputes to arbitration [emphasis mine] he will have power to refer the said disputes



to an arbitrator direct without having to refer them to the Commissioner for decision [emphasis mine].

A reference "to arbitration", without more, is not synonymous with a reference "to the Commissioner".

In this respect the writer wishes to point out the difference between the Kenya and Cyprus Acts as far as the reference of liquidation disputes are concerned.

Section 42 of the Cyprus Co-operative Societies Act states -

"(1) A liquidator appointed by the Registrar shall have power :-

(b) to refer to arbitration as provided in section 53, [emphasis mine] any disputes touching the business of the society [emphasis mine] referred to in sub-section (1) of the said Section 53"<sup>118</sup>

It should be noted that under the Cyprus Act :-

- (i) the disputes that the liquidator may refer are specifically limited to those falling under section 53 (in Kenya, s. 80) [emphasis mine]; and
- (ii) the disputes are to be referred in the manner provided in Section 53 (in Kenya, s.80), i.e. to the Registrar (in Kenya, the Commissioner).

A liquidator appointed under the Kenya Act or Uganda Act has therefore wider powers than one appointed under

the Cyprus Act because he has also a general power to refer disputes to arbitration even if they do not concern the business of registered societies [emphasis mine].

## CHAPTER V

## APPRAISAL OF THE OUSTER OF THE COURTS

Having examined the statutory provisions regulating the settlement of co-operative disputes and studied the disputes which have been settled under the existing legislation it now seems necessary to -

- (a) ascertain, if possible, whether the reasons for compulsory arbitration are practically justified, and
- (b) establish the extent, if any, to which the applicable law could or should be changed.

To a Kenyan the reasons for arbitration are those reasons which he invariably finds listed in leading English text books on arbitration. This is so not only because it is the British colonial administration which introduced arbitration into Kenya,<sup>119</sup> but also because there is, as yet, no Kenyan text book on arbitration which is based on a study of Kenyan arbitration experience. It would therefore be fallacious, in the writer's view, to rely on the advantages of English arbitration as the basis for advocating compulsory arbitration for Kenya co-operatives and their members.

The writer has, however, endeavoured in the earlier paragraphs of this thesis<sup>120</sup> to demonstrate that as far as Kenya is concerned the government's intention in asking Parliament to pass an Act providing compulsory arbitration for co-operative disputes was their determination that the Commissioner and his officers were to strive to uphold amongst the members of a co-operative society a personal relationship that would render it possible for co-operatives to be able to work smoothly and efficiently. The Commissioner and his officers were to be first and foremost public relations officers to co-ordinate and help public relations between the members and officials and the society as a whole. The power that was being conferred on the Commissioner to refer disputes to arbitration was meant to exclude the courts from being involved in co-operative disputes settlement because in the government's view -

(i) the courts could not be expected to promote good public relations amongst the members; and

(ii) litigation would permanently damage the members' personal relationship and cause considerable chaos within the Co-operative Movement.

It was also believed that a successful public relation exercise on the part of the Commissioner and his

officers would prevent many disputes from arising. But in the undesired event of a dispute actually arising arbitration was believed to be preferable to litigation since it was assumed that the public relations exercise would still be practicable after arbitration but more difficult (or even impossible) after litigation.

The success of the Co-operative Movement was believed to depend primarily on the success of the Commissioner in preventing disputes from arising [emphasis mine] rather than on the skill and speed with which he settled the disputes that had actually arisen. This belief, in the writer's view, has been justified in practice by the infrequency of major co-operative disputes requiring arbitration. The question that may now be considered is whether the Commissioner and his officers have in fact done or achieved what the government intended them to achieve? A close study of the disputes recorded in Chapter IV indicates, in the writer's view, that the Commissioner and his officers have on the whole achieved what the Government intended them to achieve. It is hoped that this state of affairs will continue to prevail in the future.

The writer believes that the Commissioner and his officers have substantially achieved what they were intended to achieve because his research has revealed that only seven disputes have actually been referred to

arbitration by the Commissioner between the time the current Co-operative Societies Act was passed in 1966 and the time he completed his investigations in September, 1975. The paucity of the disputes actually referred to arbitration can in the writer's view, only be attributed to successful public relations exercise and effective mediation by the Co-operative Officers [emphasis mine]. In this respect the writer regards as unjustified the views expressed by a learned writer to the effect that within the co-operative movement there is a "frequency of disputes arising from bad management by co-operators and insufficient supervision by government officers".<sup>121</sup>

Fears have however been expressed by some writers that the co-operative officers appointed by the Commissioner to act as arbitrators may not always be the best suited persons to represent the interests of an ordinary member [emphasis mine] who is involved in a dispute with his society. It was in fact mainly these fears which led to the suggestions for the establishment of independent Co-operative Tribunals.<sup>122</sup> The Commissioner and his staff, it is said, cannot be considered as neutral arbitrators over disputes on co-operative affairs. An abstract or theoretical discussion of these fears would no doubt hold a terrifying prospect for a member of a co-operative society who envisaged the appointment of a

co-operative officer to act as the arbitrator in a dispute between him and his society.

The writer feels that no useful purpose can be achieved by engaging in an abstract evaluation of these fears and proposes instead to dispel them by referring the reader to the facts disclosed by the disputes recorded in the last Chapter.

In all the disputes [emphasis mine] filed by members against their societies the awards were made in favour of the members [emphasis mine]. The writer therefore sees no reason why a member of a co-operative society should doubt the fairness or impartiality of an arbitration conducted by an appointee of the Commissioner.

