

**DISPUTE RESOLUTION MECHANISMS
UNDER COOPERATIVE SOCIETIES ACT
2005**

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DEDICATION

To my mum and dad, Margaret Wanjiru Kabi, and Dr. Gabriel Kabi Kuria Kiboo who are both great fans of education and for your moral, material and financial support in my academic life this far.

DECLARATION

This dissertation is my original work and has not been presented for a degree in any other university. All the sources have been quoted and acknowledged by means of complete references.

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I have learnt if one advances confidently in the direction of dreams, and endeavors to live the life he has imagined, he will meet with a success unexpected in common hours.

- *Henry David Thoreu... philosopher and poet*

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LIST OF ABBREVIATIONS

CT	-	Cooperative Tribunal
CSA	-	Cooperative Societies Act
PCC	-	Public Complaints Committee
CPA	-	Civil Procedure Act
CPR	-	Civil Procedure Rules
LRA	-	Law Reform Act
JSC	-	Judicial Service Commission
FIDA	-	Federation of Women Advocates
LSK	-	Law Society of Kenya
CLE	-	Continuing Legal Education
ADR	-	Alternative Dispute Resolution

CHAPTER ONE

1.0 BACKGROUND

Societies have done their expensive duty in civil litigation in allowing judges to declare important rules of law in disputes in which they have been involved. *Newton Abbot*¹ society for example has given its name to a case establishing an important rule of land law and *Leeds Society*² has the honour of being named in the books on jurisprudence where the binding force of judicial pronouncements is examined. From time to time, societies appear in courts where the question is one of interpretation of society rules. Cases involving co-operative societies *qua* cooperative societies, however, are conspicuous by their rarity.

One can only speculate why this is so. Possibly the helpful guidance of the commissioner and the cooperative union are enough to keep societies out of legal trouble. But it may be because no one has yet found a way to use the Act as a means to commit irregularities.

Part XIV of the Cooperative Societies Act, provides for settlement of disputes and establishes the following mechanism as follows briefly:³

“76. (1) If any dispute concerning the business of a co-operative society arises:-

(a) among members, past members and persons claiming through members, past members and deceased members; or

¹ Hand Book to the industrial and Povident societies W. J. CHAPPENDEN 1966

² Hand Book to the industrial and Povident societies W. J. CHAPPENDEN 1966

³ Cooperative Societies Act 2005

(b) between members, past members or deceased members, and the society, its committee, or any officer of the society; or

(c) between the society and any other co-operative society; it shall be referred to the Tribunal.

Disputes

(2) A dispute for the purpose of this section shall include -

(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such a debt or demand is admitted or not; or

(b) a claim by a member or past member, or from the nominee or personal representative of a deceased member for any debt or demand due from a cooperative society, whether such debt or demand is admitted or not.

77. (1) There is hereby established a Tribunal to be known as the Co-operative Tribunal which shall consist of five members:

(a) a Chairman and deputy Chairman appointed by the Minister on the nomination of the Judicial Service Commission;

(b) an advocate of the High Court of Kenya appointed by the Minister on the nomination of the Law Society of Kenya;

(c) three persons with at least ten years experience in the field of co-operative management and practice appointed by the Minister.’’

In a nut shell this translates to the fact that the tribunal is the only mechanism established for the settlement of disputes under the cooperative Societies Act with a single appellate avenue, which is the High Court and its decision is final. Disputes are eminent in our day to day lives. They occur in various forms and hence require efficient resolution mechanisms.

It is evident that many cooperatives are experiencing turbulent times with many succumbing to unresolved disputes especially when many were re-established when the Narck government came to power in 2002. I have been able to establish through commentaries and media broadcasts that financial constraints is not a major cause of collapse per se but simple disputes which could be resolved amicably. Such is the dilemma coffee growers in Karatina⁴ are in and have gone further to spill their produce after they were compelled to deliver their produce to a cooperative they did not belong to in violation of one of the pillars of the cooperative movement of voluntary membership.

Ignorance of dispute resolution mechanisms could be attributed to this turn of events or lack of effectiveness could be a contributing factor.

The cooperative movement is a core pillar of the economy and their welfare can thus not be overlooked. Their existence, just as other corporate bodies or persons, depends heavily on how amicable they settle their disputes.

⁴ Daily Nation December 10th – 17th 2011

STATEMENT OF THE PROBLEM

If two persons are in dispute as to their rights under an agreement, they may take their dispute to the courts for settlement. Alternatively, they may take their dispute to an independent third person and agree to accept his decision on the question. This statement shows the need and availability of various avenues through which justice may be sought.

In enquiring justice mechanisms in cooperative cases the statement of the problem is as follows:-

Does the Cooperative Societies Act adequately provide for institutional and procedural framework necessary in accessing justice in cooperative cases?

How has the High Court and the Cooperative Tribunal under Cooperative Societies Act handled cooperative cases and to what extent do they facilitate access to justice in environmental cases?

Is there need for reforms to further enhance justice in environmental cases?

1.2 THE THEORETICAL/CONCEPTUAL FRAMEWORK

This study will be based on positivism jurisprudence as espoused by *Mario Jories in his book the International library of essays in law and legal theory schools 7 Legal Positivism*⁵ and *MacCarmick and Ota Weinberger*⁶. The central point in their conception is

⁵ The international library of essays in law and legal theory schools 7 Legal Positivism- Mario Jories 1992

that saying which and what law is should be kept a separate enterprise from deciding whether it is just or unjust, good or evil. It purports to develop a method for a natural description of law in order to produce a legal science.

‘As an institutional fact the law lays down when a contract, a right of ownership, a trust, a will, a right of intestate succession, a corporation, a person, an obligation reparation comes into existence. That is, the law lays down that on the occurrence of ascertain act or event, a specific instance of the institution in question comes into existence. It is thus possible to state in the form of a separate rule of law the conditions which are essential to the existence of an instance of any such institution. Such a rule is called an ‘institutive rule’⁷.’

