SOME LEGAL ASPECTS OF THE HARAMBEE INSTITUTION IN KENYA.

A Dissertation submitted in the partial fulfilment of the requirements for the Bachelor of Laws (LL.B.) Degree of the University of Nairobi.

By

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To MY BELOVED PAPA, MAMA

AND

Mlle. MELLAB W. NANDECHIA

PREFACE

The paper contains an exposition and discussion of the Harambee institution in Kenya in a legal context, and some suggestions for its legal regulation. The Harambee institution is an important social and economic institution which has been largely responsible for the honourable task of nation-building since Kenya's independence. Naturally such an important institution requires legal regulation if it is to be protected from wanton abuse.

I was at first attracted to the idea of writing this paper as a consequence of a discussion with Mr. Peter Morton, then Lecturer in Equity and Law of Trusts, University of Nairobi (now at University of Birmingham, England) on the apparent legal penury from which the Harambee institution suffers, particularly as regards the collection and management of the Harambee funds. Besides, there was at a general level, the issue of the relevancy of the English law of trusts to Kenya. Initially the paper was intended to be in the form of a handbook for the collectors of Harambee funds. Unfortunately, however, this scheme had to be abandoned when Mr. Morton was recalled to the University of Birmingham late 1977, and I had to adopt a different approach. I therefore chose instead, after supplying the historical and analytical background to the nature and socio-economic importance of the Harambee institution, to describe and discuss the English law of charities received in Kenya as part of the doctrines of equity and then apply them to the Harambee institution and hence give it a legal expose'. Hence I deal in turn with the classification of Harambee projects, the collection of Harambee funds, the management and use of the funds and in concluding suggest the legal steps that should be taken to make the institution legally viable.

The bulk of the matter in this paper is Kenyan, collected from newspaper cuttings and through empirical research and interviews, but, nevertheless, references to the position in East Africa and English law are made when and where comparison is desirable or where they lend support and credence to the writer's inferences.

I must state that the account given herein is by no means exhaustive. This is attributable to various factors. A detailed and exhaustive research on the Harambee institution needs a lot of time and heavy financial backing. I suffered from an acute lack of both resources. Besides, the lack of co-operation coupled with an attitude of indifference shown by most of the administrators, and the reluctance of people to divulge the requisite information for fear that the same may be used against them by the Government, rendered my empirical research extremely difficult; so much so that I sometimes felt the research would bear no fruit at all. But somehow I was not possessed with the thought of giving up the whole idea. One thing consoled me: that if my work will enable and stimulate me or some other interested student of law to still greater efforts to research on the Harambee institution I shall find a solace.

It is a pleasurable duty to acknowledge the benefit which, in preparing this work, I have derived from encouraging comments and criticisms by colleagues and fellow undergraduates in the Faculty of Law. First and foremost, I am deeply indebted to my colleague and supervisor, David M. Isabinye Esq. Lecturer, Department of Private Law, for the painstaking and laborious task of helping to streamline and keep my thoughts in a scholarly orbit. His friendly and constructive comments and criticisms proved invaluable to me, and I am certain that without him the writing of this paper would have been an insurmountable task. His touching devotion will always remain indelible.

Secondly, Mr. Peter Morton read through my detailed outline of the original draft and offered useful help in the lay-out of my paper, chapter by chapter.

My fellow undergraduates, Messrs. Salim Wanyonyi Machio and Jack Kimeu Kakonzi were an indispensable asset. Their encouraging comments and criticisms cannot be sidelined as they were

of great help. They too helped to pull me out of the legalistic muddle in which I had fallen.

My aunt, Mrs. Dorcas K. Wakhisi undertook the breathless work of reducing my unreadable handwriting to a typed and easily readable form.

And if I appear to be incapable of articulately expressing the debtowed to my beloved Papa and Mama and to Mlle. Mellab W. Nandechia, to whom this work is happily dedicated, then the reason is that this dedication itself betrays more than they would wish me to say in public.

Finally, it remains to be stated that I remain fully responsible for all errors of commission and omission of both procedural and substantive legal contents of this work.