While the fact that a dispute has been resolved in a member's favour does not conclusively demonstrate a co-operative officer's impartiality when acting as an arbitrator it definitely renders invalid the assumption that a co-operative officer will usually be biased against a member involved in a dispute with a co-operative society.

It has also been contended that the Co-operative Officers might be helpless when it comes to protecting poor members against the machinations of powerful

committee composed of local dignitaries [emphasis mine].

However, the strong warnings given to these local dignitaries by the arbitrator in the dispute between Wilfred Iguna and Magumoni Farmers Co-operative Society Limited<sup>123</sup> would tend to indicate that the Commissioner and his officers will not hesitate to take appropriate measures against a committee that has shown a deliberate disregard for a member's rights.

The dispute between Magu Waicua and Mathira Farmers Co-operative Society<sup>124</sup> was determined in favour of Mr Waicua notwithstanding the fact that the Committee Chairman was a leading politician and a Member of Parliament.<sup>125</sup>

Perhaps the writer's appraisal of the ouster of the courts would not be complete without a reference to and a brief discussion of the following criticisms which have also been made against co-operative arbitration by a learned writer, namely, that -

- (a) disputes are seldom dealt with quickly;
- (b) co-operative arbitration may not minimise costs; and
- (c) there is no privacy.<sup>126</sup>

Are disputes seldom dealt with quickly by the Commissioner and his officers?



Having alleged that the Department of Co-operative Development is suffering from an acute shortage of qualified personnel the learned writer went on to state that such a shortage of personnel and ordering of priorities inevitably create a backlog in dealing with disputes and the result was that disputes are seldom dealt with quickly by the Department of Co-operative Development.

Unfortunately, the writer has not given any facts in substantiation of his claim that disputes are seldom dealt with quickly. He has simply referred to the remarks made by a High Court Judge during the hearing of the case of Republic v The Commissioner for Co-operative Development ex parte Kabuthi.<sup>127</sup> It is however, submitted that the mere fact that in the said case there was considerable and unwarranted delay before a decision could be made by the Commissioner whether to refer the alleged dispute to arbitration does not justify a conclusion or inference that the reference of disputes by the Commissioner invariably entails long delays.

A close study of the disputes recorded in the last chapter will show that most of the disputes that were referred to arbitration by the Commissioner were actually decided or disposed of within a reasonably short time after their reference.

Although the said disputes tend to establish that it usually takes a rather long time for a dispute to be referred to the Commissioner after it has arisen [emphasis mine] this does not, in the writer's view, justify a conclusion that the co-operative officers concerned did not take steps to deal with the disputes as soon as they had arisen. On the contrary, the officers concerned have usually dealt with or attended to these disputes as soon as they were reported to them. The numerous letters that they wrote to the various people (including the disputants) and the visits they paid to the societies where the disputes had arisen are proof that they had not neglected to attend to any dispute that had been reported to them.

The delay by the officers concerned in referring some of the disputes to the Commissioner is in the writer's view attributable to their desire that whenever a dispute arises in a co-operative society it should, if possible, be solved through conciliation

or mediation rather than arbitration [emphasis mine]. Although it has generally been agreed that arbitration does not normally damage the personal relationships of the disputants to the same extent that litigation does, the co-operative officers must have realised from experience that arbitration may in certain circumstances not only entail considerable expense but also have disadvantageous consequences for the parties. An example is the dispute between Wilfred Iguna and Magumoni Farmers Co-operative Society Limited where the other members firmly resolved to expel Mr Iguna from the society one day after the arbitrators had decided the dispute between him and the society in his favour.<sup>128</sup>

In the process of trying to mediate or reconcile the disputing parties some delay in referring the dispute to the Commissioner will be inevitable. For example, in the above dispute the co-operative officer arranged a meeting between the Meru District Officer and the Society's management which resulted in the latter agreeing to convene a special general meeting of the society to reconsider the decision to expel Mr Iguna. Convening such meetings inevitably results in some delay. But the dispute is nevertheless being dealt with.

The attempts by the co-operative officers to reconcile the parties is quite consistent with the public relations duties [emphasis mine] that the Minister had told Parliament that the Government expected the Commissioner and his officers to discharge. It appears to be rather unfortunate that the Co-operative Societies Act, 1966 has not made specific provision for mediation and conciliation as prerequisites to reference to arbitration under the Act.

The writer believes that experience has tended to indicate that disputes or quarrels normally wither away with the passage of time as tempers cool down. In consequence of this experience some laws have specifically provided for a certain minimum cooling down period before which no steps can be taken to settle an existing dispute under the legal machinery.

It is in this context that the writer submits that the delay in some cases by the co-operative officers in referring disputes to the Commissioner has much to commend it. The fact that the officers in question may not actually have intended to achieve that objective - i.e. letting tempers cool down - does not affect this submission. While perusing the various societies' correspondence files at the headquarters of

the Department of Co-operative Development the writer came across a significant number of disputes which, after having been referred to the Commissioner, were later withdrawn after successful mediation by the co-operative officers in the field [emphasis mine]. It was also observed that even in those cases where the field officers had failed to reconcile the disputing parties and the dispute had been referred to the Commissioner, the latter did not normally proceed to appoint an arbitrator straight away. He has in some cases tried to have the parties reconciled by instructing another officer to go and talk to the society's officials and the member or members with whom the society is in dispute. Examples are the disputes between -

(a) Wilfred Iguna and Magumoni Farmers Co-operative Society;<sup>129</sup> and

(b) Turbo Munyaka Co-operative Society and Mugumo Dairy Company.<sup>130</sup>

The writer finds it unnecessary to examine in detail the merits of the allegation that the Department of Co-operative Development is suffering from a lack of man-power [emphasis mine] which renders it impossible for the Co-operative officers to deal promptly

with disputes. The Co-operative Societies Act, 1966 s. 80(4) states, inter alia,

"Provided that -

(i) nothing in this section shall preclude the appointment as arbitrator of an officer appointed under section 3 of this Act."