‘Just as with a contract, whenever trust, a will a right or intestate succession or the link exists, it is operative in law to produce not one but a whole of further legal consequences in the way of rights and powers, duties and liabilities. It is possible to consider the law in so far as it provides for these consequences in relation to any one such institution, as comprising a set of rules. This set of rules in relation to any institution constitutes a class, just because each rule is conceived as having the form. For each institution, there is a set of

⁶ Legal Positivism Law as an institutional fact- Neil MacCarmick and Ota Weinberger- an institutional theory of law, chapter 11 pp49-76 1992

⁷ Legal Positivism Law as an institutional fact- Neil MacCarmick and Ota Weinberger- an institutional theory of law, chapter 11 pp49-76 1992

rules which an operative fact is that an instance of the institution exists. Such a rule is called ‘*consequential rule*’⁸.’

‘‘Since an instance of any such institution is conceived as coming into existence on the occurrence of an institutive act or event, and since it is conceived as continuing in existence for a period of time during which it generates legal consequences, it is also necessary for the law to provide for its termination some point in time. Again it is possible in the case of each institution to treat as separate rules these legal provisions as to termination. Examples are the various rule about discharge of contracts, or the winding up of trusts, or dissolution of incorporated companies. Such a rule is called ‘‘terminative rule’’⁹’’

The institution of law will therefore signify those legal concepts which are regulated by sets of institutive, consequential and terminative rules, with the effect that instances of them are properly said to exist over a period of time from the occurrence of an institutive act or event until the occurrence of a terminative act or event.

The enactment of the Cooperative Act 2005 was intended in as far as dispute resolution mechanisms is concerned, to create an adequate channel through which amicable cooperative movement disputes could be resolved. The Act established the Cooperative Tribunal to dispense cooperative justice to cooperators. These institution is supposed to be

⁸ Legal Positivism Law as an institutional fact- Neil MacCarmick and Ota Weinberger- an institutional theory of law, chapter 11 pp49-76 1992

⁹ Legal Positivism Law as an institutional fact- Neil MacCarmick and Ota Weinberger- an institutional theory of law, chapter 11 pp49-76 1992

constitutionally established and take into account the ability and capacity of the parties to litigate before it and the application of the law itself.

With regard to the study, the theoretical framework presupposes that the cooperators are able to understand the intricacies of the High Court and the cooperative Tribunal under the Cooperative Societies Act and when there are violations of the law as regard their constitution and operations, there will be automatic redress. The situation on the ground does not concur with the hypothesis and the concept of the study. Cooperative disputes persist because of the various constraints like, *locus standi* at the Cooperative Tribunal and the lack of execution of authority by both the Tribunal and the Public complaints commission.

1.3 HYPOTHESIS

The study will be based on the following hypothesis:-

There are no adequate mechanisms to address the prevalent disputes in the cooperative movement in Kenya.

The mechanisms are illegally constituted since they are not in line with the letter and spirit of the Kenya constitution 2010

The enactment of the Cooperative Societies Act 2005 was an important legislative milestone in access to cooperative justice

Various legislative and administrative reforms are necessary to adequately address cooperative justice in those institutions.

1.4 RESEARCH OBJECTIVES

This study examines the institutions established under the Cooperative Act 2005 and the extent to which they are able to execute their mandates. It also examines the extent to which the Cooperative Act itself has contributed or otherwise towards that mandate and the trends in decided cases and rulings in the High Court and the Cooperative Tribunal. The reports and recommendations of the Public Complaints Committee shall also be considered in order to make an informed analysis with regard to many hurdles that militate against access to justice. These hurdles include legislative and institutional constraints, the complex procedures of the High Court, costs, *locus standi*, and lack of knowledge on Cooperative justice mechanisms and rights by the public.

1.5 RESEARCH JUSTIFICATION

The right of access to justice is endowed to all human beings in equal access and opportunity. Cooperative disputes are rife and cooperatives sector being a key economic driver, calls for adequate and sustainable dispute resolution mechanisms. The institutions established under the Cooperatives Act 2005 are intended to contribute towards this goal. However, the cases that are brought to those institutions invoke a critical and analytical study aimed at: Updating and polishing the existing literature on dispute resolution mechanisms in the cooperative sector; Creating public awareness on the subject to leverage cooperative movement operations to be in line with objectives towards attaining of vision 2030; and to Provide the government through the relevant ministry with recommendations put forward in the study to improve the mechanisms

1.6 LITERATURE REVIEW

There is inadequate literature specifically with reference to cooperatives dispute resolution mechanisms in Kenya. What follows is a literature review of some of the key literature which are relevant to this study:-

*W. J CHAPPENDEN, C.S.D.*¹⁰ and *MUCAI-KATTARBO*¹¹ - argue in their works that;

The machinery of the Act for the settlement of the disputes may be used when the parties are , on the one hand, a society and, on the other; A member of the society; or Any person aggrieved who has ceased to be a member within the previous six months; or A person claiming through a member or such aggrieved person; or A person claiming under the rules of society. According to them the Act does not make clear what is meant by a ‘person claiming under the rules’.

More so, although every dispute between the parties may be settled as provided in the rules, essentially the machinery is meant to apply to disputes arising out of the rules of society and the society-member relationship. To them, this does not apply to disputes arising out of other relationships such as the society and customer or society and employee relationships even though the customers and employees are also members. If the rules of a society make provision for their settlement, disputes are to be settled as so provided.

¹⁰ the handbook to the industrial and provident societies 1966

¹¹ cooperatives: formation, management and settlement of disputes 1992

Unless the rules of the society expressly forbid it, the parties to a dispute may, by consent refer the dispute to the chief registrar who may either personally, or by some other registrar hear and determine the dispute.

If the rules of a society direct that any disputes are to be referred to court, the disputes are to be determined by the court. The court's decision are final and binding.

In her concluding statement on settlement of disputes, Mucai states; “ *in view of rapid expansion of cooperative activities, cooperative disputes are bound to become more complex and will require an efficient arbitration machinery. Serious thought should therefore be given to the creation of a cooperative disputes tribunal to operate independently and to be manned by specialized personnel working on full-time basis*”

Though not a mechanism today for cooperative societies dispute resolution, it had been provided earlier that, the conduct of arbitration under the rules is governed by the Arbitration Act except where it is inconsistent with the Industrial and Provident Societies Act or the rules of the society.

