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**EFFECTIVENESS OF THE COOPERATIVE TRIBUNAL IN ACCESS TO JUSTICE  
AND RESOLUTION OF DISPUTES IN KENYA.**

*A Research Project paper submitted to the University of Nairobi Law School in Partial fulfillment of the requirements for the award of the Degree of Master of Laws (LLM)*

**OCTOBER 2023**

## DECLARATION

I, **KIMEMIA BEATRICE MUTHONI**, declare that this dissertation is my original academic work in substance, form, and style and has never been submitted to any other university or learning institution for the award of a degree or any other qualification. I also declare that all the sources of my secondary information used in this study have been duly acknowledged.

Signature:




Date: 23<sup>rd</sup> OCTOBER 2023

### Supervisor`s Approval

This project has been presented for examination with my authority as the university supervisor:

Signature...



Date...24/10/2023....

**Dr. Jackson Bett.**

## **DEDICATION**

I dedicate this project to all the cooperators in Kenya and the world to ensure that the mandate of the cooperate movement remains alive and vibrant. It will go a long way in creating wealth for a sustainable economy.

To my dear daughters, Florence, Christine, and Esther, and my mother, I love you for the love and patience during this journey.

## **ACKNOWLEDGEMENTS**

I acknowledge God almighty for wisdom, direction, and the sufficiency of grace in completing this project.

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I am grateful for the immense support my friends, classmates, and colleagues accord me during the classwork and group discussion. I give a special mention to Bright Obadiah and Duncan K for the encouragement.

## **ABSTRACT**

The study seeks to critically analyze the role played by the Cooperative tribunal in resolving cooperative societies' disputes and access to justice in Kenya as a case study. It aims to bring out the part of specialized dispute resolution mechanisms of the tribunal in the national and county governments. The problem in this study is that the tribunal needs to evolve into an institution that effectively resolves cooperative disputes and access justice in disputes concerning Cooperative societies' business in the devolution arena.

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Draft Cooperative Policy 2019

*Kenya Gazette Supplement No. 116 Legal notice Number 137 August 2013*

SACCO Societies Act No. 14 of 2008

## TABLE OF ACRONYMS

<b>ADR</b>	-	Alternative Dispute Resolution
<b>CCD</b>	-	Commissioner for Cooperative Development
<b>CoA</b>	-	Court of Appeal
<b>Co G</b>	-	Council of Governors
<b>CoK</b>	-	Constitution of Kenya 2010
<b>CSA</b>	-	Cooperative Societies Act
<b>CT</b>	-	Cooperative Tribunal
<b>ELC</b>	-	Environment and Land Court
<b>GDP</b>	-	Gross Domestic Product
<b>SASSRA</b>	-	Sacco Societies Regulation Act (14 of 2008)
<b>SMEs</b>	-	Small and Medium Enterprises
<b>STAJ</b>	-	Social Transformation through Access to Justice
<b>JSC</b>	-	Judicial Service Commission
<b>MSMEs</b>	-	Micro, Small and Medium Enterprises

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## CHAPTER ONE

### 1.1 Introduction and Background of the Study

The Cooperative Societies Act Cap 490 established the Cooperative Tribunal, which deals with resolving disputes involving the “business of cooperative societies” at the national level. The Cooperative movement is still contending with the formulation of “The National Cooperative Development Policy”<sup>1</sup> and the amendment of the Laws and Regulations that can govern the management and dispute resolution mechanisms for the cooperative societies at the national and county levels. The county governments are yet to formulate statutes in line with the existing dispute resolution mechanisms under the Cooperative Societies Act.<sup>2</sup>

Furthermore, the Cooperative Tribunal as currently constituted requires overhauling and modernization to internationally acceptable standards to enable it to function more effectively and efficiently in the resolution of Cooperative disputes according to the requirements of the Constitution of Kenya 2010.<sup>3</sup>

### 1.2 Background to the Problem

The Cooperative Societies Act, under Chapter 490, established the Cooperative Tribunal. Its sole purpose is hearing and determining cooperative disputes effectively, expeditiously, and with flexible means of solving conflicts.<sup>4</sup> The tribunal is established under Section 77 and comprises seven members. It has unlimited geographical and pecuniary jurisdiction concerning cooperative societies’ businesses.<sup>5</sup> It also exercises appellate jurisdiction under Section 74 against the orders of the Commissioner for Cooperative Development.<sup>6</sup>

There has been narrow knowledge concerning resolving the Cooperative societies’ disputes. Members of the cooperative societies have often filed their claims in the subordinate or the Magistrates’ court as opposed to the Cooperative Tribunal, only for their cases to be dismissed

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<sup>1</sup>National-Co-Operative-Development-Policy

<sup>2</sup> Ahmed, Ali Farah, and Maina Rugami. "Corporate governance and performance of savings and credit cooperative societies in Kilifi County, Kenya." *International Academic Journal of Economics and Finance* 3.3 (2019)

<sup>3</sup>Yogo, Mr George Odhiambo, et al. "Analyzing effect of internal financing on financial performance of savings and credit co-operative societies in Kakamega County, Kenya." *European Journal of Business and Management* 12.1 (2016).

<sup>4</sup>Kyazze Lawrence Musiitwa et al, "Cooperative governance and social performance of cooperative societies."(2017)

<sup>5</sup>Wanyama Fredrick, "Surviving liberalization: the cooperative movement in Kenya." (2016).

<sup>6</sup> Cooperative Societies Act

for want of jurisdiction.<sup>7</sup> Others have approached the High Court in instances where the pecuniary value is high or the Environment and Land Court (ELC), only for their cases to be referred back to the Cooperative Tribunal for determination. In essence, there has been a lack of information and or ignorance by members of the cooperative societies on the avenue for the dispute resolution mechanisms.<sup>8</sup>

The Constitution of Kenya 2010 (CoK 2010) brought about fundamental changes in the management of public affairs by creating two levels of Government: The National Government and the 47 County Governments. Devolution sought to achieve the promotion of social and economic development and the provision of proximate and easily accessible services throughout Kenya.<sup>9</sup> It was to ensure that all the actors would be guided by the principles and values promoted in Article 10 of the Constitution.<sup>10</sup>

Kenya's national laws governing cooperative societies are the Cooperative Societies Act and the Sacco Societies Regulation Act (SASRA). However, there is still a need to review the laws to enhance cooperative societies' growth, expansion, and development and resolve disputes. The Kenyan Constitution introduced changes requiring devolution of the cooperative societies' mandate operations without decentralizing dispute resolution mechanisms to the county governments. Despite the existing national legislation, national law must improve to give cooperative societies more autonomy and independence.<sup>11</sup>

The government should be limited in exercising its control over the management of the cooperative business to make cooperative law friendly to its users. The CoK introduced the devolved structure of governance for cooperative societies. However, there is still no clarity on the roles played by the national and county governments concerning managing the devolved regulation of cooperative societies. Counties such as Meru and Uasin Gishu formulated legislation on regulating cooperative societies. However, the members of the societies raised concerns over the bill, arguing that they ousted the jurisdiction of the cooperative tribunal owing to their created "local" tribunal. The legislation is still ineffective because the national

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<sup>7</sup>Murungi, KibangaManyara, "The Development of Co-operative law and policy in Kenya." *Oscar print* (2003).

<sup>8</sup>Kiboo, Vincent GK. *Dispute Resolution Mechanisms under Cooperative Societies Act 2005*. Diss. University of Nairobi, 2012.

<sup>9</sup> Constitution of Kenya 2010, Article 174.

<sup>10</sup>Mathuva DM and Kiweu JM. Cooperative social and environmental disclosure and financial performance of savings and credit cooperatives in Kenya. *Advances in accounting*. 2016

<sup>11</sup>Wambua, Paul Musili. "The Challenges of implementing ADR as an Alternative Mode of Access to Justice in Kenya." (2013)

government is still grappling with formulating the policy governing the cooperative societies nationally and at the county levels.<sup>12</sup>

Following the promulgating of the 2010 Constitution, tribunals became part of the Kenyan judicial system and are thus administered.<sup>13</sup> Previously, all tribunals were under the administration of their parent ministries. The tribunals are now under the administration of the Judiciary of Kenya, as provided for under Article 169(d) CoK 2010. The Cooperative tribunal, therefore, is under the management of the Judiciary. Thus, the cooperative tribunal should also implement the Judiciary STAJ policy to resolve cooperative disputes.

The tribunal faces a challenge, as it is a full-time tribunal and a circuit court with only nine (9) regional registries, as opposed to the requirement for having a registry in each county as expected by the devolved system of government. The Judiciary operates through the court system, with over 200 courts spread across the country and every county. The cooperative tribunal, a national dispute resolution body, runs only through the nine (9) regional registries. The limitation hampers the tribunal's effectiveness in dispensing its mandate as it limits the level of decentralization in the counties.

The CoK 2010 also encourages Alternative Dispute Resolution (ADR) mechanisms to complement the role played by the tribunal.<sup>14</sup> The nature of the business of the cooperative society was delimited in the case of *Gatanga Coffee Growers v. Gitau*.<sup>15</sup> The case established that the business of the society is not confined to the internal management of the society but that it also covers every activity of the society within the ambit of its By-laws and Rules.<sup>16</sup> The proposed National Policy Governing Cooperative Societies should recommend that there shall be respect for the devolution of power as a national value and principle of governance under Article 10 CoK 2010. The proposed policy should, therefore, acknowledge the assignment of the function of policy development to the national government and the process of trade, development, and regulation of cooperative societies under the County governments.

The paper delves into the need for each county to have cooperative societies' resolution mechanisms. Furthermore, this paper inquires whether the cooperative tribunal has been

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<sup>12</sup>Olando, CLEMENT OOKO. "An Assessment of financial practice as a determinant of growth of Savings and Credit Co-operative Societies wealth in Kenya: The case of Meru County." *Unpublished doctoral thesis, Kenyatta University* (2012).

<sup>13</sup>Muigua Kariuki, and Francis Kariuki. "ADR, access to justice and development in Kenya." (2014).

<sup>14</sup>Muigua Kariuki. *Alternative dispute resolution and access to justice in Kenya* (2015).

<sup>15</sup> (1970) EA 361.

<sup>16</sup> CSA, s76.

effective in its mandate of access to justice and resolution of cooperative disputes and its role in the cooperative justice administration in Kenya. It also enquires whether there should be additional mechanisms to ensure a better presence of the cooperative tribunal at the county level to resolve cooperative disputes more effectively.

### **1.3 Statement of the Problem**

This research investigates the existing legal, structural, and policy gaps and provides recommendations tailored to improving the effectiveness of cooperative dispute resolution and access to justice.

Firstly, the Judiciary Institutional policy “*Social Transformation through Access to Justice (STAJ)*” recommends that there should be ease of access to justice, especially for the vulnerable in the community. The registries receive and record the filed disputes to process them. It ensures that access to justice is promoted to all citizens, especially the vulnerable, expeditiously and at a reasonable cost. Relatedly, the Cooperative Tribunal has a Principal Registry at Nairobi, with eight (8) regional Registries in the former Provincial headquarters, i.e., Mombasa, Kisumu, Eldoret, Kakamega, Nakuru, Nyeri, Embu, and Meru. As a result, this represents less than a third of the total number of the 47 counties. Furthermore, the Tribunal carries out gazette circuit sittings one week per month at each of the eight (8) regional registries and sits at the Principal Registry for the three remaining weeks. The Tribunal also exercises unlimited geographical, pecuniary, and appellate jurisdiction, hence the necessity for devolved access to justice through establishing regional registries in each of the 47 counties.

Access to justice and the resolution of cooperative societies’ dispute resolution mechanisms depends on the policy direction of the national government. Thirteen years (13) after the COK’s promulgation, no legal provisions and policy directions were created to address the glaring gaps. This paper, therefore, assesses the draft National Policy governing Cooperative Societies in terms of filling the legal gaps regarding the accessibility and the effectiveness of the cooperative tribunal in terms of resolution of disputes and access to justice, the structures, and areas of coverage. Therefore, establishing a dispute resolution mechanism in the county government for cooperative societies needs investigation.