This means that the Commissioner may, if he finds it necessary to do so, appoint one of his officers to act as an arbitrator in a particular dispute. But the Act does not make it mandatory for him to do so.

[emphasis mine]. Consequently, if he feels that a co-operative officer is too preoccupied with other duties to attend to any dispute he may appoint any other person to settle the dispute. That is what happened in the dispute between Joseph Njeru Njue and Kyeni Farmers Co-operative Society Limited<sup>131</sup> where none of the three arbitrators was a co-operative officer. The writer therefore finds no merit in the submission that co-operative officers are usually too busy with other duties to deal with disputes. They simply do not have to deal with any dispute.

Even if "dealing" with a dispute could be said to mean referring the dispute to the Commissioner (and not acting as arbitrator) it is still submitted that there is nothing to prevent a member or society from

referring a dispute direct to the Commissioner in Nairobi without reporting it first to the Co-operative Officer in charge of the society's area of operation. Section 80(1) of the Act merely requires the dispute to "be referred to the Commissioner" and does not specifically require it be referred to him by a co-operative officer [emphasis mine]. Neither does Form II in the schedule to the Co-operative Societies Rules, 1969 indicate such requirement. That form merely states, inter alia,

"And whereas the said dispute has been referred to me by..",

thereby making it possible for anybody interested in the settlement of that dispute to report it to the Commissioner. The fact that there are no co-operative officers around the society does not appear to be relevant. It is primarily for the parties to the dispute [emphasis mine] to act quickly.

However, it might be surmised as to what may happen if the Commissioner himself sits on a referred dispute, probably because he is too busy with other matters to refer it to arbitration. It is suggested that in that event the parties who had referred the dispute to the Commissioner would be entitled to apply to the High Court for an order of mandamus directing

the Commissioner to carry out this duties - i.e. refer the dispute to arbitration - within the time specified by the Court. This right of a party to a dispute to apply for mandamus was established or vindicated in the case of the Republic v The Commissioner for Co-operative Development ex parte Kabuthi and others.<sup>132</sup>

It may be said, therefore, that the Co-operative Societies Act, 1966 and the case-law decided thereon have provided adequate safeguards against unwarranted procrastination in settling co-operators' disputes. It all depends on the initiative taken by the parties to the dispute.

The other point which merits some consideration is the question of costs that the parties to a co-operative arbitration may incur. In this respect Mr Nowrojee has said -

"The fact that parties may opt for representation removes the other advantage of arbitration - the minimisation of costs. Arbitration will not cost very much less if both parties are being represented by counsel. Additionally, the other supposed disadvantage of the courts, delay, also manifests itself here."

The writer is in full agreement with this statement, and to justify his agreement with the statement



he wishes to draw the reader's attention to the dispute between Joseph Njeru and Kyeni Farmers Co-operative Society Limited.<sup>133</sup> Since the advocates who represented the parties and the advocate who was one of the arbitrators were charging the same scale of fees as they would have charged for an attendance at the High Court the ultimate result will be that the parties will have spent more money at the end of the arbitration than they would have spent had the matter been litigated in the High Court.<sup>134</sup>

It should also be observed that delay also manifested itself there. All the advocates were almost fully booked to appear in the High Court during different dates and it was an extremely difficult task to find a date during which all of them would be available to proceed with the arbitration. Hence the long adjournments. The result, as we have seen, has been that the dispute is still unresolved despite the fact that the arbitrators were appointed over two years ago.

It is circumstances like those prevailing in the above dispute that has led the writer to the cautious view that we should refrain from uncritically pointing our accusing fingers at the Commissioner and his

"over-burdened" officers every time we read a statement in some publication that a co-operative dispute took "such a long time" to dispose of. Delays can also occur even if the disputes are not being adjudicated upon by co-operative officers. However, would such delays and expense justify a conclusion that a resort to the courts in those circumstances would be desirable? The writer thinks they do not.

The attitude of the Commissioner and his officers as far as legal representation of parties is concerned was spelt out in the dispute between Magu Waicua and Mathira Farmers Co-operative Society Limited<sup>135</sup> when the Co-operative Officer (Legal Section) in a memo to the Deputy Commissioner stated -

"we should as much as possible, avoid representation by lawyers".

Neither does the Co-operative Societies Act contemplate such representation, unless one of the parties insists on the representation.

The writer has observed that in those disputes where the parties were represented by advocates they did so against the advice of the Commissioner [emphasis mine]. Consequently, it is felt that any delay or expense resultant on such representation has been

voluntarily and deliberately opted for by the disputant himself. To seek to extricate him from such self-induced expense and delay would be to demonstrate a remarkable degree of paternalism.

But it should be particularly noted that where the parties have not been represented by advocates and the arbitration proceedings were conducted by co-operative officers no costs were involved, since the Commissioner does not charge a fee where one of his officers has acted as an arbitrator [emphasis mine]. The only disputes known to the writer, in which costs were awarded in favour of the Commissioner were the disputes between Wilfred Iguna and Magumoni Farmers Co-operative Society Limited,<sup>136</sup> and the dispute between Mr Njeru and Kiriani Farmers Co-operative Society Limited.<sup>137</sup> In the former dispute the society was ordered to pay Shs.240/- to the Commissioner because the co-operative officer who heard the dispute had used his private car on the two occasions that he had to travel from his station to the place where the arbitration proceedings were held. He travelled a total of 240 miles assessed at one shillings per mile for his car of 1500 c.c. The money in question had to be paid over to the government because the arbitrator, as a co-operative officer, was entitled to claim mileage from the government while

travelling on official duty. The costs in the latter dispute were also made in respect of mileage claim.