Brenda Brainch¹² argues that in common with many fellow Africans, Kenya's present legal system does not yet deliver swift or cost-effective justice. There are now well over 200,000 cases pending in our principal High Court in Nairobi; cases can take up to 10 years to reach

¹² The Climate of Arbitration and ADR in Kenya, Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003 . *This paper has since been published in the Commonwealth Lawyer 2003, Indian ICFAI Journal of ADR, Corporate Africa, CEDR (Centre for Effective Dispute Resolution) London*

judgement; uncertainty has been rife. Even with ongoing changes within the judiciary, the backlog is simply unmanageable; we have to change the way cases are handled in our courts to achieve efficiency and effectiveness at a reasonable cost and thereby dispel the adage that: 'It is better to enter the mouth of a lion than a Kenyan court of law'.

She further observes that the notion of non-lawyers assisting in the resolution of disputes is not foreign to Africa. A former Chief Justice of Tanzania, the Hon Justice Nyalali once said: 'The use of custom, special rules and communal practice to resolve disputes is not a strange idea. It is common in most African communities and in commercial communities the world over'.

Traditional systems in Kenya have broken down largely due to a rise in political appointments at district level and a lack of understanding of legal rights by the older, less educated, generation such that our communities have come to believe that litigation provides not only the ultimate, but the only, justice.

The practice of domestic and international arbitration in Kenya is conducted within the framework of our 1995 Arbitration Act and is interpreted as: 'any arbitration whether or not administered by a permanent arbitral institution'. The Act follows the UNCITRAL model almost word for word but with a number of glaring omissions: notably no provision for costs

and interest. These omissions are dealt with by the Rules of an active local branch of the London-based Chartered Institute of Arbitrators, being an amalgam of Rules established by leading international arbitral institutions and providers such as the London Court of

Arbitration and the ICCA (International Commercial Court of Arbitration).

Draft amendments to the Act, completed by 2001, take stock of the experience of Kenyan Fellows and Chartered Arbitrators as well as the most effective provisions of the English 1996 Act with particular reference to speed and cost. However, this Draft is yet to see the light of day in Parliament. Significantly, it contains no reference to ADR, conciliation or mediation.

Eileen Carroll of CEDR¹³, describes the successful resolution of a commercial problem as requiring: 'layers of understanding and approach. Indeed, the more complex the problem, the greater the need for a broader and more flexible approach.

Kenya's Dispute Resolution Centre (DRC) is an independent, not-for-profit organization which promotes the prompt, effective and economic resolution of disputes through arbitration and ADR, predominantly mediation, expert determination and early neutral evaluation.

In seeking to address the issue of access to justice **Connie Ngondi-Houghton**¹⁴ observes that the ' the justice system is a continuum. It begins from points of entry where service of

¹³in her book on International Commercial Mediation, 2005.

¹⁴ Ngondi-Houghton, C., *The State of Human Rights in Kenya: A Baseline Survey Report for the Development of a National Action Plan and Policy for Human Rights in Kenya*. A Publication of the Ministry of Justice and Constitutional Affairs. 2005. **access to justice and the rule of law in Kenya-a paper developed for the commission for the empowerment of the poor November 2006**

the system is sought, to the enforcement of end of case, enforcement of judgment or the serving sentence”

The above literature is now history and has since been replaced by provisions of the cooperative Act 2005 and the constitution 2010¹⁵. It is not exhaustive of the mechanisms of

¹⁵ **2.** (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

(2) No person may claim or exercise State authority except as authorised under this Constitution.

(3) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute

resolution mechanisms shall be promoted, subject to clause

dispute settlement and in my view also lacks comprehension in light of the existing constitutional regime.

For instance, the issue of the cooperative tribunal¹⁶ has not been addressed at all and contingent circumstances involving cooperatives have not been addressed such as the parties to benefit in the mechanisms and what other avenue they may follow to get justice.

1.7 RESEARCH METHODOLOGY

This study shall use both primary and secondary data in the research.

1.7.1 Primary sources

I intend to administer questionnaire to be filled by cooperators in assessment of the execution of the cooperative tribunal mandate. I prefer this mode because it is cheap and the fact that a majority of cooperators in remote areas are ignorant of importance of formal mechanism and appreciation of rules of operation , and the low literacy levels. The limitations here are that many respondents may not be cooperative or understand the

(3); (d) justice shall be administered without undue regard to

procedural technicalities; and

(e) the purpose and principles of this Constitution shall be

protected and promoted.

¹⁶ Established under chapter 486 of the laws of Kenya, the Cooperative Societies Act

intensity of the questions. I will also interview persons in the various organs established by the Act as staff of the Cooperative tribunal based at the Kenya Re plaza.

Primary literature shall make reference to Acts of parliament, International Conventions, Court Judgements and Cooperative Tribunal.

1.7.2 Secondary sources

This source will include research from the library at the University of Nairobi Faculty of law library, text books, journals, magazines, newspapers and reports from research organisations, and the internet.

1.8 CHAPTER BREAK DOWN

The study contains four chapters as follows:-

Chapter one introduces the research problem, the theoretical framework and links relating to law and governance administration, the methodology, research problem, the hypothesis to be evaluated, the literature review, objectives of the study and the broad chapter breakdown.

Chapter two examines access to cooperative justice at the Cooperative tribunal, its composition, functions, independence, proceedings, appeals to the High court.

Chapter three examines access to cooperative justice at the High Court of Kenya and the extent to which the High Court has advanced access to cooperative justice, the procedural and institutional constraints, the developing jurisprudence in cooperative cases and the extent to which the principles of cooperative law under Cooperative Act 2005 have contributed towards that jurisprudence, including judicial activism in that development.

Chapter four contains recommendations and conclusions arising from the study

CHAPTER TWO

2.0 THE COOPERATIVE TRIBUNAL

2.1 INTRODUCTION

A tribunal has been defined as a court or any other body charged with the duty of adjudicating disputes. Most tribunals have judicial functions dealing with disputes between individuals and government departments or between an individual and another. They may be permanent or ad hoc, appointed to deal with a specific subject matter. They do not operate in the same ways as an ordinary court and the powers and procedures of the tribunals vary from courts since they are cheap, accessible, and free from technicalities. They may be composed on the nature of the subject matter at hand such as social security, land, property, housing, economic activities licensing or taxation, and may be classified on the basis of their ‘general considerations’ which include the composition, appointment, dismissal of members, powers, jurisdiction and procedure.