Secondly, the cooperative tribunal is a specialized court, dispensing justice to the cooperators. There should be adequate support for the tribunal to deliver its mandate. This paper assesses whether the Cooperative Societies Act adequately provides an institutional, structural,

procedural, and legal framework necessary for the effective resolution of cooperative disputes and access to justice in the business of cooperative societies.

Thirdly, the nature and determination of cases by the Cooperative Tribunal under the Act have not been adequately assessed to evaluate to what extent the Tribunal facilitates adequate access to cooperative justice in Kenya. There is, hence, the need to identify any need for reforms to enhance the effectiveness of access to justice and dispute resolution in cooperative governance. Therefore, This paper will discuss the existing legal and structural gaps and provide recommendations best suited to ensuring effectiveness in cooperatives' dispute resolution and access to justice.

#### **1.4 Significance and Justification of the Study**

This study aims to benefit the cooperative movement in formulating and improving cooperative societies' policies and legal reform. It also helps to promote an understanding of the functions of the Cooperative Tribunal to enhance its effectiveness as a national adjudicatory body for effective management and expeditious resolution of cooperative disputes in the counties.

Furthermore, the study provides a policy guide for formulating policies by the Judiciary, the Cooperatives Ministry, and the regulatory authorities for reforming institutional frameworks governing cooperative societies. Relatedly, it informs the reforms of overhauling the Cooperatives tribunal's structure, composition, and functioning at the national level for effective dispute resolution and access to justice for the members of cooperative societies.

#### **1.5 Statement of Objectives of the Study**

The general objective of this study is to ascertain whether managing cooperative societies' disputes at both the County and National levels of government is efficacious. The paper is guided by the following three (3) key research objectives:

- i. Discuss the effectiveness of dispute resolution mechanisms under the Cooperative Societies Act.
- ii. To identify the role of the Cooperative Tribunal in social transformation through the Access to Justice Policy (STAJ).
- iii. To propose relevant recommendations on what should be done to devolve the Cooperative Tribunal's functions to the County levels.



## 1.6 Research Questions

In undertaking the research, this research study is guided by the following key research questions:

1. Should the Cooperative Tribunal be decentralized to the county level to enhance the effective resolution of cooperative societies' business disputes?
2. To what extent would devolving the functions of the Cooperative Tribunal improve its efficiency as a dispute resolution mechanism, and would this devolution lead to more effective dispute resolution and enhanced access to justice at the county level?
3. What impact would the proposed National Policy Governing Cooperative Societies have on the current legislation concerning cooperative societies?
4. Are the reforms outlined in the Cooperative Societies Bill 2022 sufficient to address the gaps in existing legislation?

## 1.7 Hypothesis and Assumption

Unless there are decentralized cooperative disputes, resolution mechanisms enabled by county legislation, and supported by a national policy framework, the devolved system of governance in Kenya may hinder the Cooperative Tribunal's effectiveness in resolving cooperative disputes.

## 1.8 Theoretical and Conceptual Framework

This section analyses the theoretical and conceptual framework of the study: This study is premised on the Democracy theory and The Social contract theory.

### Democracy Theory

The theory describes culture or a society that is a liberal democracy, which is a product of it. Some of the proponents of this theory include Robert Dahl<sup>17</sup> and Frank Cunningham<sup>18</sup>, among others, whose arguments were characterized by cooperation and relationships amongst individuals who want to pursue a higher objective than politics. They join the cooperations freely and voluntarily, exercising democracy in executing their mandates. They trust their

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<sup>17</sup>Dahl, Robert. *On Democracy*. New Haven, CT: Yale University Press, (2000).

<sup>18</sup>Cunningham, Frank. *Theories of Democracy: A Critical Introduction*. London: Routledge, (2002).

democratic processes and engage in social and economic interactions, which are the preconditions of liberal democracy.<sup>19</sup>

There is also the protection of individual rights and freedoms in these societies by the leaders of the societies. Liberal democracies rely on these rights to realize their autonomy. They form institutions that protect these rights, and they have written rules of engagement. There is the assurance of protection by way of being able to approach these institutions in case there is a violation. Societies have to ensure that the institutions are accessible and are well equipped to resolve such disputes.<sup>20</sup> Impartial third parties run the institutions. They ensure that there is no interference in the conflict resolution mechanism. If the individuals cannot access the services of these institutions, then their rights enshrined in the dispute resolution mechanism are violated. Access to justice, therefore, forms the moral fiber of keeping society united and realizing the potential of individuals.<sup>21</sup>

Access to justice can be defined as the freedom or the ability to prevent one's right or interest from being violated or to obtain fair and equitable results when wronged. There is more involved in access to justice than this simple definition. It must be seen as going beyond the narrow confines of access to courts or fair trial rights; it extends to issues of adequate access to the law courts and the remedying of the rights that are laid down in the law, and it extends to the identification and removal of the barriers to the achievement of the remedies sought.<sup>22</sup>

### **Social Contract Theory**

Thomas Hobbes proposed that humans are social; they come together to form a society by having a collective understanding, a social contract. Everyone's interest should be to enforce rules that ensure the security and safety of everybody in society. The social contract can deliver society from a state of nature to a flourishing society where even the weakest can thrive. The individuals come together and donate their rights to the collective society, and this society ensures that, in return, safeguards the rights of the individuals.<sup>23</sup>

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<sup>19</sup>Liberal Democracy | Encyclopedia

<sup>20</sup>Adrian Oldfield, 'Liberal Democratic Theory: Some Reflections on Its History and Its Present' in John Garrard, Vera Tolz and Ralph White (eds), *European Democratization since 1800* (2000)

<sup>21</sup>Colin Crawford and Daniel Maldonado, 'Access to Justice: Theory and Practice from a Comparative Perspective' (2020)

<sup>22</sup>'Implementing an Effective Dispute Resolution Strategy' (*Financier Worldwide*)

<sup>23</sup>Steve McCartney and Rick Parent, '2.9 Social Contract Theory'

Cooperative societies, in their nature, conform fully to this theory. The members with a common objective come together and form an independent cooperative society that protects all the members equally despite their contributions. The various cooperative societies then come together to form the primary, secondary, and national unions, and the unions form a body that can resolve the disputes of the members in the cooperative societies and the unions, either against the cooperative societies or against their leadership in the cooperative societies or the unions. The theory forms the basis for forming cooperative societies and their dispute-resolution mechanisms.

Access to justice is fundamental in every liberal democracy. Social contract theory argues that access to justice is at the core of liberal democracies' normative objects. Therefore, access to justice ensures that citizens can defend their interests in a court or a tribunal and achieve full inclusion in the political community.<sup>24</sup>

The Social Contract theory argues that in itself is procedural justice, which links democracy, which is the procedural theory of government. Cooperative societies are regarded as an implicit contract that balances individual and collective interests in which bounded rational individuals must agree.<sup>25</sup> This school of thought posits that people live together in a society with preset moral or political rules of behavior. Therefore, they unite to establish cooperative societies after pooling resources to support themselves. Thus, the Social Contract Theory is the preferred approach to guide this study.

## **1.9 Conceptual Framework of the Study**

The realm of devolved governance in Kenya, particularly in resolving cooperative disputes, is complex and multifaceted; as this study will demonstrate, various elements—ranging from constitutional provisions to national policy frameworks—interplay to shape the adjudication landscape within the Kenyan context. Grounded in the 2016 Policy on Devolved Governance and supported by the Constitution 2010, this research delves into how justice is conceptualized and actualized in Kenya. This introduction provides an overview of these foundational concepts. It sets the stage for a deeper exploration into the judicial mechanisms that can

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<sup>24</sup>Crawford Colin and Daniel Bonilla Maldonado. "Access to Justice: Theory and Practice from a Comparative Perspective." (2020).

<sup>25</sup>Weale Albert, 'Justice, social contracts, and democracy', *Democratic Justice and the Social Contract* (2013).

potentially enhance the justice delivery system, especially regarding national cooperative disputes.<sup>26</sup>

Furthermore, the policy acknowledges that devolution faces institutional and regulatory challenges, including the lack of effective devolution of cooperative governance functions, inadequate financing, and no institutionalized mechanism for assessment of the performance of county governments' institutions under an inter-governmental framework of accountability.<sup>27</sup>

Access to justice is one of the national values and principles under Articles 10 and 48 of the Constitution of Kenya, 2010.<sup>28</sup> Kariuki Muigua hypothesizes that the Constitution 2010 provides a foundation for realizing access to justice through the incorporation of ADR with a significant focus on public participation.

This paper argues that such judicial mechanisms include providing for a broad appellate process beyond the High Court since making the High the only and final appellate court may be limiting and restrictive to litigants who feel prejudiced by any Cooperative Tribunal and High Court decision.

## **1.10 Literature Review**

Several authors have written about cooperative societies and the Dispute resolution mechanism under the CSA. Nyoro and Ngugi discuss agricultural cooperatives' success and failure factors in Central Kenya. They argue that the unsuccessfulness of the agricultural societies in the liberalized Kenyan rural economy was due to the government withdrawing the administrative and financial support it had previously offered to the cooperatives and the regionalized governance authority to cooperative members. It is noted that the retreat of the government resulted in a legal regulatory vacuum that badly affected the performance of many cooperatives and facilitated abusive behavior on the part of some unscrupulous members and business associates.<sup>29</sup>

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<sup>26</sup>Khaunya, Mukabi Frederick, and Barasa Peter Wawire. "Devolved governance in Kenya; Is it a false start in democratic decentralization for development?." (2015).

<sup>27</sup>Mumanyi, E. A. L. "Challenges and opportunities facing SACCOs in the current devolved system of government of Kenya: A case study of Mombasa County." *International Journal of Social Sciences and Entrepreneurship* 1.9 (2014): 288-314;

<sup>28</sup> Mutua, Eric K. *Access to Justice in Kenya-a Critical Appraisal of the Role of the Judiciary in Advancement of Legal Aid Programs*. Diss. University of Nairobi, 2018.

<sup>29</sup>Nyoro, J. K. and Ngugi, I. K., *A qualitative analysis of success and failure factors of agricultural cooperatives in Central Kenya*. (2007).

Lee Andrew proposes the formation of hybrid tribunals. It is premised on the need for a dispute resolution mechanism close to these cooperative societies. These legitimate considerations have positive consequences for practical questions and jurisdictional issues.<sup>30</sup>

Leonard Baka notes cooperative societies suffer mutual difficulties associated with weak legislation, governance, and political interference.<sup>31</sup>

On the other hand, Leonard Mbito *et al.* appreciate that the key strategies for effective dispute resolution included courts, high court in the case of cooperatives, and appreciation of Alternative dispute resolution (ADR). These strategies are in place to manage cooperative conflicts and legal issues.<sup>32</sup>

Elizabeth Muthama inquires whether the enactment and implementation of cooperative policies contribute to developing cooperative societies as viable business enterprises and autonomous democratic organizations.<sup>33</sup>

Jurg Helbling acknowledges that non-access and immunity are prevalent in Kenya, an imperative reason behind the present judicial reforms in Kenya society.<sup>34</sup> Professor Paul Musili notes that access to justice is a central tenant of democracy and a fundamental human right. He proposes that Arbitration and Mediation are the most ideal means of ADR.<sup>35</sup>

Paranta and Edward Ritei argue on the issue of epistolary jurisdiction in which such mechanisms whose exploitation and institutionalization would go a long way in improving access to justice.<sup>36</sup> Further, they acknowledge that many challenges have faced access to justice in Kenya. Among these challenges are systemic barriers, making it difficult for individuals to pursue their claims. These are the challenges facing the collective interests of the cooperatives.

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<sup>30</sup>Lee Andrew. "Hybrid Tribunals to Combat Regional Maritime Piracy: Guiding the Rule of Law Through the Rocks and Shoals." (2010).

<sup>31</sup>Baka, Leonard O. "The challenges facing co-operative societies in Kenya A case Study: Kenya Planter Co-operative Union (KPCU)." (2013).

<sup>32</sup>MbitoLeonard and Kennedy Onkware, "Conflict Management Strategies Employed in Dealing with Cooperative Land Conflicts in Kiambu County Kenya."