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ABBREVIATIONS

A.C.	-	Appeal Cases.
All E.R	-	All England Law Reports.
Beav.	-	Beavan (1838 - 1866).
Cal. Apps	-	California Appeals (U.S.A.).
Ch.	-	Chancery Reports.
Ch. D.	-	Chancery Division Reports.
C.L.J.	-	Cambridge Law Journal.
Conv. (N.S)	-	Conveyancer and Properly Lawyer (New Series).
E.A.	-	Eastern Africa Law Reports.
E.A.L.J.	-	East Africa Law Journal.
E.A.L.R.	-	East Africa Law Review.
Ex.D.	-	Exchequer Division Reports.
I.C.L.Q.	-	International and Comparative Law Quarterly.
J.A.L.	-	Journal of African Law.
K.L.R.	-	Kenya Law Reports (1922-1956)
L.Q.R.	-	Law Quartely Review.
M.L.R.	-	Modern Law Review.
Str.	-	Strange, I (ad. by Nolan) (1716 - 1749)
W.L.R.	-	Weekly Law Reports.

CHAPTER ONE:
INTRODUCTION.

I:1. Scope and Aim of the Paper:

During the colonial period, the social and economic development of Kenya was not uniform and consistent. The colonialists lived and developed their resources in their own area as a distinct and separate country. The reasons for this are fairly obvious. Colonial rule was the antithesis of national development in its broad context. To permit the African to play a part in the development would have been unconscionable. The natives were to develp at their own pace and rate. As a result there were so many discrepancies. Time in turn facilitated colonial exploitation of both natural and human resources of the country so that at independence Kenya was confronted with social and economic problems of staggering magnanimity.

There was inherited in Kenya a system of extreme inequality. Kenya had painfully few resources at its disposal with which to confront these problems. There were enormous demands. Education at a mass level was unknown as it was regarded as a special integral part of the elite colonial society. Technical skills were desparately limited. The majority of the people were still engaged in subsistence cultivation and living in a state of object poverty. Many welfare services were at a primitive stage of development or non-existent. This was the reality with those who became the new leaders at independence had to cope. They had to remove from the people the burden of poverty, the scourge of mulnutrition and illhealth, the frustration of illiteracy, and the demoralising lack of economic opportunity.[1]

One of the ways of at least containing these demands was to harness a tradition that was deeply rooted in the social life of the people and give it a new and revitalised role in modern Kenya[7]: the concept of self help - a realisation by the people of their own common needs and the conviction by the people that these common needs could be made through their own collectively concerted efforts. The role of this concept and its positive contribution to the social and economic development of Kenya since independence is undoubtedly colossal. The aim of this paper is to discuss how this concept of self help - HARAMBEE - has been used since independence, the circumstances in which it has been applied to the development projects in Kenya and the laws that apply or should apply to this institution of Harambee.

There are two basic arguments here. Firstly, I argue that Harambee projects throughout the country have had no systematic control and co-ordination from the Government at all stages[2] so that some of the people's contributions have been misused[3]. More concisely, I argue that there is, generally, an unavailability of Government machinery to ensure enforcement and control the maladministration of contributions for Harambee projects. Various projects went up, and still do so, just because the wananchi thought, and think, it is the way to forge ahead in development.

Secondly, I argue that the harembee projects are potentially and actually charitable institutions and as such the rules of charity received in Kenya as part of the doctrines of equity made applicable by the reception clause[4], will be considered in this relation. No effort is made here to -

discuss the political activities which determine the pattern of control of the harambee projects, though this may be mentioned incidentally in the course of the paper, as this is a highly complex province into which the ocassion does not allow us to enter. Rather it will suffice to say that political participation has become a grab-bag concept[5] with prominent politicians patronising harambee projects and so regarding them as their own properties[6]. An obvious example is shown by the Tudor Harambee Clinic in Mombasa which sparked off hot accusations sabotage between the sitting Member of Parliament for the area Sharrif Nassir and his predecessor Mohamed Jahazi? As we have said the concentration and emphasis are on the legal aspects or rules that may be applied to make the harambee projects more viable.

It is important to bear in mind that this account is by no means exhaustive because as we have noted above time and ocassion do not allow. Besides, resources to make an exhaustive research and account to be done here lacking. However, it is believed that the account given herein represents the general trend in the Harambee institution in Kenya.

I:2. The Nature and Importance of the Concept of Harambee in Kenya's socio - economic Development.