The Cooperative Tribunal was established under section 80 of the 1996 Cooperative Societies Act cap 490 of the laws of Kenya and the subsequent repeal by Act no. 12 of 1997 establishing the tribunal. It is important to understand that the 2004 amendment strengthened the tribunal. It hears disputes as among members, past members and persons claiming through members, past members and deceased members; or between members, past members or deceased members, and the society, its committee, or any officer of the society; or between the society and any other co-operative society; it shall be referred to the Tribunal.

This chapter examines the composition, independence, proceedings and jurisdiction of CT the extent to which, in the execution of its mandate under CSA it advances access to cooperative justice to aggrieved persons, in the cases that are brought before it.

The CT has been in existence for 12 years. Statistics show that it has received hundreds of complaints. It has handled complex disputes in 7 provinces namely: Nairobi; Central; Nyanza; Eastern; Western; Coast; and Rift Valley. The majority of cases have been on: share refunds; guarantees and charges; management issues; election petitions; interlocutory applications and injunctions issues of by laws; loan recovery; surcharge; expulsion and suspensions; and land disputes.

The CT has still to handle complex disputes in North Eastern province. It is not clear from data available why CT has not received substantial cases, if any, though it has active registries in : Nairobi, Kakamega; Nyeri; Embu; Kisumu; Nakuru; Mombasa and recently established registries in Meru and Eldoret after demands made to the chairman.

The present chairman is of the view that there is need for the CT to spread its wings all over the country to sensitize the public by way of seminars involving stakeholders and members of the public.

Nevertheless, the most critical aspect to note is the constitutional foundation of all tribunals. For the first time upon the promulgation of the constitution, all the tribunals have been recognized as means and mechanisms of justice dispensation.¹⁷

¹⁷ Article 164 (3) (b)

2.2 THE COMPOSITION, OPERATIONS AND FUNDING OF THE CT

2.2.1 COMPOSITION

The CT is composed a Chairman and deputy Chairman¹⁸ appointed by the Minister on the nomination of the Judicial Service Commission; an advocate of the High Court of Kenya appointed by the Minister on the nomination of the Law Society of Kenya; three persons with at least ten years experience in the field of co-operative management and practice appointed by the Minister in consultation with the apex society.¹⁹

In order to ensure continuity, all members of the CT are appointed at different dates upon expiry of their terms. The minister also appoints a public officer to be the secretary of the CT whose remuneration the minister also determines. The appointments are skewed in favor of the minister since he appoints nearly all the members to the CT.

The possibility of the minister appointing members who are loyal to him as opposed to those who can carry out the functions of the Ct effectively is very likely and will hinder the CT in the dispensation of its mandate since such appointment may reflect on the quality of the CT's decisions however negligible and therefore influence access to cooperative justice.

¹⁸ Cap 16 Advocates Act. sections 12 and 13

¹⁹ Cap 490 Cooperative Societies Act section 77

2.2.2 OPERATIONS AND FUNDING

The CT since inception has never operated to its full capacity in terms of organizational structures, staffing and funding. Funding is purely from the ministry and budgetary allocations have not been adequately done to appreciate the institution of the tribunal. If proper structures, staffing and budgetary support was improved, the tribunal would be able to efficiently deliver services in terms of disputes resolution, the provincial registries would be fully operational and collection enhanced contrary to the 2.5 million collected in the last financial year.²⁰

2.3 ORIGINAL JURISDICTION OF CT

CSA provides for the original jurisdiction of the CT as in the case of the High Court²¹. This duo choice of forum has tended to bring confusion in cooperative cases since there are no procedural and or other conditions that define when one should go before the CT or the High Court but the only thing that is clear is that one can appeal to the High Court for the CT decision. It would be appropriate that cooperative disputes should at the outset, be referred to the CT which is not tied up with procedural complexities of the High Court.

This automatic right to the High Court cannot be left to the vagaries of procedure at the High Court as there is no guarantee, unlike at the CT, that an applicant will be granted injunctive orders in the first instance. The tribunal, upon the lodging of an appeal to it, shall order the status

²⁰ Hand out on ,An overview of the Cooperative Tribunal , Cooperative Tribunal 2012

²¹ Article 165 (3) of the Kenyan Constitution 2010

quo of any matter or activity which is the subject of the appeal be maintained until the appeal is heard and determined.²²

Access to cooperative justice will be better served, if the CT, is the first port of call in cooperative disputes. It addresses itself to cooperative and other technical issues, summons expert witnesses, visits sites and issues orders for the protection of cooperators legitimate interests. It is also sensitive to the financial implications and undertakings by proponents and in majority cases, the High Court, as statistics show, usually confirms decisions of the tribunal and injunctive orders are automatic without the need of proof or the success of appeal.

2.4 PROCEEDINGS AT THE CT

The proceedings at the CT are not bound by the rules of the Evidence Act²³. This section 26 (2) states as follows:

‘...the Tribunal shall conduct hearing in such manner as it considers most suitable to the clarification of issues before it and generally in the just handling of the proceedings and shall, so far as the application to it appropriate, seek to avoid legal technicality and formality in its proceedings’

This procedure enables the CT to render access to cooperative justice expeditiously and without the usual interlocutory and other applications that are rife in the courts of law which delays the hearing of the substantive issues in dispute, at times, for several years. The proceedings are open to the public unless CT has reasons to direct otherwise.