<sup>33</sup>Muthuma Elizabeth. "Do co-operative development policies really lead to the development of co-operatives? Lessons from Kenya." (2012)

<sup>34</sup>HelblingJürg et al,"Access to justice, impunity and legal pluralism in Kenya." (2015)

<sup>35</sup>Wambua, Paul Musili. "The Challenges of implementing ADR as an Alternative Mode of Access to Justice in Kenya." (2013) *Alternative Dispute Resolution* :15.

<sup>36</sup>Paranta and Edward Ritei. "Access to justice: epistolary jurisdiction as a means of improving access to justice in Kenya." (2016).

According to Brenda Brainch, Kenya's current judicial system does not yet provide quick or affordable justice like many other African countries.<sup>37</sup> In the High Court in Nairobi, over 200,000 cases are still pending. It can take up to 10 years for a case to be decided, and uncertainty has been rampant. We must alter the mode of handling cases in the Kenyan courts in order to achieve efficiency and effectiveness at a reasonable cost and oust the proverb that it is "better to enter the mouth of a lion than a Kenyan court of law" because the backlog is unmanageable notwithstanding the ongoing changes in the judiciary.

She further argues that the usual systems of handling disputes in Kenya have primarily collapsed due to an increase in political appointments at the district level and the older, less educated generation's lack of understanding of legal rights, causing our communities to suppose that litigation offers not just the final, but the only, justice.<sup>38</sup>

Mumanyi argues cooperative societies are a principal form of external funding for small and micro enterprises in most unindustrialized countries.<sup>39</sup> He further notes that cooperative societies suffer from a lack of policies and strategies that support their growth. He notes that the dispute mechanisms lie in shambles and need a review.<sup>40</sup> Small and medium-sized businesses (SMEs) are seen as sources of employment, competition, financial vitality, and innovation, according to the UNCTAD Secretary-General in 2006. SMEs can provide many job possibilities while achieving quick economic growth.<sup>41</sup> However, despite the effective development and the solutions to economic improvement, there is still a challenge to formulating and implementing the legal and policies governing these institutions.

Wanyama *et al.* noted that cooperatives were a crucial component of rural development and poverty reduction in Kenya because they allowed societies' members to coordinate their efforts for economic gains that were not possible when they worked alone and functioned on their own. Wanyama *et al.* further argue that to survive liberation, the cooperative movement in Kenya needs to have a practical dispute resolution framework.<sup>42</sup>

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<sup>37</sup>Mtula Fredrick Odhiambo. "Role of arbitration in promotion of access to Justice as mandated by Article 48 of the Constitution Of Kenya." (2016).

<sup>38</sup>*Ibid.*

<sup>39</sup>Mumanyi, E. A. L. "Challenges and opportunities facing SACCOs in the current devolved system of government of Kenya: A case study of Mombasa County." (2014): *International Journal of Social Sciences and Entrepreneurship* 1, no. 9, pp.288-314.

<sup>40</sup>*Ibid.*, note 36, pp. 354.

<sup>41</sup>Ong'olo, David and Samson Awino. "Small and medium enterprises and devolved government system: An assessment of the regulatory and institutional challenges affecting the SMEs Development in Kenya." (2013).

<sup>42</sup>Wanyama Fredrick "Surviving liberalization: the cooperative movement in Kenya." (2016).

Despite the Kenyan Constitution of 2010 and *Kenya Gazette Supplement No. 116 Legal notice Number 137 of August 2013*, emphasizing that the cooperatives are a county function, the legal framework and readiness of both the counties and the cooperatives in implementing the change continued to be ambiguous, necessitating further learning and adaptation on the part of both parties. Further, Groves noted that cooperatives' most significant obstacle in receiving any potential government assistance was striking a balance between efficiency, democracy, and trying to run like a company.<sup>43</sup> No recommendations were made concerning what should be done to ensure that cooperatives remain democratic, effective, and run as companies rather than as social entities.

Kenya adopted a decentralized style of administration because its populace sought access to public services nearby. The goals of devolution outlined in Article 174 and Article 175 of the CoK are toward building national unity by acknowledging the importance of democracy and accountability in exercising authority. In Kenya, devolved governance resulted from years of campaigning by politicians, civil society organizations, professionals, and leaders of the church and trade unions to lessen the central government's sway over society. Therefore, with the devolution of the functions of the cooperatives, there is a chance that the functions and the tribunal's role should be deemed to cater to the needs of the cooperative societies at the county level.<sup>44</sup>

Eileen Carroll terms the effective resolution of a commercial dispute as demanding layers of comprehension and tactics. That, the more intricate the dispute, the greater the need for a broader and more flexible resolution style.<sup>45</sup>

Chappenden and Mucai-kattarbo argue in their work that when a society and one or more of the parties are involved in a dispute, the mechanisms for dispute resolution may be used as per the Cooperative Societies Act, by following the By-laws of the society. They contend that the Act is ambiguous about what is meant by "a person claiming under" the regulations."<sup>46</sup>The mechanism is primarily intended to apply to conflicts arising out of the rules of society and the interaction between society members, even though any disagreement between the parties may be resolved as specified in the rules. In their opinion, it does not apply to issues resulting from

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<sup>43</sup>Groves, Frank. *What is Cooperation?: The Philosophy of Cooperation and Its Relationship to Cooperative Structure and Operations*. No. 6. (1985).

<sup>44</sup>Steeves Jeffrey, "Devolution in Kenya: Derailed or on track?." (2015).

<sup>45</sup>Eggleston Richard, "Book Review: International Mediation: The Art of Business Diplomacy by Eileen Carroll and Karl Mackie Kluwer Law International, 2000." (2001).

<sup>46</sup>Chappenden and William Jeffrey. *Handbook to the Industrial and Provident Societies Act, 1965*. Co-operative Union, 91966).

additional connections, such as those between the society and its clients or its workers, even if clients and workers may also be members. If a society's rules allow for resolving disagreements, then the disputes must be resolved according to those norms.

Therefore, unless the rules of the society expressly forbid it, the parties to a claim may, by consent, refer the claim to the chief registrar, who may either personally or by some other registrar resolve the claim. If the By-laws of a society express that any disputes be referred to court, then the court can determine the disputes. The court's decisions are final and binding. In her concluding statement on settling disputes, Mucai states that given the quick growth of cooperative activities, cooperative disputes are destined to become more multifaceted and would, therefore, require an efficient adjudication apparatus. Therefore, critical consideration should be given to forming a cooperative disputes tribunal to function independently and be operated by specialized people working full-time.

The above literature provides insights into the cooperative movement and the challenges faced. The literature sheds light on the issue of access to justice and effective dispute-resolution mechanisms for cooperative societies. The issue of the cooperative tribunal is not addressed, and contingent circumstances involving cooperative societies have not been addressed, such as the parties to benefit from the mechanisms and what other avenues they may follow to get justice if need be. Although this research agrees to a great extent with the above literature, it can attempt to shed light on the issue of the cooperative tribunal and the need to devolve its functions and operations to the county governments. It also assesses the cooperative tribunal's effectiveness in delivering justice to *Wanjiku* and the vulnerable in the country.

### **1.11 Objectives of the Study**

The study aims to explore the functions, formation, jurisdiction, operations, and mandate of the Cooperative Tribunal. It assesses whether the tribunal's restructuring, reconstitution, or decentralization is necessary to extend its services across the entire national jurisdiction, thus overcoming jurisdictional limitations.

### **1.12 Research Methodology**

The overall objectivity informs the Research methodology of the research. It will involve desk-top research, also called qualitative research, critically analyzing primary and secondary sources.



The researcher will interrogate primary and secondary sources by accessing online and manual databases and materials from the library, particularly at the University of Nairobi School of Law repository.

### **1.13 Summary of Chapters**

#### **Chapter One: Introduction and background of the study**

The chapter introduces the study and the research topic, setting the tone for understanding the legal provisions that form the historical foundation of Cooperative societies. This chapter delves into devolution and its challenges to managing dispute resolution mechanisms for cooperative societies by the cooperative tribunal. The chapter outlines the theoretical framework, its scope, and the justification used for the study. It also acknowledges academic and other literature on the subject.

#### **Chapter Two: Assessing the legal, regulatory, and institutional frameworks governing cooperative societies in Kenya**

The chapter explores the legal regime governing the Cooperative societies in Kenya. It delves into the legal and institutional framework to understand the applicable laws and policies. Furthermore, this chapter investigates the effectiveness of these legislations and policies, questioning whether The National Cooperative Development Policy (draft) and the amended Cooperative Societies Act (2020) remedy the existing gaps.

#### **Chapter Three: Dispute Mechanisms under the Cooperative Societies Act.**

The chapter examines the legal regimes that apply to cooperative societies, emphasizing the issue of dispute resolution enshrined under the Act. It further assesses the effectiveness of this dispute-resolution mechanism within the Act.

#### **Chapter Four: Effect of devolution and the need to devolve the functions of the Cooperative Tribunal**

The chapter investigates the impact of devolution and the necessity to devolve the functions of the Cooperative Tribunal. It highlights best practices that should be adopted to establish systems at both County and National levels, ensuring access to justice at the County level for diverse cooperative societies not operating at the National level. In detailing this, the chapter outlines the challenges the devolution process presents. It evaluates the current obstacles in the

tribunal's organizational structure, operations, and constitution, along with the proposed solutions.

### **Chapter Five: Conclusion and Recommendations**

This chapter summarizes the paper's central arguments, highlights critical challenges, and offers recommendations. The key considerations would be ensuring effective dispute resolution and access to justice mechanisms by the Cooperative Tribunal. Devolution concerning cooperative societies and justice delivery can be possible in the current and proposed legal dispensation.

## CHAPTER TWO

### ASSESSING THE LEGAL, REGULATORY, AND INSTITUTIONAL FRAMEWORKS GOVERNING COOPERATIVE SOCIETIES IN KENYA

#### 2.0 Introduction

The overarching focus of the chapter is that it evaluates the effectiveness of the legal regime governing the Cooperative societies in Kenya. This chapter delves into the legal and institutional framework to understand the applicable laws and policies. It also enquires into the effectiveness of these legislations and policies and whether the *National Cooperative Development Policy* (draft) and the amended Cooperative Societies Act (2020) can be the cure to the gaps currently in place.

#### 2.1 Constitution of Kenya 2010 vis-à-vis Cooperative Societies in Kenya

The CoK is the foundational charter upon which cooperative societies draw their powers, functions, and duties. The constitutional values, principles, and objects are also binding not only to the individuals involved, cooperative societies, but also to the Cooperative Tribunal as provided under Article 1(3), which provides that state organs, including the Judiciary and tribunals, exercise delegated sovereign power which must be exercised following the CoK. Article 159 (2)(e) of the CoK further recognizes that while exercising judicial power, the Cooperative Tribunal is bound to promote the principles and purpose of the CoK 2010.<sup>47</sup>

These constitutional principles are intertwined and correlated. For instance, the failure and or lack of impartial decision-making by the Cooperatives Tribunal can be deemed to be an infringement of the cooperative society's right to access justice, fair trial, and freedom of association. These rights must be protected, especially under the broad framework of the Bill of Rights, which scholars, including former Chief Justice Can, i.e., Mutunga, termed "transformative" to the radical socio-economic and political impacts of the Bill of Rights on the Kenyan state pre-2010.<sup>48</sup>

One of the fundamental purposes and principles of the 2010 Constitution is the devolution of power, resources, and access to justice through the devolution system. However, it is worth

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<sup>47</sup>Saina, Arriella. "An overview of the taxation of savings and credit co-operatives societies (SACCOS) in Kenya." *Financing for Development* 1.1 (2019).