Harambee as a concept, meaning collective effort - "pull together" - is not new to Kenya. The concept embodies ideas of mutual assistance, joint effort, mutual social responsibility, and community self-reliance. It is applied in the day to day activities such as collective neighbourhood house-building, weeding, bush clearing, irrigation, harvesting, fund raising, and the term is found in languages of many tribes in Kenya. For instance the Luo -

call it "Konyir Kende", the Kikuyu call it "Karambi", the Kamba call it "Mwethia", the Masai call it "Ematonyok", whereas some tribes among the Luhya Community call it "Obwasio", ehabini" or Owulala". Even the concept is not confirned to Kenya[8]. In fact the concept is an old universal one and its difference from one culture or community to the other is merely a matter of nomenclarure. No society can claim to have the monopoly of Harambee as a concept of self help. In Africa, it played and continues to play a very important role in traditional life among many traditional societies.

In Kenya Harambee self-help groups and schemes are merely a modernisation of the traditional system whereby if anything major needed doing most, if not all, of the people turned up and lent a hand. Thust in June 1963 when The Father of the Nation, His Excellency Mzee Jomo Kenyatta, put out to the nation what has since become motto on the nation crast and a rallying cry at political and self-help meetings, he was not introducing a new concept but rather rousing an old tradition and life style among the people and trying to utilise it as one of the answers to the ostensibly insurmountable and innumerable demands of the people[9]. Thus the political - cum - economic nature of the Harambee concept did not amply manifest itself in Kenya until the advent of independence when it emerged out of H.E. Mzee Jomo Kenyatta's fertile political mind as a powerful and premeval slogan for nation building. On that auspicious ocassion of Kenya's internal self - gover- nment, Mzee Kenyatta said,

> But as we celebrate, let us remeber that constituional advance is not the greatest and in itself. Many of our people suffer in sickness. Many are poor beyond endurance. Too many live out narrow lives beneath a burden of ignorance. As we participate in pomp and circumstance, and as we make mery at this time, rember this: we are relaxing before the toil -

> that is to come. We must work harder to fight our enemies - ignorance, sickness and poverty.
> .....
> I therefore give you this call: HARAMBEE! Let us all work hard together for our country, Kenya.... We must make systematic efforts to harness the spirit of self-help and national unity".[10]

Thus, the President on this day specified the new dimensions of community self-reliance and gave HARAMBEE the seal of approval, respectability and protection agains single minded technical planners who may contradict local level aspirations, work procedures and priorities. After this date Harambee was used to donate community self-help efforts and all forms of collective self-reliance. Nationally, harambee self-help development effort is distinctive from other development activities. The Harambee projects are normally initiated, planned, implemented and maintained by local communities so that they reflect a bottom-up rather than top-down project initation. Secondly, they are heavily biased towards the use of local resources such as human labour, local power, local materials in construction and use of donations in kind.

R. Rasmusson summarises the distinction thus:

> "The distinctionbbetween Harambee projects and other development programmes supported by government or voluntary agencies is often fuzzy but local village, neighbourhood or region origin and initiative, the use of local leadership and indigenous principles appear to be critical distinctive components of Harambee. The style of resource mobilisation which emphasises articulating public committment and collective pressure, especially in mobilising capital and labour is seen as typical of Harambee.
>
> Harambee has very close affinity with indigenous reciprocal work arrangements. In many areas these work groups have become the building blocks of Harambee activity .... It is in many cases a cohesive solidarity movement at different social levels fo founded on common social, economic and political needs in different combinations".[11]

Perhaps more crucial is the economic significance of Harambee. Between 1967 and 1973 Harambee contributed 11.4% of the overall national development expenditure. And in 1975 alone 43% of the registered students in Kanya's secondary Schools attended non-government assisted Harambee Schools. In the same year people's contributions in cash amounted to K£ 4,299,250 as compared to K£ 4,125,166 in 1974.[12] Overall Harambee contributions in community development fields such as Community Centres and recreation exceeded government investment for most years between 1965 and 1972. In 1967 Harambee contributions to health projects and in education, were very close in marching government investment and the close tie in the field of education has been maintained ever since.[13] In 1977 it was estimated by the Ministry of Housing and Social Services that since 1964 more than Shs. 560 million had been collected and contributed by "Wananchi" in the form of cash, labour and materials.[14] The performance of Harambee is outstanding: it has forged a dynamism that has been responsible for Kenya's rapid development. It is trite in Harambee meetings to see man and woman contributing their personal property such as bananas and eggs which the income tax collector can never obtain.[15]

What then does the goevernment do to encourage the people to contribute towards the Harambee projects? In other words, is there a co-ordinating relationship between the government and Harambee? This is the subject of the next part of this chapter.