²² This is what is referred as ‘stop order’

²³ Section 126 (1) Evidence Act cap 80 Of Laws of Kenya

Any person desiring to file a dispute will be provided with simple forms free of charge, to fill upon paying a small filling fee.²⁴The fees chargeable at the tribunal are quite low. It must be stated that the tribunal has decentralized its services to the provincial registries which are located at the provincial cooperative offices countrywide. There is no need therefore, to travel all the way to the Nairobi Tribunal Headquarters as the same services are readily available at the stated registries. The Tribunal regularly moves to hear disputes at the provincial registries and this has assisted a great deal in decongesting the Nairobi Tribunal and also reduce the case backlog.²⁵

2.5 THE INDEPENDENCE OF THE CT

The independence of the cooperative tribunal has been guaranteed under the Act²⁶ with appeals against its decision only to the High Court. The tribunal has never experienced any interference either from the political circles or the ministry²⁷. However one of the issues of independence is having cooperative officers handling tribunal issues in the provincial registries putting them in situations of conflict of interest and thereby the tribunal not seen as independent. One would be left to ask what is the relationship between the field officers and the: tribunal; governance; owning up; enforcement; linkage between tribunal and societies with its members; and commissioners mandate and that of the tribunal?

²⁴ The Cooperative Tribunal Service Charter, October 2008

Refer to Annex four of the report

²⁵ Refer to footnote 24

²⁶ Section 77 of the Cooperative Tribunal cap 490 Laws of Kenya.

²⁷ An overview of the Cooperative Tribunal, Cooperative Tribunal 2010

Moreover, the minister determines the remuneration of the tribunal members and the secretary and there is no provision for²⁸ the funding of CT under the Act with regard to the running of its offices including staff, rental of furniture and equipment expenses. This failure by parliament to allocate direct funding to the CT has led to its starting on the wrong footing at inception. It has therefore been left to the goodwill of members of the CT and that of the minister with regard to the funding of CT. It will require explicit legislation in order to determine the extent to which the CT can dispense its mandate in access to justice in cooperative disputes.

2.6 CONCLUSION

The CT's contribution to justice in cooperative cases should not be assessed on the basis of the disputes that have come before it since inception. In order for the CT to sustain itself and execute the mandate bestowed upon it by the CSA, there is need to revisit the legislative provision that gives it that authority, particularly with regard to cooperative justice.

The CT needs to obtain direct allocation of funds by parliament in a way similar to the position pertaining with PCC.²⁹ There is need to reduce the powers of the minister since he appoints and determines the remuneration of the CT members. The tribunal should be able to appoint its secretary under the established laws of public procurement. There is danger at present, since the secretary is an appointee of the minister, to emphasize more on loyalty than attending to his or her duties as the secretary to the tribunal.

²⁸ George Siro, secretary to the Cooperative Tribunal, responding to questionnaire question 26/03/2012

²⁹ Public Complaints Committee section 36 (1) (2)

The judiciary needs to exercise discretion and activism in cooperative cases that come before it either by original jurisdiction or from the CT. It makes no sense for an interested party to be given an opportunity to be heard at the tribunal and then be shut out at the High Court. It is important for the High Court to address itself to the underlying cooperative issues and determine the appeal in substance with regard to those issues appealed against. A lost opportunity to hear a cooperative case may have serious irreparable cooperative impact and the courts should be minded of that fact.

The CT is and should remain the most important institution in access to cooperative justice. This is because it acts as a watchdog over cooperative societies. Due to its significance, its independence cannot be gainsaid.

CHAPTER THREE

3.0 THE HIGH COURT

3.1 INTRODUCTION

This chapter shall consider the mandate that guide the jurisdiction of the High Court under 2010 Kenya Constitution and shall critically analyse the original jurisdiction conferred by the constitution to the High Court over all matters brought before it. Its key to note that, irrespective of whether the Act confers the High Court jurisdiction or not, it still bears jurisdiction as a court of unlimited original jurisdiction.³⁰

3.2 APPEALS TO THE HIGH COURT³¹

CSA provides that any person aggrieved by the decision of the tribunal may within thirty days of such decision or order, appeal against such decision or order to the High Court. No decision or order of the CT shall be enforced until such time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal is heard and determined. The High Court upon hearing an appeal may:

confirm, set aside or vary the order in question; remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give; exercise any of the powers which could have been exercised by the Tribunal in the

³⁰ Article 164 (3) of the Kenyan Constitution 2010

³¹ Section 81 of the Cooperative Societies Act cap 490 of the laws of Kenya

proceedings in connection with which the appeal is brought; or make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.

The decision of the High Court on any appeal under the CSA shall be final. This finality of appeals at the High Court from the CT's decisions or orders is very important in access to justice in cooperative cases. It determines disputes at that level unlike in ordinary cases where there is an appeal to the court of appeal.

There is debate as to whether an appeal from the CT to the High Court before a single judge is in fact an 'appeal' since the chairman of the CT is qualified for appointment as a judge of the High Court of Kenya. Following closely is also a difference of opinion as to whether, in view of the equal status of the chairman of the CT to a judge whether the appeal should be before more than one judge. Ft on jugdes and qualification of chair These are obvious procedural deficits and as long as they subsist this will hamper access to cooperative justice at the CT. it remains to be seen how the High Court will interpret the relevant sections of CSA as cooperative cases continue to reach the High Court.

While cooperative dispute complained of is not allowed to continue during the hearing of the appeal, this requirement is betrayed by the inability of the tribunal to police its orders since it does not have execution authority.. it is assumed that the tribunal may have to apply to the High Court for assistance. Appeals to the High Court against the CT decision are also defeated on technicalities or because of their inability of interested parties financial muscle.

3.3 JURISDICTION OF THE HIGH COURT

The High Court of Kenya is the superior court of record established under³² of the constitution of Kenya. It has unlimited original jurisdiction and powers as may be conferred to it by the constitution and any other law.

For administrative purposes and in order to enhance efficiency in dispensation of justice and expeditious disposal of cases, the Chief Justice has established various divisions of the high court in which cases are designated to a particular division at the time of filing, depending on the nature of the case. These divisions include the commercial, family, constitution and judicial review, criminal division among others.

3.4 PROCEDURES IN THE HIGH COURT

In order to access cooperative justice at the High Court there are several ways a person moves to the court which are as follows:-

3.4.1 Plaintiff

The most common way by which a person may lodge a claim in the High Court is by way of plaintiff under the CPA.³³With regard to cooperative claim, the plaintiff has to prove that he or she suffered or could suffer as a result of defendants action complained of. **Rylands v Fletcher**³⁴, the

³² Article 165 of the constitution of Kenya 2010

³³ Cap 21 of the Laws of Kenya The Civil Procedure Act

³⁴ (1868) LR 3. HL. 330

remedies available to the plaintiff will be an award for damages, injunction or a declaratory judgement.