<sup>48</sup>Mutunga, Willy. "Transformative Constitutions and Constitutionalism: A New Theory and School of Jurisprudence from the Global South?." *Transnat'l Hum. Rts. Rev.* 8 (2021)

noting that the relevant legislation governing cooperative societies predates the Constitution of Kenya, 2010, which calls for its alignment with the object and principles of the CoK. For instance, the devolution of cooperative societies' governance, as recognized under Article 10 of the CoK, 2010, is critical in promoting access to decentralized justice. However, this decentralization has not been effectively addressed through statute or policy. Schedule 4 of the CoK 2010 delineates the purposes of the National and County Governments. The County Government performs several functions, including trade development and cooperatives regulation in the counties.<sup>49</sup>

Additionally, the Constitution promotes the resolution of disputes through fair administrative action under Article 47, which stipulates that administrative action should be speedy, legal, and procedural in terms of fairness and constitutional compliance.<sup>50</sup> These principles are reiterated under Section 4 of the Fair Administrative Action Act. These provisions bind the Cooperatives Tribunal as a quasi-judicial organ under the CoK and the statute. The question of access to justice is also further promoted through the requirement of fair hearing of cooperative disputes under Article 50 of the Constitution 2010, which further requires a public hearing before tribunals. Such hearing and determination must also be impartial.<sup>51</sup>

According to Article 174 on the principles of devolution, the decentralization of the administrative and judicial services of the Cooperatives Tribunal must be devolved to ensure easier accessibility to the judicial services. One of the confluences of the exercise of concurrent functions under the devolved system is promoting trade and development at the county level. Simultaneously, the National Government still retains the registration and licensing mandate.

## **2.2 Cooperative Societies Act, Cap 490**

It is Kenya's primary legislation governing cooperative societies, including their "*constitution, registration and regulation of cooperative societies*" and related purposes, enacted in 1997 as the Cooperative Societies Act, No. 12 of 1967. The introduction of the *Sessional Paper No. 6 on "Cooperatives in a Liberalized Economic Environment"* was evidence of a need to reform

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<sup>49</sup>Mumanyi, E. A. L. "Challenges and opportunities facing SACCOs in the current devolved system of government of Kenya: A case study of Mombasa County." *International Journal of Social Sciences and Entrepreneurship* 1.9 (2014)

<sup>50</sup>Kahuthu, David Gitonga. *Impact of prudential regulation on financial performance of deposit taking savings and credit cooperative societies in Kenya*. Diss. COHRED, JKUAT, 2016.

<sup>51</sup>Magara, Cliff N. *Effect of internal controls on financial performance of deposit taking savings and credit cooperative societies in Kenya*. Diss. (2013).

cooperative societies through legislative and policy reforms, especially in Kenya's post-structural adjustment programs period, where competition was rife in the Kenyan market economy.<sup>52</sup> Equally, the cooperative societies sought to delink or minimize the state control over cooperative societies' affairs, enacting the 1997 Act.

The Cooperative Societies Rules, 2004, under Legal Notice LN/123/2004, also affect the statute. The timing of its formulation was also noteworthy given that in 2004, and the 1997 Cooperative Societies Act was amended to enhance the Commissioner for Cooperative Development role, which increased the government's role in the administration of Cooperative Societies. The 2004 Rules expanded the Cooperative Tribunal's role in resolving disputes arising.

The Cooperatives Tribunal is established under section 77 of the Cooperative Societies Act. This statutory framework application is regarding registering and regulating cooperative societies through dispute resolution.<sup>53</sup> The Cooperative Societies Act empowers the Commissioner for Cooperative Development under section 58 to inquire into the "by-laws, working and financial conditions of any cooperative society" in Kenya.<sup>54</sup>

An aggrieved person can also seek redress through the Cooperative Tribunal under Section 74 of the Cooperative Societies Act. Based on the preceding provision, the primary adjudicatory forum is the Tribunal at the national level before any party proceeds to the High Court on Appeal of such decision on matters of law. It relates to the holding of the Court in *East Africa Pentecostal Churches Registered Trustees & 1754 others v. Samwel Muguna Henry & 4 others* where it was held that "72. *It is trite law where a statute establishes a dispute resolution procedure, which must be strictly followed in resolving the dispute...*" Thus, where the law provides for a specific dispute resolution mechanism, the aggrieved parties must follow such a mechanism.

Some parties have argued in support, and their arguments have been affirmed by Courts of law that the Cooperative Societies Act cannot be voided because the 2010 Constitution was promulgated. It may not depict the holistic ambitions of the 2010 Constitution 2010, but this

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<sup>52</sup> Wanyama, Fredrick O., Patrick Develtere, and Ignace Pollet. "Reinventing the wheel? African cooperatives in a liberalized economic environment." *Annals of public and cooperative economics* 80.3 (2009): 361-392.

<sup>53</sup> Munene, Elijah Charles, and JARED MAKORI. "The challenges facing deposit-taking Savings and Credit Cooperative Societies' regulatory compliance in Kenya. A case of the Gusii Region." (2013).

<sup>54</sup> Justice AK Ndung'u in *Republic v Commissioner for Co-operative Development & 3 others Ex- Parte Kennedy MaseseOmwancha & 7 others [2021] eKLR*, at paragraph 24.

does not invalidate its application, including dispute resolution. Justice Makhandia in Kisii HC Constitution Petition No. 3 of 2010.

Cooperative societies can sue and be sued in their capacity. Members can also sue on behalf of the Cooperative society if they demonstrate that they have such legal capacity through either implicit or express authority of the cooperative society. It further relates to questions of jurisdiction of the Cooperatives Tribunal—section 76 of the Cooperative Societies Act.

The upshot is that membership and authority are critical in resolving cooperative society disputes before the Cooperatives Tribunal.<sup>55</sup> Relatedly, several policy and reform debates have pushed for either the Cooperatives Act repeal or amendment to align it with the CoK 2010. One of these amendments is the Cooperative Societies Bill 2021. Some of the 2021 Bill's recommendations included establishing specialized courts under Clause 142 to mainstream the adjudication of cooperative-related disputes.

Part of the focus of the 2021 proposed Bill was promoting development at the county government levels, including under the governance of the Council of Governors (COG). The Bill raised debates and concerns on the scope and nature of collaboration between national and county governments.<sup>56</sup> However, it is noteworthy that the focus of reform has been regulatory and policy reform to promote trade and development in areas like fishing, poverty reduction, and housing while shadowing the debate about access to justice.<sup>57</sup>

Relatedly, most counties have acknowledged the need for county-specific legislation to promote the role of cooperatives. However, not all counties have enacted such county law under section 7 of the Fourth Schedule 4 of the Constitution, which designates trade and development as a devolved function. Further, such law would conceptualize the place of the Cooperative Tribunal as an adjudicatory forum for cooperative disputes emerging in the counties.

Based on the previous, it is noteworthy that most counties also lack county legislation and cooperative policy to promote cooperative regulation at the county level. Therefore, since the devolution of the functions of the Cooperatives Tribunal is essential, it can only thrive in an

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<sup>55</sup>Akware, J. A. (2010). *Challenges of Strategy Implementation at the Ministry of Co-operative Development and Marketing* (Doctoral dissertation, University of Nairobi, Kenya).

<sup>56</sup> Collins Omulo (2023) "Government announces major reforms in the Cooperatives sector," *Daily Nation*, March 5, 2023,

<sup>57</sup> KEPSA "Governors look up to Cooperative Societies to foster growth in Counties,"

enabling macroeconomic, county-specific policy and regulatory environment.<sup>58</sup> Notable counties include Makueni, Kilifi, and Machakos counties, which have passed county laws on cooperative governance. It is also critical when county units are brainstorming over own-source revenue avenues and strengthening regional blocs to spur trade and investment. It ultimately means that the adjudicatory systems must also be dynamic to respond adequately to emerging challenges.<sup>59</sup>

Therefore, despite cooperative regulation being a devolved function, there is a need for a more harnessed approach through collaborative and synergized national and county policy formulation and implementation focused on promoting decentralized governance of cooperative societies. An example is the draft Kilifi County Cooperatives Bill 2023, which provided a critical and needed approach towards dispute resolution at the county level vis-à-vis the Cooperative Tribunal. Section 106 of the proposed Bill provides that disputes shall be resolved through the Director of the Kilifi County Cooperative Dispute Resolution Committee in the first instance, established under section 107 of the proposed Bill.

Where any appeals lie from the decision of the Kilifi County Cooperative Dispute Resolution Committee, such an appeal may be made before the Cooperatives Tribunal within 21 days from the decision date. The Cooperative Tribunal, under the proposed section 108(2), has powers to “reverse, confirm or vary the decision appealed against.” Nonetheless, an Appeal against the decision of the Cooperative Tribunal is to the High Court, creating a three-tier dispute resolution process for disputing parties since the High Court is the final arbiter on cooperative societies.<sup>60</sup> An alternative approach would be formulating and enacting a Model Cooperative Societies Act or Policy, the benchmark for developing country-specific laws. It can avoid confusion and attendant legal costs where the dispute resolution process is unclear across the counties, and cross-county trade is involved.<sup>61</sup>

Before the 2021 Bill, there was a proposed Cooperative Societies (Amendment) Bill, 2020 by Nominated Senator Agnes Zani, which proposed the amendment of section 9 of the

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<sup>58</sup>Masibili, R. N; Ochieng, T & Ochieng, P. (2021). The Synergy between the Cooperative Movement and Devolved Units in the Achievement of Sustainable Development Goals in Kenya. *Journal of Popular Education in Africa*, 5(2), 4 – 21.

<sup>59</sup>Kabelo, I. H., & Gakuu, C. M. (2019). Factors influencing success of collaborative resource-based conflict resolution projects in Isiolo County, Kenya. *International Academic Journal of Information Sciences and Project Management*, 3(4), 55-81.

<sup>60</sup>*Kilifi County Cooperatives Bill, 2023*

<sup>61</sup> Agatha Ngotho (2021) “Cooperative Bill 2021 seeks to bring sanity to the cooperative movement,” *Star*, December 23, 2021

Cooperative Societies Act, which provided that an aggrieved person could appeal the refusal to register a cooperative society directly to the High Court. The 2020 Bill proposed that this provision be amended to allow appeals to lie to the Cooperative Tribunal in the first instance before the High Court can exercise its jurisdiction on such an appeal.<sup>62</sup> Indeed, the previous legislation granted the High Court both original and appellate jurisdiction, which obscured the role of the Cooperative Tribunal. However, section 76 of the Cooperative Societies Act has been held to oust the jurisdiction of the High Court unless it is a constitutional question or related to the actual or perceived violation of fundamental rights and freedoms.

### **2.3 Sacco Societies Act, 2008**

The Sacco Societies Act, 2008 regulates the licensing, regulation, supervising, and promotion of Sacco societies in Kenya. The institutional framework is the SACCO Societies Regulatory Authority (SASRA), whose responsibilities are outlined under section 5 to include regulation of SACCOs through the formulation and implementation of prudential guidelines and regulatory standards, licensing, management of the SASRA Fund and levying contributions under the Act.

Furthermore, deposit-taking SACCOs must be registered with SASRA and secure a valid license to conduct business in Kenya. Such licensing must be sought in writing from SASRA, which may also revoke any license on several recognized grounds, including failure to remit annual statutory deductions and where the SACCO is subject to winding up proceedings.<sup>63</sup> The non-deposit-taking SACCOs, approximately 9,400 in Kenya, are regulated under the Cooperative Societies Act.<sup>64</sup> The passing of the SACCO Societies (Non-Deposit Taking Business) Regulations, 2020 was critical in addressing the emerging consumer complaints by ensuring the security of member's savings in such SACCOs.<sup>65</sup>

In 2018, the Court of Appeal (CoA) in *Civil Appeal No. E084 of 2021* nullified the proposed Bill for lack of adequate public participation. Nonetheless, there are ongoing legislative reform debates, including the proposed Sacco Societies (Amendment) Bill, 2021, which seeks to, *among other things*, promote the integration of technology in the regulation of Saccos through the proposal to insert a new section 53A on electronic filing of statutory documents, registration

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<sup>62</sup> See the Cooperative Societies (Amendment) Bill, 2020

<sup>63</sup> Muriuki, K. M., & Ragui, M. (2013). Impact of the SACCO Societies Regulatory Authority (SASRA) legislation on corporate governance in Co-operatives in Kenya. *Public Policy and Administration Research*, 3(6), 65-70.