As the disputes recorded the last chapter indicate, an arbitration conducted by co-operative officers involves either little or no expense to the parties to the dispute, provided that they have not insisted on legal representation [emphasis mine].

The writer therefore finds no pecuniary justification for advocating a recourse to litigation since nearly all the disputes are in practice arbitrated upon by co-operative officers.

A final point for consideration is whether there is undesirable publicity [emphasis mine] during the hearing of disputes before the co-operative officers.

When submitting that there is a strong case for offering the courts as a forum for the settlement of disputes Mr Nowrojee specifically gave privacy as one of the benefits of the arbitration process which the arbitration machinery provided in the Co-operative Societies Act, 1966 does not in practice manifest. But nowhere in his paper has the learned writer shown that arbitration conducted under the Co-operative Societies Act has been attended by publicity.

The writer wishes to state that arbitrations under the Act are private and not public. There is not a single instance known to the writer when the proceedings before an arbitrator[emphasis mine] have been reported in the newspapers. The awards made were forwarded to the Commissioner directly by the arbitrator and were not pronounced in the public for newspapers to report. The Co-operative Societies Rules 1969, Rule 55 states -

"(1) The award of the arbitrator shall be in Form XI in the Schedule to these Rules...

(2) Upon the completion of the proceedings, the arbitrator shall forward to the Commissioner (a) the file of the proceedings and (b) the award."

Once these documents are received by the Commissioner they are normally filed in the society's file which is then kept in the Registry at the Headquarters of the Department of Co-operative Development. The registry is not accessible to unauthorised persons.

So private are the proceedings that in fact even most co-operative officers are not aware of the disputes that have been referred to arbitration under the Co-operative Societies Act, 1966, unless they personally acted as arbitrators or came to know about them in course of their duties.

The writer had access to the registry (from where he conducted most of his research) only after he was kindly allowed to do so by the Co-operative Officer in charge of the Legal Section.

### Conclusions

On the basis of the facts established by his research and the inferences that he has drawn therefrom the writer has concluded that -

1. The main objections to the Commissioner appointing Co-operative Officers to act as arbitrators have been largely academic or theoretical. There appears to be no compelling reason for divesting the Commissioner of the powers conferred on him to refer disputes to arbitration, and appointing co-operative officers to adjudicate on those disputes.
2. The "common-sense justice" approach of the lay co-operative officers who adjudicated the investigated disputes is preferable to litigation in so far as it precludes awards from being made without having regard to their consequence to a registered society in terms of practical co-operation.

The co-operative officers were largely preoccupied with restitution and a restoration of the co-operative equilibrium rather than with the niceties of legal procedure and a vindication of the strict legal rights of the parties. This practice, in the writer's view, should be allowed to continue.

### Suggestions for Improvement

In consequence of the above conclusions the following measures would appear to be necessary in order to facilitate a more efficient execution of the powers conferred by sections 72 and 80 of the Co-operative Societies Act, 1966:-

#### 1. Exclusion of Advocates

- (a) S.80(4) (ii) <sup>138</sup> of the Co-operative Societies Act, 1966 should be deleted.

Consequently no party shall insist upon being represented by an advocate, and the Commissioner shall be under a duty to refer to arbitration all disputes affecting members in their capacity as members [emphasis mine].

- (b) Rule 54<sup>139</sup> of the Co-operative Societies Rules should be replaced by the following:

\*54(1) In proceedings before the Commissioner or an arbitrator a party shall not be represented by an Advocate.<sup>140</sup>

(2) The Commissioner or arbitrator shall decide all disputes referred to him according to substantial justice without undue regard to technicalities of procedure and without undue delay."

2. Promotion of Reconciliation

The Co-operative Societies Act, 1966 should make specific provision for reconciliation. The following addition to the Act is suggested:-

"S.80(4)(ii) Notwithstanding the reference under subsection (1) of this section the Commissioner shall endeavour to conciliate the parties to a dispute by all reasonable means at his disposal, and may for this purpose suspend or revoke any reference made by him under sub-section 4(1) of of this section".

3. Finality of Awards made by the Commissioner

No appeal should be allowed from a decision of the Commissioner made after an appeal from an arbitrator's award because, in the writer's view -

(a) An appeal to the High Court appears to be undesirable because it seems unlikely that the judges would be in a position to appreciate the consequences or impact of their decision to the co-operative movement,<sup>141</sup> and

(b) An appeal to the Minister is equally undesirable because it might facilitate the making of politically motivated awards, especially in disputes having political undertones.



It is therefore recommended that -

(i) s. 80(7) should be amended by deleting the words "subject to sub-section (12) of this section".

It should then read as follows:-

"A decision of the Commissioner under sub-section (6) shall be final".

(ii) The provisos to sub-section (11) of section 80 should be deleted.

4. Liquidation Disputes

As has already been stated, Section 70(1)(d) of the Co-operative Societies Act, 1966 confers on the liquidator the power to refer to arbitration [emphasis mine] all disputes arising during a society's liquidation.

(a) In order to make the "default powers" vested in the Commissioner by s.72(1) (k) more effective it is suggested that the words "if that party consents in writing to be bound by the decision of the arbitrator" should be deleted. The section should then read -

"(k) refer any subject of dispute between a liquidator and any third party to an arbitrator or arbitrators (in this section referred to as the arbitrator)".