The plaint must contain the details of the plaintiff and defendant stating the grounds upon which the complaint is based. The procedural aspects of filing a plaint in a cooperative case has several hinderances in access to cooperative justice at the High Court. The plaintiff must pay the court fees which are assessed by the High Court in the same manner like any other case at the High Court. The plaintiff has to extract the summons and serve the summons upon the defendants at his expense. It is important that in cooperative cases filed by way of plaint a timely injunction is obtained.

3.4.2 Judicial review

Judicial review is an important process of judicial intervention in cooperative cases at the High Court. It is based on the premise that administrative excesses must be checked. These excesses relate to decisions of officers or organs of public authorities which may affect environmental rights and liberties of citizens and which are enforceable in or recognized by the court of law³⁵.

Judicial review is concerned with the following orders:

Certiorari , this remedy is applicable where a lower tribunal or other public body has made a decision that is subject to judicial review. They are issued by the High Court addressing inferior bodies requiring them to submit to the High Court their decisions for examination. If the High Court finds the decision or action of an inferior body faulty, then it may quash that decision or action.

³⁵ Lord Diplock " Judicial Control of Administrative Access" 1971 at pg 1

Mandamus, is issued where a public officer refuses to act in a manner prescribed by law and it compels performance.

Prohibition , is issued in cases where there is duty imposed by statute and there is inability on the part of public body or officer to act.

Judicial review is therefore a means by which the High Court scrutinizes public law functions, intervening as a matter of discretion to quash, prevent, require, and or clarify not because it disagrees with the judgement but as to right a recognized public law wrong. This public law wrong could be unlawfulness, unreasonableness or unfairness³⁶. Judicial review applications are filed under order 53 of the CPR³⁷ and the legal basis on application for remedies are under section 8 and 9 of the LRA³⁸.

The technical nature and procedure in judicial review has led to dismissal of applications in many cases. An advocate or plaintiff must therefore be very careful and cautious in filing a judicial review application. Application to commence judicial review is made in two stages. The first stage relates to the application for leave to apply for judicial review and the substantive application is made. The complex natureof the judicial review is an affront to access to environmental justice at the High Court.

³⁶ PLO Lumumba, Judicial review in Kenya, LAW Africa, 2nd edition 2006 at pg 3

³⁷ Chapter 21 of the laws of kenya

³⁸ Chapter 26 laws of Kenya

3.5 LOCUS STANDI

Locus standi is a coming law concept which means legal standing. That for any person to bring a case or complaint before a court or tribunal he or she must have sufficient interest in the matter.

In the case of **R v Inland Revenue Commissioners Ex parte National federation of Self Employed and Small business limited**³⁹, it was held that for a person to be said to have locus standi, he should have a direct, personal and sufficient interest in the case and the test of the applicants standing must be based on legal and factual context. The development of the jurisprudence of locus standi in Kenya has taken a more or less the path of the English law. Previously, the Kenyan court applied the concept strictly and rigidly.⁴⁰

3.6 COSTS

Costs in legal sense are charges or fees asked by the court, expenses of litigation, prosecution or other transaction especially those allowed in favor of one party against the other⁴¹. The concept of ‘cost follow the event’ infers that a successful party is entitled to an award of those costs it has incurred at the conclusion of a case. In other instances courts would order costs to be shared where the parties have partially succeeded in their claim but essentially costs are awarded at the discretion of the courts. Costs are compensatory, and to some extent punitive so as to discourage vexatious and frivolous claims.

³⁹ (1982) AC 617

⁴⁰ PLO Lumumba, *Judicial Review in Kenya*, 2nd edition, Law Africa, 2006. Pg 75

⁴¹ Section 27 (1) of the Civil Procedure Act (cap 21) laws of kenya

Costs are a major impediment in pursuit of environmental justice. Potential plaintiffs and applicants are wary of the possibility of being condemned to costs because of the discretionary nature of awarding costs at the High Court. There is only apathy among potential litigants to see cooperative litigation as not being personal responsibility as they have nothing monetary to gain.

The unique nature of cooperative litigation requires timely provision of financial and legal aid to poor litigants in order not to expose them to unreasonable financial risk. The issue of costs will have to be determined by the High Court on case by case basis. It is not adequate to state that costs are awarded to either party or shared without giving reasons. It is important to give reasons in order to emphasize the uniqueness of costs in cooperative litigation unlike in ordinary civil suits.

3.7 LOGISTICAL AND ADMINISTRATIVE ISSUES

Cooperative litigation at the High Court, like any other one, is subject to the usual delays and administrative hiccups that are rife in our courts. The position with regard to the delays has been aptly summarised in the report by the committee on the administration of justice that:

Currently no system is in place to monitor the progress of a case, which judges and magistrates are- when it comes to case management...that courts throughout the republic are plagued with delays and backlog of cases...the issue of completion has taken center stage.⁴²

⁴² Report of the committee on the Administration of Justice, June 1998 at pages 9, 40, 47

CHAPTER FOUR

4.0 RECCOMENDATIONS AND CONCLUSION

4.1 INTRODUCTION

The enactment of the Cooperative Societies Act and subsequent establishment of quasi judicial institutions was an acknowledgement by the Kenyan government of the importance of cooperative movement to the economy. The concepts of the cooperatives which are are however still in their infancy in comparison with other branches of law, and in view of their importance, urgent attention, direction and fast tracking of government policy in access to cooperative justice, urgency is required in order to forestall the dangers that are imminent in the cooperative movement which affect majority Kenyan in one way or another.

The paper has demonstrated that there has been gains made in access to cooperative justice in Kenya. The vacation of *locus standi* at the High Court, the CT's contribution, its reports and recommendations, have widened the scope in access to cooperative justice. The paper has however shown at the same time that the intended goals by CSA are yet to be achieved not because of the inability of the institution but because of the various legislative, administrative and financial factors that detail the execution of the institution mandate under CSA. Having identified the factors in this paper, the following pages suggest how they can overcome in pursuit of the access to cooperative justice.