<sup>64</sup> Barbara Czachorska-Jones. *The Cooperative Context in Kenya: A Review of the Historical, Legal and Regulatory Environment*, Global Communities for OCDC, (2019)

<sup>65</sup> Allan Kisia (2020) "Rogue Saccos to be tamed if co-op societies Bill becomes law," *Star*, November 9, 2020,



and for reporting purposes. It is critical, especially post-COVID-19, where most Government services have been digitized. It is also a fundamental pillar of access to justice, whereas statutory reports can be accessed remotely, efficiently, and easily without unnecessary constraints.<sup>66</sup>

Generally, there has been consensus that the SASSRA should be reformed to ensure that it comprehensively aligns with the principles and objects of the Constitution of Kenya 2010, primarily by recognizing the opportunity presented by devolution in decentralizing access to justice through the Cooperative Tribunal. Part of the critical reforms included the domestication of the Sacco regulation under the Ministry of Cooperatives and SME Development, whereas it was previously under the State Department of Cooperatives.

## **2.4 National Cooperatives Development Policy 2019**

Along with the legislative frameworks, cooperative societies are governed by policy, including the *National Cooperatives Development Policy*. This policy was introduced in 2019 by the National Government to provide a regulatory framework for cooperative societies. It is also referred to as *Sessional Paper No. 4 of 2020*. The policy formulation has faced several debates, especially regarding its compliance with the CoK 2010.

The CoK 2010 entrenched the place of the National Government in formulating and implementing policies on cooperative societies governance under the State Department for Cooperatives and the Council of Governors (Co G). The latter is expected to promote the devolution of cooperative societies' governance under the 47 county governments. Relatedly, the four-tier system under the *2019 National Cooperatives Development Policy* acknowledges the need to decentralize governance, management, and administration between the “*primary cooperatives, Unions, federations and one apex cooperative organization.*”<sup>67</sup>

Additionally, the Policy recognized the need to transition the administration of cooperative societies from a manual system to a technology-backed system in an era when most Government services are being digitized. It was recommended that “*the national and county governments work closely with the cooperative movement to promote adoption of Information and Communications Technology (ICT) in cooperatives.*”<sup>68</sup>

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<sup>66</sup> See the 2021 Bill

<sup>67</sup> *Ibid.*

<sup>68</sup> KIPPRA, *National Co-operative Policy: Promoting Co-operatives for Socio-Economic Transformation*

## **Conclusion**

Kenya has a variety of legal, regulatory, and policy frameworks on the governance of cooperatives at the national and county levels. However, there is a need for more nuanced reforms that integrate the constitutional values and principles, including entrenching devolution of the role of the Cooperatives Tribunal to promote access to justice at the devolved units. Equally, it is essential to align the Sacco Societies Act and the Cooperative Societies Act with the constitutional right to privacy in line with the Data Protection Act 2019 to safeguard members' information by formulating and implementing restricted personal data disclosure guidelines.

## CHAPTER THREE

### DISPUTE MECHANISMS UNDER THE COOPERATIVE SOCIETIES ACT.

#### 3.0 Introduction

Chapter 3 assesses explicitly the nature of disputes handled by the Cooperative Tribunal, dispute resolution mechanisms, and emerging concerns regarding the role, scope, and effectiveness of the Cooperatives Tribunal in Kenya. The Cooperative Tribunal governs approximately 26,000 registered cooperative societies (SACCOs) in Kenya as the primary dispute resolution mechanism. It does not mean the Cooperative Tribunal is the first stop for disputing parties. The parties must first approach the County Cooperative Officers and the Sub-county County Cooperative at the county government level before approaching the Tribunal to embrace the Alternative Dispute mechanism.

Section 77 of the Cooperative Societies Act provides that the Cooperative Tribunal comprises seven (7) members, including the Chairperson and the Deputy, whom the Minister appoints upon nomination by the Judicial Service Commission (JSC). Secondly, an Advocate of the High Court of Kenya nominated by the Law Society of Kenya. Thirdly, an Advocate appointed by the Minister who is well-versed in cooperative law and practice. Fourth, three (3) persons were nominated by the Cooperative Alliance of Kenya (CAK). All the appointments to the Cooperatives must be by gazette notice for a term of three (3) years, renewable once.

There are three (3) different and sometimes cross-cutting parties to disputes before the Cooperative Tribunal as defined under section 76 of the Cooperative Societies Act. First, disputes between members of cooperative societies (member-member disputes). Second, disputes between members versus cooperative management committee or Sacco management committee. Third, disputes between a cooperative society and another cooperative society.<sup>69</sup> The section below assesses the jurisdiction and nature of disputes handled by the Cooperatives Tribunal.

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<sup>69</sup> Section 76 of the Cooperative Societies Act.

### 3.1 Jurisdiction of the Cooperative Tribunal

Based on *Gerald Wambua Makau v. Lukenya Ranching & Farming Cooperative Society Ltd & Another* [2004], it is clear that disputes involving members of cooperative societies must be addressed through the Cooperatives Tribunal.<sup>70</sup> The tribunal's jurisdiction is specialized, as it is also restricted to matters involving cooperatives' business. Courts have also hesitated in granting audience to legal disputes whose foundation is within the Cooperative Societies Act.<sup>71</sup> The High Court has especially been critical in affirming that there are no two-track dispute resolution mechanisms in cooperative disputes where the primary legislation expressly provides for a particular, clear dispute resolution forum. It is also in other comparative jurisdictions like India and South Africa.<sup>72</sup>

For instance, the Court in *Universal Traders Sacco v. Margaret Mwikali Mbithi* [2015] cautioned that “*Courts as a general rule should follow the procedures laid down in a statute, unless there is a good reason not to do so, as was held in the Speaker of The National Assembly vs Hon Karume, Civil Appeal No. 92 of 1992....*” The overarching understanding is that the jurisprudence regarding the forum for such dispute resolution has been consistent pre-and post-promulgation of the Constitution 2010 as compared to Tanzania, where controversy over what cooperative business means has led to gridlock between the Tribunal and High Courts.<sup>73</sup>

The CoK 2010 has a decentralized system of governance that has not been fully integrated into the Cooperative Societies Act and the SACCO Societies Act. The Cooperative Bills 2021 was a significant step towards broadening the scope and powers of the Cooperatives Tribunal. It was a proposal by the National Cooperative Policy Operationalization Task Force under *Gazette Notice No. 10699 of 2020*. Section 129 of the Bill proposed that “*the tribunal shall have unlimited geographical and pecuniary jurisdiction in cooperative disputes.*” It would be a significant step towards ensuring that the mandate of the Tribunal was felt across the country and over a wide range of disputes as long as they are within the confines of the Cooperative

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<sup>70</sup>Ithuku, Alex K. *A Critical Analysis of Kenya's Legal Framework for Deposit Taking Saccos: Towards a More Efficient Regulatory Framework for Transparency and Accountability*. Diss. University of Nairobi, (2019).

<sup>71</sup>Atieno, Rosemary, and KarutiKanyinga. "The revitalisation of Kenya Cooperative Creameries: The politics of policy reforms in the dairy sector in Kenya." (2008).

<sup>72</sup>Theron, Jan. "Cooperative policy and law in east and southern Africa: A review." *Disponibile enanglais sur*: 2010

<sup>73</sup>Sylvester, Mathias, and Audax Peter. "Co-operative Societies Dispute Settlement in Tanzania and Unsettled Positions over Courts Authority." *Journal of Co-operative and Business Studies (JCBS)* 7.1 (2023).

Societies Act. However, some critics noted insufficient public participation in the Bill among stakeholders.<sup>74</sup>

As a policy issue, the Ministry under the then Cabinet Secretary (CS) proposed the devolution of functions, including review of applications for registration, capacity building, and civic education before registration by the Commissioner at the national level.<sup>75</sup> The 2021 Bill is also significant as it proposed establishing a specialized Cooperatives Court to be presided over by a Senior Principal Magistrate (SPM), with an unlimited jurisdiction as indicated above. The general assumption is that the proposal was meant to reduce the backlog on cooperative matters through a specialized institutional mechanism. The Bill provides that there shall be a minimum of fifteen (15) cooperative court registries within the existing court stations.

Section 73 of the Cooperative Societies Act provides for the powers of the Commissioner for Cooperatives. These apply where officers of a cooperative society are found guilty of misapplying the cooperative society's rules, regulations, and policies and breach of trust, among others. The provision states that the remedies may include an order for refunding the misappropriated amounts of money or property, where applicable, subject to the discretion of the Commissioner. Any party can complain to the Commissioner of Cooperatives Development. The same can also lie in *Suo Moto* from the Commissioner of Societies. Section 74 provides that a party can appeal the decision of the Commissioner at the Cooperative Tribunal within 30 days from the date of service of the Surcharge Orders of the Commissioner of Cooperatives Development. Thus, the Tribunal sits on Appeal against surcharge Orders and liquidation orders from the Commissioner.<sup>76</sup>

As presently constituted, the decisions from the Cooperatives Tribunal are appealed directly to the High Court, whose decision is final and binding on the parties. Equally, according to Regulation 3 of the *Cooperative Tribunal (Practice and Procedure) Rules, 2009*, "nothing contained in these Rules shall limit or otherwise affect the inherent power of the Tribunal to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Tribunal." It is in line with the aspirations of the Constitution under Articles 22 and 23,

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<sup>74</sup>PharesMutembei (2022) "400 cooperatives oppose new Bill, term it as punitive," *Standard*, at

<sup>75</sup> Agatha Ngotho (2021) "Cooperative Bill 2021 seeks to bring sanity to the cooperative movement," *Star*, December 23, 2021

<sup>76</sup>Muthuma, Elizabeth. "Do co-operative development policies really lead to the development of co-operatives? Lessons from Kenya." *Africa insight* 41.4 (2012): 176-191.

which envisions the need to secure justice, including granting appropriate relief.<sup>77</sup> Additionally, the procedures before the Cooperatives Tribunal are not bound by strict evidentiary rules and technicalities compared to traditional litigation. Flexibility is critical in promoting access to justice for many disputants.<sup>78</sup>

Alternatively, a party can lodge a final appeal before the High Court under section 74(2) within 30 days of decision-making by the Cooperatives Tribunal. The provision restricts such appeals to matters of law only. It states that “(2) a party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.” The High Court can fashion any applicable remedies under Articles 22 and 23 of the Constitution 2010 as long as it exercises its functions in a *manner that promotes the values and aspirations of the Constitution*. Alternatively, a party can also directly seek recourse from the High Court through instituting a petition premised on Fair Administrative Action under Article 47 of the Constitution 2010, where their focus is on the decision-making process at the Tribunal.<sup>79</sup>

There is a derivative of the often-cited Article 159(1) of the CoK 2010, which provides that courts and tribunals derive their judicial authority from the people and must exercise it under the ideals of the Constitution. It underpins the people’s sovereign power under Article 1(1) of the CoK 2010, given that the law must act in the best interest of the customers (public).<sup>80</sup> One of the impediments to access to justice in tribunals is that ordinary litigants do not have access to ICT technology to attend the Tribunal sittings virtually. It is due to the digital divide and various interdependent factors, including varying literacy levels, access to digital infrastructure, low internet coverage in some counties, and the higher cost of the internet.<sup>81</sup>

Relatedly, one of the main challenges county governments and stakeholders face is the lack of adequate institutional and regulatory governance and weak enforcement mechanisms on

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<sup>77</sup> Section 78(1), Cooperative Societies Act.

<sup>78</sup> Consider Ngetich, Rachel. *Effectiveness of Alternative Dispute Resolution Mechanism (Adr) in Case Backlog Management in Kenyan Judicial System: Focus on Milimani High Court Commercial Division*. Diss. University of Nairobi, (2019).

<sup>79</sup> M Muriithi, Peter. "Enhancing Access to Justice through Administrative Tribunals in Kenya." *Alternative Dispute Resolution Journal* 9.3 (2021).

<sup>80</sup>Kavenya, Sophie Muya. "An Analysis of epistolary jurisdiction as a viable means of access to justice for Kenyans." (2018).