I:3. <u>The Relation between the Government and the Harambee Institution</u>:

Government documents indicate how very keen the Government of Kenya is to expand Harambee, as it emerged in its modern sense out of the Father of the Nation's fertile political mind, so that it becames a way of life and a strategy of development for all Kenyans. In planning terms Harambee projects come -

out as one of the most important means through which an important development objective of the 1970-74 and 1974 - 78 Development Plans were to be reached; that is, welfare improvement and increased participation of every Kenyan in the economy. Thus in the 1970-74 Development Plan, the Government stated that its first and most important goal was to produce a sufficient number of people with skills, knowledge and experience to support the national economy at a high rate of growth. The establishment and development of the various colleges of technology during this period was a practical and realistic response to this challenge and the supporters of these colleges believed that they would contribute to these requirements. And in 1974-78 Development Plan the government stated that it welcomes these colleges as a clear manifestation of the Harambee spirit in education. The government further stated that although it had a vast number of educational programmes to finance, it wanted to give support to the institutes by means of a block grant of £600,000 during the Plan period and other tangible measures. Besides, there is a special co-ordinating committee of the colleges, under the Ministry of Education, composed of representatives from Industry and Labour, the colleges and the relevant Ministries.

At a lower and grass-root level is the Division of Community Development in the Ministry of Housing and Social Services. This is the department which is directly concerned with the organisation of local effort aimed at ensuring that people collaborate with each other and the government to improve their own economic, social and cultural conditions. It is also responsible for self-help projects and allocates government grants to various projects. During the 1970-74 Plan period the government allocated £444,000 through the department for assistance to self-help projects and during the 1974-1978 the government projected £815,000 as contribution to self-help projects.

Financial assistance to the Harambee projects aside, there is no coherent and comprehensive plan to march government assistance with what people in particular areas want, as the self-help efforts usually arise in response to unfulfilled needs as defined by the Community itself.[16] Apart from the provincial and district administration that license the Harambee fundraising meeting there is no managerial hand of the government given. It is therefore not uncommon to find that such self-help projects as nursery and primary Schools, dispensaries, cattle dips, health centres and churches have either collapsed or have been abandoned altogether where such activities are masterminded by a few spongy profligates who seem to have mastered the intricacies of the grammar of mammonism and have ultimately misappropriated the colossal sums of money involved in such projects. This is trite knowledge so that any quotation would be superfluous. Kenya as a developing country needs a very comprehensive plan to spearhead the process of nation building through the essential and powerful spirit of Harambee. Of course, it cannot be denied that there is a great deal of evidence of social mobilisation during Harambee fundraising meetings. But it is argued that it is not proper to leave the collection and management of Harambee funds to the people themselves. Such vital asset as the Harambee institution in the social and economic development of Kenya needs government patronage in order to avoid its abuse and sabotage. For instance, the government should come out with a defined way of auditing the money contributed by the "Wananchi", and the money given by it as assistance, towards self-help projects in order to alleviate the problem of embesslement. Though the National Community Development Committee is charged with the duty of co-ordinating self-help activities, there are no measures to ensure that there is no maladministration and that self-help projects are not undertaken for which resources are not available. This lack of coherent control is discussed in -

CHAPTER TWO

CLASSIFICATION OF HARAMBEE PROJECTS

2:A. Introductory:

In the foregoing chapter we made two assertions by way of introduction. The first was that the doctrines of equity as applied in Kenya under the reception clause apply to the institution of Harambee, and the second was that Harambee projects are potentially or actually charitable projects or objects. In this chapter we aim at developing these arguments. We shall first briefly consider the development of the doctrines of equity and then the law of charities in England before these were imported in Kenya via the reception clause.

The term equity has the general meaning of equality or justice. As a legal concept in the 12th and 13th centuries it was the principle of mercy and fairness which would be invoked by English courts to mitigate harships caused by too strict an adherence to the general common law doctrine in unusual cases. Equity in the sense of an exceptional exercise of discretion based on mercy or fairness was a technique used by the English judges during the formative years of the common law. During that period the common law courts freely adapoted their procedures and remedies to the changing needs of their society and they occasionally invoked the concepts of equity or right reason to justify adaptations and changes in law. In time, however, reliance upon concepts of equity as a means of expanding the common law declined. This in turn stimulated the development of a "court of equity", in contradistinction to the system of procedures and remedies of the common law courts.