(b) Rule 53(4) of the Kenya Co-operative Societies Rules, 1969, should be amended to read -

"Where a dispute arises between a registered society and a third party in the course of a liquidation any reference to arbitration under section 70(1)(d) of the Act shall be made on Form X in the Schedule to these Rules."

The existing Form X be deleted and replaced by "Form X" enclosed as an appendix to this Thesis.

(c) It is noted that the mode of reference by the Commissioner under Section 72(1)(k) has not been prescribed, and it is recommended that Form XII (see appendix II) should be adopted.

5. Senior and Experienced Officers Only to be Appointed Arbitrators

The proposed exclusion of advocates suggests the desirability of selecting senior and experienced co-operative officers only to act as arbitrators. This would be a safeguard against farcical or arbitrary decisions being made (for an example of such a farcical decision see the dispute between Wendani Farmers Co-operative Society Limited and Bayete Farmers Co-operative Society Limited).

Co-operative officers previously connected with the dispute or those whose normal work has made them be acquainted with the dispute should not be appointed arbitrators.

The writer has put forward this proposal because he is fully convinced that the Department of Co-operative Development has a sufficient number of senior co-operative officers with a very good background of co-operative work who would be suitable for co-operative arbitration. What is important is the way in which they are selected to do the work.

Whatever may be the shortcomings of the Co-operative Department in 1979 shortage of senior officers suitable for conducting co-operative arbitration is, in the writer's view, not one of them.

6. Standardisation of Awards and Procedures

An arbitrator appointed to conduct a hearing into a particular dispute should be provided with mimeographed notes (or full records) of previous disputes which are similar to the one before him. Such notes should be prepared by the Commissioner on the basis of the awards submitted to him. This procedure, if adopted, would create precedents which could be used by future arbitrators as the basis of their awards.

APPENDIX I

FORM X

(r.53(4))

THE CO-OPERATIVE SOCIETIES ACT

(Cap. 490)

REFERENCE OF A DISPUTE TO ARBITRATION

(Section 70(1)(d))

WHEREAS a dispute has arisen between \_\_\_\_\_  
\_\_\_\_\_ on the one  
hand and \_\_\_\_\_

\_\_\_\_\_ Co-operative Society/Union Limi-  
ted on the other hand concerning \_\_\_\_\_

NOW THEREFORE in exercise of the powers vested in me by  
section 70(1)(d) of the Co-operative Societies Act, 1966  
(Cap. 490) I DO HEREBY REFER the said dispute for deter-  
mination and the making of an award within \_\_\_\_\_  
months from the date hereof to \_\_\_\_\_  
\_\_\_\_\_ of \_\_\_\_\_

GIVEN under my hand at \_\_\_\_\_ this \_\_\_\_\_  
\_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_\_

\_\_\_\_\_  
LIQUIDATOR

APPENDIX II

FORM XII

(r.53(5))

THE CO-OPERATIVE SOCIETIES ACT

(Cap. 490)

REFERENCE OF A DISPUTE TO ARBITRATION

(Section 72(1)(k))

where

WHEREAS a dispute has arisen between \_\_\_\_\_

\_\_\_\_\_ on the one hand

and \_\_\_\_\_

Co-operative Society/Union Limited on the other hand con-

cerning \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

AND WHEREAS the said \_\_\_\_\_

\_\_\_\_\_ has consented in

writing to be bound by the decision of the arbitrator NOW

THEREFORE in exercise of the powers vested in me by Section

72(1)(k) of the Co-operative Societies Act, 1966 I DO HEREBY

REFER the said dispute for determination and the making of

an award within \_\_\_\_\_ months from the date

hereof to \_\_\_\_\_

of \_\_\_\_\_

GIVEN under my hand at \_\_\_\_\_ this \_\_\_\_\_

day of \_\_\_\_\_ 19 \_\_\_\_\_

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT

NOTES

- 1 No. 39 of 1966
- 2 See also Munkner, H., Co-operative Principles and Co-operative Law, Institute for Co-Operation in Developing Countries, University of Marburg, Papers and Reports, No. 5, Marburg, 1974, p. 23 where it is stated: "The purpose of such a definition is to distinguish Co-operative societies clearly from other organisations and to underline its characteristic features".
- 3 Munkner, H., Co-operative Law as an Instrument of State-Sponsorship of Co-operative Societies; reprinted from: "Co-operative Information" published by the International Labour Office, Geneva, Switzerland, No.1/73, pp. 27-42, pp. 1-2 where it is stated "Co-operatives originally were not institutions of the Law but instead a social and economic phenomenon. The first co-operatives were established before Co-operative Legislation existed".
- 4 For an interesting discussion of whether Co-operatives existed in the pre-colonial or "traditional" African society see: Migot-Adhola, S.E.: "Traditional Society and Co-operatives", in: Widstrand, C.G., ed., Co-operatives and Rural Development in East Africa, Uppsala, pp. 34-36 where it is stated, "It is clear enough that modern co-operatives are not a direct continuation of the native communal forms, even though they may appear to be so... there is no direct continuity between the autochthonous co-operative forms and modern marketing co-operatives".
- 5 "Co-operation at home and abroad" cited Calvert, H., The Law and Principles of Co-operation, 5th ed., p.16.
- 6 Ibid, at p.18 where it is stated: "Originally the movement owed its origin to poverty and to the desire for some way out of all the distress and hardships that poverty entailed. The common bond that held the members together, or that induced them to combine, was poverty or economic distress".