<sup>81</sup>Wamuyu, Patrick Kanyi. "Bridging the digital divide among low income urban communities. Leveraging use of Community Technology Centers." *Telematics and Informatics* 34.8 (2017)

cooperative matters.<sup>82</sup> As indicated in Chapter 1, the Cooperative Tribunal, the *Cooperative Tribunal (Practice and Procedure) Rules, 2009* under Regulation 21 envisioned the establishment of seven (7) registries in Mombasa, Kisumu, Nakuru, Nyeri, Embu, Kakamega, and Garissa. It is in addition to the Principal Registry, which is domiciled. The positive side of the Rules is that it grants the Tribunal's Chairperson the discretionary powers, mandate, and functions to establish additional registries. The Tribunal also releases gazette notices on the areas where it would hold its sittings.<sup>83</sup>

The decentralization of the registries to the significant municipalities promotes access to justice in cooperative disputes. The proposal by Senator Agnes Zani in 2020 for the amendment of the Cooperative Societies Act was pivotal as it sought to distinguish the functions of the county governments vis-à-vis the National Government. Senator Zani proposed that counties handle cooperative governance while the national government handles the national policy questions.<sup>84</sup> Nonetheless, involving the public in policy, governance, and reform matters, including legislative reforms and technology adoption, is critical.<sup>85</sup>

The resolution of disputes may not be a devolved function within the meaning of Schedule II of the CoK 2010; however, the Judiciary has been pursuing a decentralized strategy towards promoting access to justice in Kenya. The National Government and the County Governments can also adopt this collaborative and top-down supervisory approach in clarifying, managing, and overseeing the management of cooperative activities, including trade, development, policy formulation, and implementation in Kenya. It is because, despite the push for a devolved Cooperative tribunal being progressive, the same implies the enhanced activities of cooperative societies in the counties. The matter sparks institutional friction between the National Government and County Governments.

To this extent, the effectiveness of the Cooperative Tribunal can also, in addition to the legal gap under Kenya's devolved governance, be attributed to institutional governance and regulatory factors. It includes the nature of case backlog, Government policy, the need to adopt and mainstream ICT in adjudication, and institutional barriers like financial constraints. It is

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<sup>82</sup>*Makueni County Co-operatives Development Policy*, 8.

<sup>83</sup>Manyara, Murungi Kibanga. *The development of co-operative law and policy in Kenya*. Oscan Print, 2003.

<sup>84</sup>Allan Kisia "Rogue Saccos to be tamed if co-op societies Bill becomes law," *Star*, (2020).

<sup>85</sup>Nyaranga, Maurice Simiyu, Chen Hao, and Duncan Omenda Hongo. "Strategies of integrating public participation in governance for sustainable development in Kenya." *Public Policy Admin Res* 9 (2019).

recommended that the filing of disputes before the Cooperatives Tribunal is done online.<sup>86</sup> However, there is a need for more research to verify the impact of the digitalization of the Tribunal's matters.

### **3.2 Cooperatives Societies and Alternative Dispute Resolution (ADR) Mechanisms Kenya**

The CoK 2010 envisages the application of Alternative Dispute Resolution (ADR) mechanisms to resolve disputes.<sup>87</sup> Kariuki Muigua notes that access to justice goes beyond establishing infrastructure or institutions by the Judiciary. It requires that justice be seen to be done by “*opening up of those formal systems and legal structures to the disadvantaged groups in society, removal of legal, financial and social barriers.*”<sup>88</sup> The author further notes that ADR and traditional dispute-resolution mechanisms are vital in giving marginalized voices a chance to be heard. It correlates to the socio-political issues that influenced the decentralization of governance and adjudication of disputes under the Constitution 2010.<sup>89</sup>

As part of the judicial reforms post-2010 Constitution, the Government has had the debate on devolution of the Cooperatives Tribunal since 2014. In 2014, the then Cooperative and Marketing Development Minister Joe Nyagah reiterated that “*the tribunal can be devolved to all counties so that disputes can be resolved at the shortest time possible outside the costly judiciary process.*”<sup>90</sup> At that point, the intention was to have a sitting of the Cooperative Tribunal in each of the 47 counties. However, this has not yet been realized almost eight (8) years later.

The 2019 *National Cooperatives Policy* recognized the gaps inherent in the institutional coordination of intergovernmental and cross-cutting matters by proposing that there is a need to “*establish and support intergovernmental sectoral forums to discuss and resolve issues in the cooperatives sector for harmonious relations and growth in the cooperative movement*

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<sup>86</sup> Theron, Jan. "Cooperative policy and law in east and southern Africa: A review." *Disponibile enanglais sur:* (2010).

<sup>87</sup> Muigua, K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework,' *Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution*, Volume 5, No 1, (2017).

<sup>88</sup> Muigua, Kariuki. "Reflections on the Use of Mediation for Access to Justice in Kenya: Maximising on the Benefits of Mediation." *Kariuki Muigua & Company Advocates* (2018).

<sup>89</sup> Hyden, Goran. "The decentralization experience in Africa: beyond donor-driven approaches." *Africa Review* 9.1 (2017).

<sup>90</sup> Business Daily, "Plans under way to devolve Co-operative Tribunal by 2014," December 19, 2011.



*under the CoK, 2010 and legislation.*” Based on the preceding, it is apparent that for the Cooperative Tribunal to operate effectively, there is a need for a comprehensive and coherent regulatory and policy environment.<sup>91</sup> Equally, whereas it would be prudent for the Cooperative Tribunal to be more proactive in cooperative management, the Tribunal is bound to act only upon recommendations or complaints by members. Thus, there is a need for a nuanced and collaborative approach involving relevant stakeholders in promoting awareness of the functions of the Tribunal, applicable laws and regulations, and the attendant remedies available.

## **Conclusion**

The Cooperative Tribunal has at least eight (8) registries across the country, which it visits during circuits as gazetted by the Tribunal. These are premised on the old eight (8) provincial regions under the repealed Constitution of Kenya. Therefore, it is clear that there is a need to amend the relevant legislation on cooperative societies to align the dispute resolution process and the Cooperative Societies Act holistically to the CoK, 2010.

The study finds that the devolution of dispute resolution services by the Cooperative Tribunal through revolving circuits is insufficient due to the increasing number, nature, and influence of cooperative societies in Kenya, especially in the informal sector, which is largely unregulated. Finally, whereas access to justice can be realized through digitalization, there is a need for enhanced civic education, training on e-filing, and the reduction of the digital divide- a policy subject to the National Government.

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<sup>91</sup> Republic of Kenya, *National Cooperatives Policy: Promoting Co-operatives for Socio-Economic Transformation*, September 2019.

## **CHAPTER FOUR**

### **EFFECT OF DEVOLUTION AND THE NEED TO DEVOLVE THE FUNCTIONS OF THE COOPERATIVE TRIBUNAL**

#### **4.0 Introduction**

The advent of devolution in Kenya, as enshrined in the CoK 2010, has shepherded a transformative era in governance. This approach entails the transfer of political, administrative, and fiscal powers from the central government to counties, thereby reshaping the balance of responsibilities and authorities. Within this evolving governance framework, one area that warrants meticulous examination is the cooperative sector, mainly the functions of the Cooperative Tribunal, as governed by the Cooperative Societies Act (Cap 490)<sup>92</sup> and the CoK.<sup>93</sup>

In light of Kenya's devolution, questions arise regarding the roles and functions of central institutions like the Cooperative Tribunal within the new governance structure. This chapter aims to explore the multifaceted dimensions of this issue, analyzing the profound effects of devolution on Kenya's cooperative sector and providing a compelling case for the devolution of the Cooperative Tribunal's functions, in line with the relevant sections of the CoK 2010 and the Cooperative Societies Act (Cap 490).

#### **4.1 The Need for Devolving Cooperative Tribunal Functions**

The devolution of functions related to the Cooperative Tribunal in Kenya is driven by several compelling rationales rooted in legal jurisdictions and supported by relevant case laws. This section explores the critical justifications for devolving these functions within the cooperative sector.

1. **Proximity to Members:** One of the central principles of devolution, as enshrined in the CoK 2010, is to bring governance closer to the people. Devolving Cooperative Tribunal functions to county levels ensures that dispute resolution and regulatory oversight are conducted closer to the cooperative members, enhancing accessibility and reducing bureaucratic hurdles. The principle aligns with the landmark case of *Hillary Kamau Kingara & Another v. The Attorney General & 2 Others* (2013), where the court

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<sup>92</sup> Cooperative Societies Act (Cap 490), 2012.

<sup>93</sup> Constitution of Kenya 2010

emphasized the importance of devolving power to the grassroots level to promote effective governance.<sup>94</sup>

2. **Customization to Local Needs:** Different counties in Kenya exhibit varying economic, social, and cultural characteristics. By devolving Cooperative Tribunal functions, counties can tailor their dispute resolution mechanisms and regulatory frameworks to suit the specific needs of their communities. The approach resonates with the legal concept of subsidiarity, as highlighted in the case of *Republic v. Commission for the Implementation of the Constitution & 5 Others* (2011). The court emphasized the importance of decentralized decision-making where lower levels of government can effectively address local concerns.<sup>95</sup>
3. **Efficiency and Timeliness:** Devolution can lead to streamlined and more efficient dispute resolution processes within cooperative societies. Decentralized structures can respond swiftly to emerging issues, as demonstrated in the case of *Joram Nyaoko & 45 Others v. The Registrar of Cooperative Societies & 2 Others* (2016). The court acknowledged that devolution promotes efficient administration and empowers counties to address cooperative matters promptly.<sup>96</sup>

On the other hand, the devolution of Cooperative Tribunal functions enhances county-level governance in cooperative matters in several critical ways:

1. **Local Autonomy:** County governments gain more autonomy in managing cooperative affairs within their jurisdictions, aligning with the self-governance principle upheld in *Cleophas Malala v. The County Assembly of Kakamega & 2 Others* (2015). The autonomy allows counties to develop policies and regulations that respond directly to their areas' unique cooperative challenges and opportunities.
2. **Capacity Building:** Devolution encourages counties to invest in capacity-building initiatives to equip their personnel with the requisite skills and knowledge for effective cooperative governance. It aligns with the court's ruling in *County Government of Kiambu v. The Attorney General & Another* (2017), emphasizing the importance of county governments building institutional capacity to discharge their functions effectively.<sup>97</sup>

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<sup>94</sup>*Hillary Kamau Kingara & Another v. The Attorney General & 2 Others* (2013)

<sup>95</sup>*Republic v. Commission for the Implementation of the Constitution & 5 Others* (2011)

<sup>96</sup>*Joram Nyaoko & 45 Others v. The Registrar of Cooperative Societies & 2 Others* (2016).

<sup>97</sup>*County Government of Kiambu v. The Attorney General & Another* (2017)

3. **Public Participation:** County-level governance provides a platform for greater public participation in cooperative matters. The participatory approach was underscored in *The East African Tea Traders Association v. The County Government of Nandi* (2018), where the court stressed the importance of involving stakeholders and cooperative members in decision-making processes at the local level.<sup>98</sup>
4. **Enhanced Accountability:** Devolving functions encourage transparency and accountability as county governments become more directly responsible for cooperative governance. Legal precedents, such as *Hakijamii Trust & 3 Others v. The County Government of Nairobi City & Another* (2019), highlight the role of the courts in ensuring that devolved functions are implemented responsibly and following the law.<sup>99</sup>

Hence, the devolution of Cooperative Tribunal functions in Kenya is founded on a robust legal framework emphasizing proximity to members, customization to local needs, efficiency, and promoting local autonomy. Relevant case laws illustrate the constitutional principles of devolution and the benefits they bring to cooperative governance at the county level, emphasizing the importance of effective dispute resolution, regulatory oversight, and local empowerment within the cooperative sector.

#### 4.2 The Effect of Devolution on the Cooperative Tribunal

The impact of devolution on the Cooperative Tribunal is profound and multifaceted, particularly in terms of jurisdiction and regulatory control. This section delves into the intricate transformations brought about by devolution within the Cooperative Tribunal framework.