The English law of charities had emerged as a distinct branch of equitable jurisdiction in the court of chancery before Tudor times, the mediaeval law being primarily concerned with gifts, whether inter rivos or by will to pious uses. Very often such gifts were made to the church or to some priest, with a direction to apply them for the relief of poverty, either generally, or more particularly in some place, or for the benefit of some group, or for some other purpose of accepted public utility, such as the repair of churches, bridges or roads, or for the redemption of prisoners who might have been enslaved abroad. The church was not the only charitable institution; private benefaction had also been responsible for the creation of many small charitable trusts.

Despite, however, the fact that the institution of charity was started even before 1500 the chief problem in the law of charities was that of securing the proper administration of charitable trusts, and especially of ensuring that the funds were applied to the objects designated by the donor. Resort at this time to court was rare and hence abuses in the administration of charities existed unchecked.[2]

The first English legislation which sought to establish some system of control for the administration of charities, which was linked with the central government was the Statute of Charitable Uses[3]. The Preamble to the Statute contained a comprehensive and varied list of charities and the statute made it clear that at least those purposes were charitable. The objects enumerated in the preamble were as follows:

> "The relief of aged, impotent, and poor people; the maintenance of the sick and maimed soldiers and mariners, schools of learning and free schools and scholars of universities; the repair of bridges, ports, havens, causeways, churches, seabanks and highways; the education and preferment of orphans; the relief, stock or maintenance of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; the aid or case of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes".[4]

It must be noted that the statute was directed to reforming abuses in the application of property devoted to charitable uses, rather than defining charity. Besides, it must also be noted that this statute was later repealed by the Mortmain and Charitable Uses Act, 1888[5] except the preamble which was expressly preserved and set out in section 13(2) of that Act.

The list in the preamble was not exhaustive; but to decide whether a purpose is charitable or not in law, it has since been the practice of the courts to refer to the ancient statute of Elizabeth. The objects there enumerated and all others which by analogies are deemed within its spirit and intendment are charitable in the legal sense. No other objects are in English law charitable. Those named in the preamble, which has received a very wide construction, are to be regarded as instances, and not as the only objects of charity. It is still the general law that a trust is not charitable unless it is within the spirit and intendment of the preamble to the ancient statute of Elizabeth. Even if the object of a trust were in some sense beneficial to the community, it would still be necessary to discover that it fell within the spirit and intendment of the instances given in the preamble to that statute in order for the courts to hold it as a valid charitable trust.

Charity in the legal sense was not authoritatively stated until the decision of the House of Lords in the case of COMMISSIONERs FOR INCOME TAX vs. PEMSEL in 1891.[6] In that case lands in England were conveyed by deed in 1813 to trustees upon trust after payment of costs and outgoings to apply two-fourths of the rents and profits for the general purposes of maintaining; supporting and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, commonly known as the Moravian Church; and to apply the remaining two-fourths for the purposes which were admitted in argument in the House of Lords to be charitable. In his judgement, LORD MACNAGHTEN said,

> "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for advancement of education; trusts for advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceeding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do either directly or indirectly."[7]

It was this definition of charity, as it stood at August 12, 1897, that was received in Kenya under the reception clause, and subsequently followed by courts in deciding the purpose which the law considers to be charitable. For instance, in THE SHEIKH FAZAL ILAHI NOORDIN CHARITABLE TRUST vs. COMMISSIONER FOR INCOME TAX,[8] the then Supreme Court (now High Court) of Kenya having found, inter alia, that the objects of a trust were only ostensibly charitable and that the class of beneficiaries was not sufficiently defined, dismissed an appeal by the trustees against tax assessments for the period 1942 to 1953. The grounds of appeal to the Court of Appeal for Eastern Africa against that decision were that the objects of the

trust - "for the benefit or towards the relief of the poor and needy Muslims in Mecca and/or Medina" - were charitable within the meaning of the Income Tax Act Section 10(1)(i)[9] and therefore its income for the years 1942 to 1951 were exempt from tax, that surpluses arising from sale of certain trust properties were not profits from trading transactions but tax free capital accretions, and that penalties imposed by the Commissioner for delay by the trustees in submitting their returns were excessive. The Court held, inter alia, that as the class of beneficiaries was ascertainable and as the construction to be placed on the words of the settlement was consistent with the ostensible public character of the trust, the trust was one of a public character within the meaning of the Act and accordingly was exempt from tax for the years 1942 to 1951.