- 7 "The Co-operative movement" began with the Owenism of the early 19th century and it seeks its ends by establishing and developing "Co-operative societies".
- 8 Kenya House of Representatives Report, (1966) Vol. 10, part 2.
- 9 "A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature... no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting or which may possibly conflict with the interest of those whom he is bound to protect", per Lord Cranworth, L.C. in Aberdeen Ry v Blaikie (1854) 1 Harq (H.L.) 461, at pp. 471-472.
- 10 See John Westwood: Chance's Principles of Mercantile Law, 19th ed. pp.311-312: "The relation of partnership is one which demands that the conduct of the partners must be of the utmost good faith, and in the absence of which the partnership cannot conscientiously or successfully be carried out".
- 11 "Histoire de Doctrines Co-operatives 1933" cited Chesman, W.J.W., Handbook for Co-operative Personnel in the Caribbean, 1st ed., pp.49-50.
- 12 Calvert, H., op.cit, p. 18.
- 13 See s. 28 of the Co-operative Societies Act, 1966.
- 14 Helm, F.C., Economics of Co-operative Enterprise, 1st ed., p. 5.
- 15 But see the Prevention of Fraud (Investments) Act, 1977 (No. 1/1977), section 2 which defines a "co-operative society" as "a society registered as a co-operative society under the Co-operative Societies Act." Cf. International Labour Conference, Recommendation 127, Recommendation Concerning the Role of Co-operatives in the Economic and Social Development of Developing Countries, Geneva, 1966, para 12(1)(a) defining a "co-operative" as "an association of persons who have voluntarily joined together to achieve a common end through the formation of a democratically controlled organisation, making equitable

contributions to the capital required and accepting a fair share of the risks and benefits of the undertaking in which the members actively participate".

Although this definition has much to commend it, it is submitted that it cannot be applied to Kenya co-operatives registered under the existing law which, inter alia, contains provisions for compulsory membership and giving the Commissioner for Co-operative Development power to veto any major decision that may be made by a society's members or Committee.

- 16 Report of the ICA Commission on Co-operative Principles, International Co-operative Alliance, London, 1967, p. 10. Co-operative Principles are also known as "the Principles of Rochdale". It should be noted that the Co-operative legislation does not define co-operative principles.
- 17 See also Bonner, A., British Co-operation, Revised ed., 1970, Manchester, pp. 308-309.
- 18 For details on Co-operative Principles see: Munkner., H. Co-operative Principles and Co-Operative Law, op. cit.
- 19 Bonner, A., op. cit., p. 296.
- 20 Article 6, Model By-laws of Producers Co-operative Societies. See also Article 6 Model By-laws of Consumers' Co-operative Societies and Article 10 Model By-laws of Co-operative Savings and Credit Societies.
- 21 Report of the ICA Commission on Co-operative Principles, op. cit., p. 12.
- 22 See Clause 10(b) of the Model By-laws of Producers' Co-operative Societies which provides for expulsion of members who "act in any way against the interest of the society".
- 23 Bonner, A., op. cit. p. 297.
- 24 See Rules 34(2), 34(4)(b), 40, 44(3), 45, 49(3), and 50(2).
- 25 See Munkner, H., op.cit. p. 83 where it is stated: "The ICA in the 1969 Congress in Hamburg has changed the term "surplus", which was used by



the ICA Commission on Co-operative Principles in their report, into the term "economic results" and thus contributed to end the old argument whether co-operative societies make surplus or profit".

This new phrase has not yet been adopted by the Kenya Co-operative Legislation which still uses the word "surplus" in s. 2 of the Act.

- 26 Munkner, H. op. cit., p. 82.
- 27 See Bonner, A., op. cit. p. 308
- 28 s. 44(2).
- 29 It would appear that there are eleven co-operative principles. See Munkner, H., op. cit., p. 102.
- 30 Soper, J.P.H., A Treatise on the Law and Practice of Arbitrations and Awards, The Estates Gazette Limited; London, 10th ed., p. 1. See also SurrIDGE, B.J. and Digby, Margaret, A Manual of Co-operative Law and Practice, Cambridge, 2nd ed., p. 156, where it is stated: "Arbitration means the settlement of a dispute by an arbiter, usually a person or persons chosen or agreed to by the parties to the dispute".
- 31 See Soper, J.P.H., op. cit. p. 7; Jenkins, D., Law for Co-operatives, p. 29.
- 32 Soper, J.P.H., op. cit. p. 4. It may be pointed out here that no such practice existed in Kenya.
- 33 Section 43(1) of which empowered the Registrar of Co-operative Societies to decide disputes between members or office bearers and co-operative societies, or between societies, as an arbitrator. See Munkner, H., New Trends in Co-operative Law of English Speaking Countries of Africa, p. 5 etc.
- 34 Section 49 of which provided for reference of certain disputes to the Registrar of Co-operative Societies.
- 35 It is the writer's view that it is the improvement of a people's given state or condition, usually economic, that is meant by "development". In this context all countries may be said to be developing. See also Bhagwati, J., The Economics of Underdeveloped Countries, 3rd Imp. p. 9: "The poor nations are variously

described as "backward", "underdeveloped" and "developing". The choice of the word depends largely on the sensitivity of the audience and the sensibility of the analyst".