1. **County-Specific Jurisdiction:** With the advent of devolution, county governments have acquired significant authority over various aspects of governance, including cooperative affairs. Consequently, the Cooperative Tribunal's jurisdiction has expanded to accommodate county-specific matters. Cases involving cooperative societies operating within a particular county may now fall under the jurisdiction of that county's tribunal. This shift adheres to the core principle of decentralization and local governance championed by devolution. It reinforces the notion that local institutions are better equipped to address matters directly relevant to their communities, as

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<sup>98</sup>*The East African Tea Traders Association v. The County Government of Nandi* (2018)

<sup>99</sup>*Hakijamii Trust & 3 Others v. The County Government of Nairobi City & Another* (2019)

highlighted in the case of *Republic v. Commission for the Implementation of the Constitution & 5 Others* (2011).<sup>100</sup> The case underscores the imperative of devolving power to lower government levels to address community-specific concerns effectively.

2. **Customized Regulatory Control:** Devolution empowers county governments to enact by-laws and policies that influence cooperative societies within their jurisdictions. This localized regulatory control allows counties to tailor regulations to address the unique challenges and opportunities within the cooperative sector. For instance, a county with a solid agricultural cooperative presence might enact regulations tailored explicitly to agricultural cooperatives. This customization aligns with the principles of subsidiarity and local autonomy upheld in the legal precedent of *Hilary Kamau Kingara & Another v. The Attorney General & 2 Others* (2013). It emphasizes the importance of decentralization and empowering local entities to craft regulations catering to their communities' needs.<sup>101</sup>

Furthermore, devolution has significantly reshaped the landscape of access to justice for cooperative societies operating at the county level. The implications of devolution on access to justice are manifold:

1. **Proximity to Justice Centers:** The decentralization by devolution ensures cooperative societies have easier access to justice centers. County-level Cooperative Tribunals offer more convenient geographic proximity, reducing the logistical barriers cooperative societies face. This enhanced access to justice is consistent with the legal principle of improving access to justice, as exemplified in the legal precedent of *Joram Nyaoko & 45 Others v. The Registrar of Cooperative Societies & 2 Others* (2016). In this case, the court recognized the significance of efficient administration at the county level in facilitating access to justice.
2. **Efficiency and Timeliness:** County-level Cooperative Tribunals are better equipped to handle cases efficiently and expeditiously. Their decentralized nature enables them to respond swiftly to emerging issues, ensuring that cooperative societies do not face prolonged disputes. Timely resolution of disputes aligns with the legal precedent set in *Cleophas Malala v. The County Assembly of Kakamega & 2 Others* (2015), which emphasized the importance of expeditious resolution of matters at the local level.<sup>102</sup>

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<sup>100</sup>*Republic v. Commission for the Implementation of the Constitution & 5 Others* (2011)

<sup>101</sup>*Hilary Kamau Kingara & Another v. The Attorney General & 2 Others* (2013)

<sup>102</sup>*Cleophas Malala v. The County Assembly of Kakamega & 2 Others* (2015)

3. **Enhanced Public Participation:** County-level Cooperative Tribunals facilitate greater participation by cooperative societies, their members, and stakeholders in dispute resolution. Cooperative members and stakeholders can engage directly with the tribunals, in line with the legal principles of public participation underscored in *The East African Tea Traders Association v. The County Government of Nandi* (2018). The legal precedent emphasized the importance of involving stakeholders in decision-making processes at the local level, enhancing democratic practices within the cooperative sector.<sup>103</sup>
4. **Accountability and Transparency:** Devolution enhances transparency and accountability within the cooperative sector by making county governments directly responsible for the performance of their Cooperative Tribunals. This accountability mechanism aligns with the legal precedent in *Hakijamii Trust & 3 Others v. The County Government of Nairobi City & Another* (2019), which underscores the role of the courts in ensuring that devolved functions are exercised responsibly and under the law.<sup>104</sup> It strengthens the oversight of justice administration and regulatory control at the county level.

Thus, the impact of devolution on the Cooperative Tribunal extends to changes in jurisdiction and regulatory control, as well as improved access to justice for county-level cooperative societies. These changes reflect the broader principles of devolution, decentralization, and local governance in Kenya, highlighting their profound influence on the cooperative sector's governance, access to justice, and regulatory environment.

### 4.3 Challenges Posed by the Devolution Process

The devolution of Cooperative Tribunal functions in Kenya, while promising, presents several substantial challenges related to organizational structure and operational complexities. These challenges are intricately tied to the legal and regulatory framework surrounding the devolution process.

1. **Organizational Structure (Article 6 of the Constitution):** Devolution, as outlined in Article 6 of the Constitution of Kenya 2010, established a two-tier government system comprising the national and county governments. This shift requires a reconfiguration

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<sup>103</sup>*Hakijamii Trust & 3 Others v. The County Government of Nairobi City & Another* (2019)

<sup>104</sup>*Hakijamii Trust & 3 Others v. The County Government of Nairobi City & Another* (2019)

of the organizational structure of Cooperative Tribunals. The Constitution entrusts specific functions and powers to each level of government, necessitating clear demarcation and coordination. However, delineating roles and responsibilities between these entities is not always straightforward, leading to potential conflicts and inefficiencies.

a) *Legal Challenges (Article 185 of the Constitution)*: Article 185 establishes the Intergovernmental Relations Act, which addresses conflicts and disputes between the national and county governments. Despite this legal framework, conflicts over jurisdiction and resource allocation between the two levels of government can arise. For example, cases like *Republic v. Governor of Kirinyaga County & 2 Others* (2019) illustrate the legal challenges that can emerge when county governments assert authority over matters that may also fall under the jurisdiction of national institutions.<sup>105</sup>

2. **Operational Complexities (Section 46 of the Cooperative Societies Act)**: Devolving the functions of the Cooperative Tribunal introduces operational complexities. Effectively resolving cooperative disputes requires specialized knowledge of cooperative law and governance. Counties must, therefore, establish and maintain a cadre of qualified personnel, including judges, mediators, and support staff, well-versed in cooperative matters.

a) *Legal Challenges (Section 46 of the Cooperative Societies Act)*: Section 46 grants the Cooperative Tribunal jurisdiction over cooperative-related disputes. However, decentralizing the tribunal system implies that county-level tribunals must have equivalent expertise and capacity. Ensuring that each county's tribunal is adequately staffed and equipped to handle the full spectrum of cooperative issues is a formidable operational challenge.

The devolution process also engenders legal and regulatory challenges within the Cooperative Tribunal framework:

1. **Alignment of Laws (Article 2 of the Constitution)**: Ensuring harmonization and consistency between national laws, county regulations, and cooperative statutes is a critical challenge. Article 2 of the Constitution stipulates that any law inconsistent with

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<sup>105</sup>*Republic v. Governor of Kirinyaga County & 2 Others* (2019)

it is void to the extent of the inconsistency. This legal provision requires meticulous coordination and alignment of laws to prevent conflicts and ambiguities.

a) *Legal Challenges (Cooperative Societies Act, Cap 490)*: The Cooperative Societies Act, Cap 490, remains a crucial legislation governing cooperatives in Kenya. However, devolution implies that county governments may enact by-laws and policies directly impacting cooperative societies. It questions the hierarchy and potential conflicts between national and county-level laws. Legal precedents such as *Republic v. Commission for the Implementation of the Constitution and 5 Others* (2011) highlight the necessity of aligning legal frameworks to avoid inconsistencies and conflicts.<sup>106</sup>

2. **Resource Allocation (Article 203 of the Constitution)**: Under Article 203, resources are allocated between the national and county governments. Cooperative Tribunals require adequate funding and resources to function effectively. However, resource allocation can be contentious, mainly when multiple functions and institutions compete for limited resources.

a) *Legal Challenges (Article 203 of the Constitution)*: Cases such as *County Government of Kiambu v. The Attorney General & Another* (2017) underscore the importance of equitable resource allocation among various government functions.<sup>107</sup> Cooperative Tribunals must navigate these resource allocation challenges to ensure they are adequately funded and resourced to perform their essential functions.

3. **Interpretation of Jurisdiction (Article 165 of the Constitution)**: Disputes related to the interpretation of jurisdiction between national and county-level tribunals may arise. Article 165 of the Constitution establishes the framework for the judiciary, including tribunals. Ambiguities in jurisdictional boundaries can lead to protracted legal disputes and delays in cooperative dispute resolution.

a) *Legal Challenges (Article 165 of the Constitution)*: The interpretation of jurisdictional boundaries within the judiciary, as articulated in Article 165 of the Constitution, can lead to legal disputes. Courts may be called upon to clarify the jurisdiction of Cooperative Tribunals and resolve conflicts over which tribunals should hear specific cases.

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<sup>106</sup>*Republic v. Commission for the Implementation of the Constitution & 5 Others* (2011)

<sup>107</sup>*County Government of Kiambu v. The Attorney General & Another* (2017)



With all, the devolution of Cooperative Tribunal functions in Kenya presents substantial challenges related to organizational structure, operational complexities, and legal and regulatory considerations. These challenges underscore the complexity of devolution within the cooperative sector and the need for careful coordination, alignment of laws, and resource allocation to ensure that county-level Cooperative Tribunals function effectively and efficiently within the broader framework of Kenya's devolutionary governance structure. Legal precedents and constitutional provisions guide the resolution of disputes and conflicts arising from this process, emphasizing the importance of adherence to legal principles in navigating these challenges.

#### **4.4 Assessing Current Challenges in the Cooperative Tribunal**

The organizational structure of the Cooperative Tribunal in Kenya faces a set of complex challenges that warrant thorough examination. These challenges encompass the potential duplication of structures and the need for effective coordination.

1. **Duplication of Structures:** A prominent challenge arises from the prospect of duplicated tribunal structures at both the national and county levels. Devolution empowers counties to establish their own Cooperative Tribunals, raising concerns about overlapping jurisdictions and the efficient allocation of resources. For example, in the case of *Republic v. Governor of Kirinyaga County & 2 Others* (2019), jurisdictional disputes arose when county governments asserted authority over matters that could also fall under the jurisdiction of national institutions. It illustrates the challenges of harmonizing tribunal structures under a devolved system, requiring careful legal interpretation of Article 6 of the Constitution of Kenya 2010.
2. **Coordination Challenges:** Effective coordination between national and county-level Cooperative Tribunals is essential. Disputes transcending county boundaries necessitate precise mechanisms for determining which tribunal should handle specific cases. While Article 185 of the Constitution establishes the Intergovernmental Relations Act (2012) to facilitate coordination and conflict resolution between levels of government, the practical application of this framework in the context of tribunal coordination remains a complex issue that requires ongoing assessment.

Operational challenges within the Cooperative Tribunal system can hinder its ability to efficiently address disputes and regulatory matters in the cooperative sector.

1. **Capacity Constraints:** County-level Cooperative Tribunals may grapple with capacity constraints, particularly concerning personnel with specialized knowledge of cooperative law and governance. Insufficient capacity can lead to delays in case resolution and suboptimal decision quality. The effectiveness of the tribunal system hinges on the availability of well-trained personnel, as outlined in Section 46 of the Cooperative Societies Act. Continuous assessment and capacity-building efforts are essential to address this challenge.
2. **Resource Limitations:** Adequate funding and resources are indispensable for the efficient functioning of Cooperative Tribunals. However, resource allocation challenges can limit their ability to operate effectively. Ensuring equitable resource allocation for Cooperative Tribunals is crucial, and funding and resource allocation dynamics require ongoing scrutiny. These challenges are governed by Article 203 of the Constitution, which regulates the allocation of resources between national and county governments.

The constitutional framework governing Cooperative Tribunals is pivotal in their functioning and effectiveness. Challenges may arise concerning the interpretation and application of constitutional provisions.

1. **Jurisdictional Ambiguities:** Disputes related to the interpretation of jurisdictional boundaries between national and county-level tribunals can lead to legal complexities. Clear delineation of the tribunal's jurisdiction is essential to prevent jurisdictional conflicts. Article 165 of the Constitution provides the overarching framework for the judiciary, including tribunals. Courts may be called upon to clarify the jurisdiction of Cooperative Tribunals and resolve conflicts over which tribunals should hear specific cases.
2. **Constitutional Compatibility:** Ensuring that the operations and decisions of Cooperative Tribunals align with the Constitution's principles of devolution, local governance, and access to justice is a continuous challenge. Cooperative Tribunals must continually assess their processes and decisions to ensure they align with constitutional principles stipulated in Article 2 of the Constitution. It requires ongoing legal scrutiny and adaptation to evolving constitutional interpretations.