And in RE: TANGANYIKA NEWSPAPERS LIMITED,[10] a company was incorporated in 1958 to manage and publish three vernacular newspapers which had been previously published for the Government of Tanganyika by its Public Relations Department. The government subscribed at par for 44,000 shares of £1 each which were the only shares issued and these were transferred to trustees appointed by a deed dated March 12, 1958, who were to ensure the continued publication of the journals. The deed also provided that the main function of the papers was to disseminate fairly and impartially news and other matters of public interest with fair comment thereon and generally to spread information and stimulate thoughts among the people of Tanganyika. The company having made substantial losses tried to arrange for continued publication of the papers in association with a Kenya company and an agreement was prepared recording the arrangements between the

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parties upon terms of which the trustees then sought the approval of the court and, if the court were to hold the proposed arrangement to be ultra vires the trustees, authority to settle a scheme whereby the trustees could enter into agreement. The court held, as far as is relevant, that the trust established could be regarded as being substantially for the purpose of advancing education in the sense of the second class of charitable trusts referred to in the Pemsel case. CRAWSHAW, J. said,

> "There can be little doubt----that the provision of a newspaper in Kiswahili provide for 'the dissemination fairly and impartially of items of news and other matter of public interest' is to the benefit of the community, or at least to a substantial section of it', and therefore charitable."[11]

It may be asked why it has been necessary, if at all to deal with what is ostensibly a restatement of the English law of charities besides looking at the historical development of the doctrines of equity in general. How relevant is this to the Harambee institution in Kenya? This discussion has been necessary as providing a working foundation for the application of the doctrines of equity to the classification of Harambee projects in Kenya.

In Kenya the courts are directed to apply the doctrines of equity as at the date of reception, that is, August 12, 1897.[12] Generally, the courts will apply recognised doctrines of equity unless either a particular rule was developed in England in the context of distinctively English circumstances, which are not relevant in Kenya, or there exist comprehensive, expressly or by implication, the English rules. This principle limits the applicability of equitable doctrines by reference to the provision in the source law which

provides that "the said common law, doctrines of equity and statutes of general application shall apply only so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary." This is an important provision that must be borne in mind in trying to classify the Harambee projects in order to determine whether or not they are objects of charities.

2:B.1. "Private" Harambee Projects:

Strictly speaking the use of the word "private" to classify the objects misnomer as the distinction between private and public Harambee does not exist ab initio. This distinction is necessitated the fact that the English law of charities which was imported in Kenya distinguishes between private and public trusts. In Kenya all the objects of Harambee funds are potentially or actually public or tend towards the benefit of the public.

According to English law, a "private" Harambee project would be defined as one which aims at benefiting either one person or a defined number of persons. As we have already seen, the spirit of Harambee fund-raising meetings have become a part of the calendar. It is not uncommon to read press reports of a Harambee fund-raising meeting to send Wafula[13] to the United States for further studies after failing to get admission to the local institutions. Members of the public are usually called upon to contribute towards such a salutary venture as Wafula may not be in a position to raise the required amount of money before admission to the institution abroad.

Similarly, an appeal to members of the public may be launched through the press to help send Ajiambo to Britain or the United States for a life saving cardiac surgery[14] or a complicated kidney transplant.[15] The public, out of mercy and goodwill and Harambee efforts to save the lives at stake, do not hesitate to contribute money in order to enable the victim to be flown abroad for the requisite treatment. In such cases the benefit to the defined individual is direct and tangible ensuing from terms of an appeal which are certain. There is somebody who has a correlative right in whose favour the court can decree, and the purpose is expressed with sufficient certainty to enable the court to control the performance of the trust fund. Thus as far as the equitable requirement of the certainty of objects, the subject matter and the words creating the trust does not arise and hence there are no problems. However, problems arise in other respects.

2. The Rule Against Perpetuities:

In England, the Rule against Perpetuities applies to private trusts, and is one of the most import rules that the trusts must conform to in order to be valid. As applied to trusts, the Rule may be stated thus:

> "A future equitable interest will be void if it may by possibility rest outside the perpetuity period, that is the period of a life or any number of lives in being at the creation of the trust plus eighteen years plus any actual periods of gestation."[16]

A discussion of this rule in relation to the ostensibly "private" Harambee projects is not possible and besides the occasion does not warrant it. The reason is that in the context and circumstances of the Harambee institution the rule does not apply. Harambee funds

are applied almost immediately for the purpose(s) for which they were raised as there is always a sense of immediacy which militates against any possible tying up of the funds. Both the legal and equitable title rest in the named beneficiary immediately after the Harambee fund has been collected. Normally, such "private" Harambee funds are established out of emergencies and dire needs to fulfil an imminent legal and/or moral obligation.