4.2 THE COOPERATIVE TRIBUNAL

The CT is a specialized tribunal in handling disputes under the CSA. While the CT has done succinctly well in discharge of its mandate, there are contributing factors that has led to its slow down. There is no direct funding by parliament to the CT like is the case with other justice dispensing bodies such as the judiciary. This coupled with excess powers of the minister with regard to finances and appointments at the CT, has burdened its independence. The CT cannot attain autonomy without financial independence. There is need for direct funding by parliament based on recommendations of the CT. The net appointment of members and the secretary whose remuneration the minister determines should instead be subjected to competitive procurement process in government. More members of CT should be appointed and who have the relevant expertise in order to increase the quorum under the Act and remove the possibility of influence by the minister. The responsibility of the minister should only concern himself with policy decisions and not executive authority to the institutions under his ministry.

The CT members travel all over the country when visiting provincial registries to hold their sittings. The tribunal holds its hearings on Tuesdays and Thursdays- 8 sittings a month. Sittings are from 0930hrs-1630hrs. It is therefore largely dependent on the government in the conduct of its work. The CT should have independent personnel under its employment in order to avoid conflict of interest between itself and the parent ministry.

The CT does not have a website. It does not also have rulings reported save for the Kenya Gazette. The website and the reports are important because they provide information to the public on various cooperative issues concerning access to justice. It should therefore establish a

website or a quarterly magazine of its rulings and reports perhaps with the help of the Kenya Law Reports. This will also sensitize the public in its activities in cooperative justice.

While the CT has powers to make orders in the cases that come before it, it has no powers to execute its orders. It also does not have the capacity to confirm that the status quo of any matter or activity which is a subject of an appeal and there are no provisions under the Act on the way forward where there is a default against its orders. The CSA should be amended to provide for clear execution procedures for the CT.

The CT should be elevated to a specialized Cooperative Societies Court of equal status and jurisdiction with the High Court since the chairman is nominated by the JSC and is eligible to be a judge. This will enhance the security of tenure of the chairman at the ‘Cooperative Societies Court’ and remuneration thereof, which will also ring true in access to environmental justice.

4.3 THE HIGH COURT

It is important to demystify the complex nature of procedure at the High Court in accessing cooperative justice. The process of filing complaints, memorandum of appeal, proceedings by way of judicial review or constitutional applications are too complex even for those with legal training, in addition to high costs and attendant expenses.

The costs that are involved in filing cooperative cases at the High Court should be minimized or abolished altogether. The traditional concept that ‘costs follow the event’ should be practiced sparingly and be discouraged in public interest litigation in cooperative litigation save for the situations where it is plainly obvious that a suit is frivolous, vexatious or an abuse of court process. The benefits in sustainability of the cooperatives in the long run to the general populace

will far out way the financial loss the government may seem to suffer in the reduced or abolished court fees.

The geographical locations of the High Courts in major towns, which are far and wide and the dilapidated infrastructure discourage applicants who have to travel long distances to access the High Court. Cooperative litigation in the High Court in the country are not distinguished from the ordinary High Court cases. there is need for establishment of cooperative division.

4.4 ACCESS TO INFORMATION

Access to information is one of the pillars towards access to justice. Access to information is not , however, expressly provided for under CSA despite the fact that it is very essential in access to cooperative justice. Every cooperator should be aware of his or her cooperative rights and obligations. This is more so with regard to the marginalized communities who usually bear the blunt of cooperative disputes. The information should be relevant, comprehensive, timely and simple. The government is under duty to disseminate that information and advise on significant cooperative disputes.

In the absence of access to information legislation, various mechanisms should be established and those already in place need to be revitalized and be geared more to access to cooperative justice. Legal aid is one of the means of public awareness but which has not been effectively tapped in cooperative awareness. Some centres that offer legal aid like kituo cha sheria and FIDA should incorporate cooperative disputes awareness and justice within their programmes.

The LSK is a good forum in facilitating access to information in cooperative matters. It conducts seminars in CLE but those related to cooperatives have never to date been given prominence. The LSK therefore needs to refocus on the areas in access to cooperative justice in its seminars

which will equip advocates with relevant information and skills in matters of access to environmental justice.

4.5 ALTERNATIVE DISPUTE RESOLUTION (ADR)

ADR refers to any means of settling disputes outside judicial or administrative procedures. It includes, among other things, negotiation, arbitration and mediation. It has the advantage of being speedy, inexpensive and it is not skewed with procedural complexities. ADR would do well in cooperative disputes which at times may cross tribal boundaries. It also reduces potential animosity between parties since the mediator or arbitrator will tend to find a win-win solution whose results will enhance cooperative sustainability. ADR can also be of use at the traditional and community level such as the role of elders in dispute resolution in environmental disputes.

4.6 CONCLUSION

Access to cooperative justice as demonstrated in this paper is a crucial aspect in sustaining the cooperative movement. The Act also removes various impediments that cooperators faced before the enactment of the CSA such as the rules of evidence during tribunal trials.

The CSA provides for judicial and quasi-judicial institutions with various mandates in access to cooperative justice. The High Court and via the constitution as organ with original jurisdiction, and the cooperative tribunal are the main avenues in access to cooperative justice under the Act. The paper has examined these institutions closely and has concluded that there are various constraints which render them unable to effectively discharge their mandate and has suggested various ways of improving their activities. It will require the input and goodwill of the government and other stakeholders to address themselves to the various recommendations in this paper. It is only then that access to cooperative justice will be realized by cooperators at an

acceptable level. This will also lead to sustainable management of the cooperative movement.
Lastly the paper established that the mechanisms are constitutionally instituted.

ANNEX ONE: INTRODUCTION LETTER

Vincent Githu Kabi Kiboo,
University of Nairobi,
Faculty of Law,
P.O Box, 30197-00100,
Nairobi.

The Principal Officer/ General Manager/ Underwriting Manager/ Chief Manager,
The Cooperative Tribunal,
P.O Box.....,
Nairobi, Kenya.