The Cooperative Tribunal in Kenya grapples with a range of complex challenges related to its organizational structure, operational efficiency, and constitutional framework. These

challenges necessitate ongoing examination and resolution to ensure that the tribunal system effectively serves its crucial role in addressing disputes and regulatory matters within the cooperative sector while adhering to the principles of devolution and constitutional governance. Legal provisions, including those outlined in the Constitution, the Cooperative Societies Act, and relevant case laws, provide the foundation for addressing these challenges and guiding the tribunal's operations.

#### **4.5 Remedies and Recommendations**

In order to address the challenges posed by the devolution of Cooperative Tribunal functions, a comprehensive set of recommendations is essential to ensure the effective transition of these functions:

- 1. Clear Legislative Framework (Cooperative Societies Act and Regulations):** Develop a comprehensive legislative framework that delineates the specific jurisdiction and responsibilities of both national and county-level Cooperative Tribunals. The Cooperative Societies Act and associated regulations should enshrine this legislative framework. The framework can significantly reduce jurisdictional ambiguities and conflicts by specifying the types of cases each tribunal can handle. For instance, section 46 of the Cooperative Societies Act can be amended to define each tribunal's jurisdiction explicitly.
- 2. Intergovernmental Agreements (Intergovernmental Relations Act):** Establish robust intergovernmental agreements between the national and county governments to facilitate seamless coordination and cooperation in Cooperative Tribunals. These agreements should outline precise mechanisms for referring cases and sharing resources. Drawing inspiration from the Intergovernmental Relations Act (2012), such agreements can provide a structured framework for inter-tribunal collaboration. An example of this collaborative approach can be observed in the intergovernmental agreements between the national government and county governments to govern functions like healthcare and infrastructure development.

To effectively tackle the organizational and operational challenges faced by the Cooperative Tribunal system, the following targeted recommendations are imperative:

1. **Comprehensive Training Programs (Cooperative Societies Act, Section 46):** Launch comprehensive training programs for tribunal personnel at national and county levels. These programs should cover various subjects, including cooperative law, governance, dispute resolution techniques, and specialized knowledge in cooperative matters. The approach aligns with the mandate stipulated in Section 46 of the Cooperative Societies Act, which emphasizes the importance of well-trained personnel in the tribunal system.
2. **Transparent Resource Allocation (Article 201 of the Constitution):** Promote transparency in allocating resources to Cooperative Tribunals. Develop a budgetary oversight mechanism that guarantees equitable funding for both national and county tribunals. In line with Article 201 of the Constitution, which mandates public participation in financial matters, encourage public involvement in the budgetary allocation process. Such can ensure that resource allocation is conducted in a manner that is fair and accountable.

To overcome constitutional and legal challenges affecting Cooperative Tribunals, these crucial recommendations can be considered:

1. **Constitutional Review (Constitution of Kenya 2010):** Initiate a comprehensive constitutional review process to clarify and refine Cooperative Tribunals' constitutional provisions. This review should seek to provide a more explicit delineation of jurisdiction, considering the principles of devolution and local governance enshrined in the Constitution of Kenya 2010. Stakeholder involvement should be integral to this process, including legal experts, cooperative stakeholders, and relevant government entities. For instance, the review can involve constitutional experts with experience drafting and amending constitutional provisions.
2. **Harmonization of Legal Frameworks (Legislative Reforms):** Launch legislative reforms to harmonize national and county laws on cooperatives and tribunals. These reforms should establish a legal framework that ensures compatibility between cooperative statutes, devolution provisions, and jurisdictional matters. Consideration of specific provisions within the Cooperative Societies Act, such as Section 3, which deals with promoting cooperative education and training, is essential in this process. Consultation with legal experts, cooperative stakeholders, and relevant government entities can provide valuable insights into the necessary amendments and adjustments.

### 3. **Regular Review Mechanism (Cooperative Societies Act and Regulations):**

Implement a structured and regular review mechanism for legal frameworks, including the Cooperative Societies Act and associated regulations. Such periodic assessments ensure these laws remain responsive to the evolving cooperative landscape and constitutional developments. Mechanisms can inspire it in other sectors, such as education, where curriculum and policies are periodically reviewed and updated to align with contemporary needs and developments.

Kenya can navigate the complexities of organizational structure, jurisdictional boundaries, and operational efficiency within the Cooperative Tribunal system. Moreover, constitutional and legal reforms can ensure that the cooperative justice system operates seamlessly within the context of devolution, promoting adequate access to justice for cooperative societies while upholding constitutional principles.

In the wake of Kenya's constitutional reforms in 2010, which ushered in a new era of devolution, the Cooperative Tribunal system has found itself at the intersection of profound change. This chapter has provided an in-depth exploration of the implications of devolution on the Cooperative Tribunal in Kenya, offering insights into the legal framework, challenges, and proposed remedies. The Cooperative Tribunal system has the potential to evolve into a robust and responsive mechanism that empowers cooperative societies, enhances access to justice, and aligns with Kenya's constitutional vision of devolution and local governance. With proactive measures and reforms, Kenya can forge an efficient and responsive cooperative justice system that serves its cooperative societies' needs and upholds its Constitution's principles.

### **Conclusion**

Therefore, the devolution of Cooperative Tribunal functions represents a dynamic and transformative process. Challenges exist, but they are not insurmountable. By embracing clear legal frameworks, transparent resource allocation, capacity building, and constitutional alignment, Kenya can steer the Cooperative Tribunal system towards a future that exemplifies the ideals of justice, governance, and cooperative empowerment envisaged in its constitutional journey.

## **CHAPTER FIVE CONCLUSION AND RECOMMENDATIONS**

### **5.0 Summary**

This research thoroughly investigates the gaps in Kenya's legal, structural, and policy frameworks concerning cooperative dispute resolution and access to justice. The study's objectives were met, confirming the hypothesis that current systems are inadequate for the evolving needs of cooperative societies. It was found that the Cooperative Tribunal, despite having regional registries, covers less than a third of the counties, highlighting a significant accessibility gap. The research also revealed that thirteen years after promulgating the Constitution of Kenya (COK), there remains a lack of legal provisions and policy directions to address these gaps. The study suggests that the Tribunal's limited reach and its outdated provincial model are insufficient for the growing and diverse nature of cooperative societies, especially in the informal sector. The research concludes that devolution of Tribunal functions is necessary but requires comprehensive legal reforms, enhanced digital access, and civic education to ensure effective dispute resolution and access to justice, aligning with the constitutional journey of Kenya.

### **5.1 Conclusion**

This paper pivots around central arguments that revolve around the devolution of functions related to Kenya's Cooperative Tribunal. The decentralization of Cooperative Tribunal functions to the county level aims to bring governance closer to the cooperative society members. This approach enhances accessibility and reduces bureaucratic hurdles, a principle that aligns seamlessly with Kenya's constitutional tenets of devolution.

By devolving Cooperative Tribunal functions, counties gain the autonomy to tailor their dispute resolution mechanisms and regulatory frameworks to cater to the specific requirements of their respective communities. Devolution promises streamlined and efficient dispute-resolution processes within cooperative societies. Decentralized structures are inherently more responsive to emerging issues.

After extensive research and analysis of the devolution of functions associated with Kenya's Cooperative Tribunal, the data suggests that decentralizing tribunal functions to the county level promotes increased accessibility to justice for cooperative society members. This shift aligns with Kenya's constitutional principles of devolution, emphasizing local governance

and ensuring services are brought closer to the people. The cooperative tribunal becomes more efficient and responsive by reducing bureaucratic layers and introducing mechanisms tailored to local needs. Therefore, the hypothesis positing that devolution enhances accessibility and minimizes bureaucracy appears to be substantiated by the findings of this study.

In summary, the Research Objectives as laid out in the project were met, since the paper has discussed the effectiveness of the cooperative tribunal, its role in the social transformation through access to justice (STAJ) has been laid down and the relevant recommendations of what should be done to devolve the cooperative tribunal's functions to the county levels has been proposed.

The Research Questions have been duly answered and the Research Hypothesis that devolution is the key to enhancing the effectiveness of the Cooperative tribunal in the access to justice and the resolution of cooperative disputes in line with the devolution principles as laid out in the COK 2010 has been proved.

### **5.3 Recommendations**

Given the challenges and intricacies of devolution in Kenya's Cooperative Tribunal, the following recommendations are proposed to bridge the gap between the study's objectives and its findings, addressing the core issue of devolution and its impact on access to justice in Kenya's cooperative sector:

#### **1. Initiate a Comprehensive Constitutional Review Process:**

- Aim: To clarify ambiguities around Cooperative Tribunals.
- Action: Explicitly delineate jurisdiction while upholding devolution principles as per the Constitution of Kenya 2010.
- Collaboration: Engage constitutional experts, cooperative stakeholders, and relevant government bodies.

#### **2. Introduce Legislative Reforms:**

- Aim: To align national and county laws regarding cooperatives and tribunals with devolution principles.
- Action: Amend and improve provisions in the Cooperative Societies Act, such as Section 3.
- Collaboration: Work closely with legal professionals, cooperative stakeholders, and government bodies.

- Establish a regular review mechanism for the Cooperative Societies Act and its regulations.
3. **Allocate Resources for In-depth Studies on Devolution’s Impact on Cooperative Tribunals:**

- **Aim:** To produce well-researched, data-backed studies.
- **Action:** Allocate sufficient resources by stakeholders, including governmental and research institutions.
- Encourage interdisciplinary research collaborations among legal experts, economists, sociologists, and governance specialists.

By integrating these recommendations with the study’s core objectives, a more robust and harmonious cooperative justice system in Kenya is envisioned. This approach aligns with constitutional governance principles and fosters local empowerment and effectiveness in dispute resolution. Hence, by weaving these recommendations seamlessly with the study’s core objectives, it is envisioned that they will address the issues observed and provide a roadmap for a more robust and harmonious cooperative justice system in Kenya. This approach not only aligns with the principles of constitutional governance but also fosters local empowerment and efficacy in dispute resolution.

**Timelines for the implementation of the recommendations:**

The following outlines the responsibilities and timeframes for these recommendations:

1. **Constitutional Review Process:**

- **Responsible Parties:** Constitutional experts, cooperative stakeholders including the Ministry of Cooperatives Development and MSMEs, the office of the Attorney General the Judiciary of Kenya and other relevant government bodies.
- **Timeframes:**
  - **Short-term:** Initiate the review process within 6 months.
  - **Medium-term:** Draft amendments and conduct stakeholder consultations within 1-2 years.
  - **Long-term:** Finalize and implement changes within 3 years.

2. **Legislative Reforms:**

- **Responsible Parties:** Legal professionals, cooperative tribunal, cooperatives stakeholders and the regulators, the Judiciary, government bodies, and legislators.
- **Timeframes:**
  - **Short-term:** Identify necessary reforms within 1 year.



- **Medium-term:** Draft and propose legislative changes within 2 years.
- **Long-term:** Enact and review the laws within 3-4 years.

### 3. **Resource Allocation for Research:**

- **Responsible Parties:** Governmental and research institutions.
- **Timeframes:**
  - **Short-term:** Allocate funds and resources in the next fiscal year.
  - **Medium-term:** Conduct and publish initial studies within 2-3 years.
  - **Long-term:** Engage in ongoing research and periodic reviews.

### 4. **Interdisciplinary Research Collaborations:**

- **Responsible Parties:** Academic institutions including the Cooperative University, cooperative societies, the Cooperative tribunal, the Regulators; SASRA and CCD, the Apex body, the Cooperatives Association of Kenya (CAK), legal experts and interdisciplinary experts.
- **Timeframes:**
  - **Short-term:** Establish collaborative frameworks within 1 year.
  - **Medium-term:** Undertake joint research projects within 2-4 years.
  - **Long-term:** Maintain continuous collaboration and publish findings.

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