- 36 Preface by the Minister for Finance and Planning.
- 37 Sessional Paper No. 10, at p. 2.
- 38 See also Development Plan, 1966-70 (Government Printer, Nairobi), p. 200: "There is only one course of action open to the nation, and that is to strengthen co-operatives to play their role adequately".
- 39 See Ministry of Co-operatives and Social Services Development Plan 1971/74. Foreword by the Minister, p.1.
- 40 Under the Co-operative Societies Act, 1945, which was repealed by the Co-operative Societies Act, 1966. See also Sessional Paper No. 8 of 1970, p.1: "The co-operative movement has now been in existence in Kenya for about 25 years as an officially recognised movement... This fact is reflected by the increase which has taken place in the number of registered co-operative societies from 1,030 in 1967 to 1850 in June 1969".
- 41 Kenya House of Representatives Report, 1966, Vol.10, Part II, Col. 2182.
- 42 Ngala, R., Minister for Co-operatives and Social Services. Kenya House of Representatives Report, op cit., Col. 2183.
- 43 The Co-operative Movement has proved to be a convenient ideological alternative for Kenya and those African countries which have openly stated that they are neither capitalist nor marxist.
- 44 Ngala, R., Minister for Co-operatives and Social Services, Kenya House of Representatives Report, op. cit., Col. 2187: "The Co-operative Movement is basically a socialist movement".

See also Yash Ghai, Co-operative Legislation in East Africa, A Simple Guide, p. 19:  
 "The Co-operative Movement has invariably been presented as an instrument of socialism".

- 45 Ss. 2 of the Co-operative Societies Acts, 1945, 1966 define a "Committee" as "the governing body of a registered society to whom the management of its affairs is entrusted".
- 46 Kenya House of Representatives Report, supra, Col.2184.
- 47 In Kenya, the Commissioner for Co-operative Development.
- 48 In Kenya, the Co-operative Societies Rules, 1969.
- 49 Yash Ghai, Co-operative Legislation in East Africa: a simple guide, supra, p. 18.
- 50 Kenya House of Representatives Report, supra, Col.2186.
- 51 Kenya House of Representatives Report, (1966) Vol 10, Col. 2720.
- 52 Kenya House of Representatives Report, supra, Col.2720
- 53 (1970) E.A. 361.
- 54 [1970] E.A., 361, at p. 362.
- 55 (1968) E.A. 523.
- 56 Corresponding to s.80 of the Kenya Co-operative Societies Act, 1966.
- 57 Jaramogi Oginga Odinga, Kenya House of Representatives Report, op.cit., Col. 2720, Committee Stage.
- 58 See page 70, infra.
- 59 See page 100, infra.
- 60 See page 131, infra.

- 61 Eg. Catanga Farmers Co-operative Society  
Ltd v Gitau, p. 37, ante.
- 62 See page 69, infra.
- 63 (1970) E.A. 361, at p. 365.
- 64 (1970) E.A. 414.
- 65 per Lutta, J.A., at p. 416.
- 66 Now section 80.
- 67 The Co-operative Societies Ordinance, 1945;  
repealed by the Co-operative Societies  
Act, 1966 which is currently in force.
- 68 High Court Civil Case No. 2432 of 1973 (un-  
reported as yet). Judgment was delivered  
on 5th June 1975.
- 69 This judgment was reversed by the Court of  
Appeal for East Africa in August 1976 on  
the ground that there was no evidence to  
prove that the society had promised to  
pay for the use of the plaintiff's land.
- 70 E.g. Rule 26(ii).
- 71 E.g. by-law 27 of the model by-laws for pro-  
ducers or "marketing" societies.
- 72 Same as note 71 above.
- 73 Co-operative Societies Rules, 1969, Rule 33.

- 74 E.g. by-law 31 of the model by-laws for producers or "marketing" societies prescribing a minimum age of 21 years.
- 75 See the dispute between Benjamin Njeru and Kiriani Farmers Co-operative Society Ltd., p. 100, *infra*.
- 76 (1948) 1 All E.R. 844.
- 77 Corresponding to the by-laws of a registered co-operative society.
- 78 A society registered under the U.K. Industrial and Provident Societies Acts, 1893 to 1928.
- 79 [1948] 1 All E.R. 844, at pp 845 - 849.
- 80 Section 49(1) provides that "every dispute between a member of a registered society... and the society... shall be decided in manner directed by the rules of the society... and the decision so made shall be binding and conclusive on all parties... and shall not be removable into any court of law..."
- 81 It should be noted that the English Friendly Societies Act 1908 does not apply to Kenya under the "reception clause" of the Judicature Act, 1967.
- 82 See Dodhia v National & Grindlays Bank, (1970) E.A.195
- 83 Such power is conferred on co-operative societies by the by-laws. See, for example, clause 10 of Model by-laws of producers' co-operative societies.
- 84 SurrIDGE, B.J. and Digby, M., Manual of Co-operative Law and Practice, 3rd ed., p.187.
- 85 (1905) A.C. 78.
- 86 At p. 83

- 87 In accordance with Order LIII, rr. 1-7 of the Civil Procedure Code.
- 88 The High Court may, on such application, issue an order of certiorari to declare that any decision already taken was ineffective, and prohibition, to prevent the "committee" from acting on behalf of the society, or to prevent the society and its agents proceeding further with the ultra vires scheme.
- 89 See Order LIII. According to Professor Wade, "the underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds". See Wade, H.W.R., Administrative Law, Oxford, 1961, p. 97.
- 90 Cap. 108, Laws of Kenya.
- 91 E.G. Election of officers under Rule 27(e) of the Co-operative Societies Rules, 1969.
- 92 Section 2 of the Co-operative Societies Act, 1966 defines "officer" as including "a chairman, vice-chairman, secretary, treasurer, committee member, employee or other person empowered under any rules made under this Act, or by-laws of a registered society, to give directions in regard to the business of a registered society".
- 93 But here again his exact legal status is not easy to define. The fact that the society has ceased to exist as a body corporate under section 67 militates against his being called an "agent" since no one can be an agent of a non-existent principal: Kelner v Baxter (1866) L.R. 2C.P. 174. But he may be described, like a trustee in bankruptcy, as a "statutory assignee" of the society's property which has vested in him under section 69.
- 94 These words must be understood as being subject to the qualification "save for the purposes of the winding up of its affairs". Such qualification is expressly provided in section 80(1) of the Tanzania Co-operative Societies Act, 1968. It is submitted that when a society's registration

is cancelled the effect of s. 67 is merely to terminate all the powers of the society as a body corporate conferred by section 28 but the society continues to exist legally until all its affairs are wound up. Otherwise we would be talking of liquidating a non-existent society.