Dear Sir/ Madam,

REF: QUESTIONNAIRE FOR RESEARCH PROJECT

I am an undergraduate final year student at the University of Nairobi undertaking a research project as part of the requirements of the degree in Law. The topic of my research is "DISPUTE RESOLUTION MECHANISMS UNDER THE COOPERATIVE SOCIETIES ACT 2005"

Your firm has been selected to form part of the study. I kindly request you to fill the outlined questionnaire to help me carry out the research project and present a detailed dissertation.

Any information provided shall be treated in strict confidence and used solely for according purposes.

A copy of the research project can be availed to you upon request. Your cooperation will be greatly appreciated.

Thank you in advance.

Vincent Githu Kabi Kiboo

Mr. Tim Mweseli

(Student)

(Dissertation Supervisor)

ANNEX TWO: QUESTIONNAIRE

**TO BE COMPLETED BY CHIEF EXECUTIVE OFFICER, MANAGING DIRECTOR,
GENERAL MANAGER, OR PRINCIPAL OFFICER.**

This questionnaire seeks to collect information on dispute resolution mechanisms under the Cooperative Societies Act 2005. Their operations, efficiency and effectiveness in cooperative societies dispute resolution in Kenya. The objective of the study is to provide status analysis of the mechanisms including their constitutionality, to find out which problem both the institutions and client encounter in the usage of the mechanisms and how they can be improved.

Any information given shall be treated confidentially and will be used purely for academic purposes. The identity of the respondent shall be held in confidence.

PLEASE ANSWER ALL QUESTIONS

SECTION A.

Name

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Designation

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Name of the organization

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Organisation established/ registered/ incorporated in year

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The organization undertakes the following

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SECTION B.

What is the structure/ layout of the tribunal?

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2a. Do you think that the general performance of the economy and cooperative movement has a bearing on the cooperatives' disputes?

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If Yes, how?

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In your view, do you think under 2010 constitution dispensation of Kenya, the cooperative tribunal is properly, constitutionally anchored in law?

Elaborate

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Do the cooperative ministry under which the cooperative tribunal falls, have any role in dispute resolution in the tribunal?

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In your view, is the Cooperative Societies Act effective in guiding and regulating disputes mechanisms and resolutions in the cooperative societies movement in Kenya? Kindly expound your response.

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In your opinion, what is the attitude of the general public to the cooperative tribunal:

Hostile

Good

Very good

Excellent

Do you think the public needs more awareness about the tribunal and its activities?..... Why?

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Have there been any case that has been appealed to the High Court? What cases are they if Yes?

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Generally, what type of disputes are submitted to the tribunal?

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10a. How are cases conducted in the tribunal?

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What is the procedure of instituting a case/ claim in the tribunal?

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How do you handle cases for other counties given the geographical distance?

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12a. Do you have a constitutive policy document for the tribunal?

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What is the tribunal’s mission and vision statement?

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Do you have publications on the operations and findings of the tribunal?

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What are the qualification requirements of the core staff who/to work for the tribunal?

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What problems or challenges does the tribunal face, if any, in dispensation of its mandate?

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15a. Do you think that Kenya, in cooperative societies dispute resolution mechanisms can learn important lessons from other foreign countries?

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b. Which ones if Yes?

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What have they employed that Kenyan system has not?

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Any other comments on dispute resolution mechanisms or the tribunal itself in Kenya?

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THANK YOU VERY MUCH FOR YOUR COOPERATION, ASSISTANCE AND MOST IMPORTANTLY, TIME.

Vincent Githu Kabi Kiboo

STUDENT

UNIVERSITY OF NAIROBI

FACULTY OF LAW

ANNEX THREE: AUTHORISATION LETTER

Vincent Githu Kabi Kiboo,
University of Nairobi,
Faculty of Law,
P.O Box, 30197-00100,
Nairobi.

The Principal Officer/ General Manager/ Underwriting Manager/ Chief Manager,
Cooperatives Societies Tribunal,
P.O Box.....,
Nairobi, Kenya.

Dear Sir/ Madam,

REQUEST FOR SUPPLY OF DOCUMENTS AND PERUSAL AUTHORISATION

I float the above prayer to enable me comprehensively analyse the information. The documents are as elicited by the questionnaire, (and/ or interview), among them though not restricted to: concluded cases; policy document(s); publications; and procedure manuals.

Kindly, I seek authoristaion to enable me secure support from the relevant personnel.

Any assistance to the above effect shall be greatly appreciated.

Thank you in advance.

Yours respectfully,

Vincent Githu Kabi Kiboo

(Student)

ANNEX FOUR: FEES FOR SERVICES

The fees for services at the tribunal are cheap and therefore affordable, and are calculated on the following formula.

Principal amount claimed- (6000) x 2% + 780+ 100

However , whatever the claim, the fees does not exceed Ksh. 70,000.00

MATRIX ON SERVICE DELIVERY CHARTER

SERVICES RENDERED	REQUIREMENTS	USER CHARGES	TIME FRAME	ASSUMPTIONS
Advisory services on filing claim	Presentation of clear and accurate facts by claimant	Depends on amount claimed	Case completed within three (3) months	That no preliminary objections are raised, No adjournments; Parties attend as required
Assessment of claim	Completed statement of claim	Depends on amount claimed	Twenty minutes	
Grant of ex parte judgement	Copy of affidavit Original summons Letter requesting judgement	Payment of a fee of Ksh. 150.00	Twenty (20) minutes	Assuming either chairman or deputy chairman is present to sign judgement
Giving of	Production of invitation	Free	Thirty (30)	That both parties

hearing dates	letter		minutes	avail themselves and consent to an agreed date
Issue of warrants of execution	Production of decree. Executor be registered with auctioneers board of Kenya	Ksh. 875.00	Twenty (20) minutes	Warrants must have been signed by chairman or deputy chairman
Issue of warrant of arrest	Notice to show cause Affidavit to serve notice to show cause why	Free	Twenty (20) minutes	Warrants are signed by chairman or deputy chairman
Grant of temporary injunction	Application supported by an affidavit	Depends on nature of request being made ie stay of execution	Thirty (30) minutes	That no major objections are raised That order is signed by chairman or deputy chairman

Note: The High Court percentages on fees charged is 5% of the principal which is far higher compared to the fees charged by the Cooperative Tribunal.

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