- 95 Where, for example, the liquidator has determined the contributions to be made by members to the funds of the society under section 70(1) (e) but the members object to the amounts so decided.
- 96 For example, Mwangi Gakuo v Iyego Farmers Co-operative Society Limited, supra.
- 97 But not a registered society which is not a member of another registered society, e.g. a primary society which is not a member of a co-operative union.
- 98 A suggestion which the writer made to the Commissioner in the dispute between Waira Kamau and the liquidator of Githunguri Constituency Ranching Co-operative Society Limited. Although the Commissioner did not instruct the liquidator to refer the dispute to arbitration he had to accept Mr Kamau's claim otherwise, it is submitted, Mr Kamau would have sued the liquidator (as the society's representative).
- 99 Disputes falling under section 80.
- 100 Ministry of Co-operatives and Social Services.  
File No. CS/722/Vols.II & III.
- 101 The correct amount would appear to be Shs. 120/-.
- 102 [1948] 1 All E.R. 844.
- 103 Ministry of Co-operatives and Social Services  
File No. CS/269/Vol. IV.

- 104 (1961) E.A. 317.
- 105 [1961] E.A. 317. See the judgment of Law, J., at pp 318-319.
- 106 Ministry of Co-operatives and Social Services. File No. CS/701/Vol.II.
- 107 Ministry of Co-operatives and Social Services. File No. CS/701/Vol.II, at folio 82.
- 108 Ministry of Co-operatives and Social Services. File No. CS/241/Vols.II & III.
- 109 The validity of this resolution is doubtful because it appears to be unreasonable.
- 110 This was seven years and five months after the dispute began.
- 111 Mr Mukule was appointed by the Commissioner and so became the Chairman of the arbitrators pursuant to Rule 53(2) of the Co-operative Societies Rules 1969.
- 112 It is not clear at the moment whether any fees will be paid to the other arbitrators who, though not co-operative officers, are government officers employed by the Ministry of Co-operative Development.
- 113 In his letter to the arbitrators dated 11th March 1977 Mr Njue stated that he had spent Shs. 18,470/- on the dispute. This excludes the society's expenses and the arbitrators' fees.
- 114 Ministry of Co-operative and Social Services. File No. CS/1076/Vol. II.
- 115 (1969) E.A. 163.
- 116 Ministry of Co-operatives & Social Services. Files Nos CS./1277/Vol. I and CS/1265/Vol. I.



- 116a See the Civil Procedure Act (Cap.21), Laws of Kenya, Section 27.
- 117 Ministry of Co-operatives and Social Services File No. CS/1831/Vol.I.
- 118 See Surridge & Digby, op.cit., at p. 147.
- 119 The Co-operative Societies Ordinance, 1945 (repealed by the Co-operative Societies Act, 1966); the Arbitration Ordinance 1962 and the Arbitration (Foreign Awards) Ordinance 1962 (repealed by the Arbitration Act, 1968, s. 38).
- 120 See page 34, etc.
- 121 Nowrojee, P., The Settlement of Disputes in Co-operative Societies, in: African Co-operatives and Efficiency (Uppsala), p. 74.
- 122 See the recommendations of the AARRO (Afro-Asian Rural Reconstruction Organisation) Conference held in Nairobi in 1966 for the establishment, inter alia, of Co-operative Tribunals.
- 123 See page 74, ante.
- 124 See page 82, ante.
- 125 The Hon. D.N. Kuguru, Member of Parliament.
- 126 Nowrojee, P., supra.
- 127 (1969) E.A. 168.
- 128 See Pages 75 - 77, ante.
- 129 See page 70, ante.
- 130 See page 120, ante.

- 131 See page 113, ante.
- 132 [1969] E.A. 168.
- 133 See page 108, etc., ante.
- 134 See Note 113 above.
- 135 See page 82, ante.
- 136 See page 70, ante.
- 137 See page 100, ante.
- 138 Which states: "where any of the parties insist upon being represented by an advocate, the Commissioner may refuse to act under this section, in which case the dispute shall be determined by a single arbitrator in accordance with the Arbitration Act...".
- 139 Which reads:- "The proceedings before an arbitrator shall, as nearly as possible, be conducted in the same way as proceedings before a court of law..."
- 140 See also the Swasiland Co-operative Societies Regulations, 1964, r. 61(7) which states: "In proceedings before the Registrar or an arbitrator a party shall not be represented by a legal practitioner".
- 141 For the legalistic attitude of the judges see National Union of Clerical Commercial and Technical Employees v Uganda Bookshop (1965) E.A. 555 where it was stated: "It is an accepted proposition of law that one of the cardinal duties of an arbitrator is to decide... the question submitted to him according to the legal rights of the parties concerned and not according to what he may consider fair and reasonable or appropriate in the circumstances. It would be unjustified and unreasonable, in lieu of deciding the question submitted to him, to direct what to

him may seem an equitable arrangement between the parties". (per Udo Udoma, C.J.) (High Court of Uganda).