3. Taxation:

In England the most significant privilege enjoyed by charitable trusts is the fiscal privilege of exemption from tax of any kind. On the other hand, the non-charitable trusts are subject to income tax, estate duty and stamp duty, and capital gains tax. Though these kinds of taxation exist in Kenya, they are unheard of in the Harambee funds circles so that all Harambee funds are not taxable. The funds arise from the public's contributions and are for a particular immediate purpose. Perhaps the only situation in which the Harambee funds would be taxed would be where they are used for running a small business concern for a few people, but otherwise it is hard to conceive of a situation where tax would be levied on Harambee funds. They enjoy the same fiscal privileges as charitable trusts in England.

4. The Surplus:

Sometimes a problem arises where, after the fund has been subscribed to, a surplus remains after the purpose has been carried out as intended. A similar problem arises also where, before the intended

likely that if any one of the contributors had raised the issue in a court of law, it would have been held that all the cash and cheques were held on resulting trust for the contributors as the consideration upon which the contribution had been made had failed completely.

The same principle will be applied where the beneficial interest is not wholly disposed of, as in the case of Baby Joan Fund and the Margaret Wangari Hospital Fund. A modern illustration of this principle is the case of RE GILLINGHAM BUS DISASTER FUND.[21] In 1951 twenty-four cadets were killed when a motor vehicle ran into them. The mayors of several boroughs in the area wrote a letter to the Daily Telegraph to the following effect: "The mayors have decided to promote a Royal Marine Cade Memorial Fund to be devoted---to defraying funeral expenses, caring for the boys who may be disabled and then such worthy cause or causes in memory of the boys who lost their lives as the mayors may determine." The appeal resulted in subscriptions amounting to nearly £9000 contributed partly by known persons but mainly anonymously as a result of street collections and the like. The trustees spent about £2500 and then took out a summons to determine what to do with the surplus. HARMAN, J. held that because t e trust had failed as a charity the surplus should be held on a resulting trust for the donors, even though many of them were in fact anonymous. This followed from the principle that where money was held upon trust and the trust declared did not exhaust the fund, it would be reverted to the donor upon a resulting trust. The reasoning was that a donor did not part with the money out and out, but only sub modo to the intent and his wishes as declared by the declaration of trust should be effected. The trust having been effected, the surplus was held on

on a resulting trust for the donors.

The basis of Re Gillingham was that there was no intention on the part of the donors to part with the money out and out when they contributed it. More particularly, such an intention should no more be attributed to the anonymous contributor who had made his gift in a street collection than it should to a contributor who was identifiable. The fact that the donors are unascertainable does not affect the existance of the resulting trust.[22]

In Kenya, it is submitted, the result should be different. The surplus, as in the case of Baby Joan Fund, should be given absolutely to the family to defray funeral expenses and any other use that may be deemed necessary regardless of the mode of collection or the donor's intention. This is supported by both case law and policy considerations. In the case of RE ANDREWS TRUST[23] a fund was subscribed by the friends of the deceased clergyman for the education of his children, all of whom were then infants, and the document declaring the trusts of the fund stated that the moeny was not intended for the exclusive use of any one of them in particular, but as deemed necessary to defray the expenses of all, and that solely in the matter of education. When all the children had grown up there remained a portion of the trust fund unapplied. It was held that there was no resulting trust of the balance for the subscribers; and that the balance ought to be divided equally among the children. KEKEWICH, J. said that he was entitled to construe education in the broadcast possible sense, and not to consider the purpose exhausted

because the children had attained such ages that education in the vulgar sense was not necessary. He further argued that even if education were to be construed in a narrower sense it was merely the motive of the gift, and the intention must be taken to have been to provide for the children in the manner most useful.

Then there are policy considerations. An anonymous giver of money must realise when he gives that it will be quite impossible for him to be traced and his money refunded in the event of the objects of the trust failing, and he must surely be taken as giving up all claim to the money. Moreover the practical aspect of the matter cannot be entirely ignored. The result of the decision in Re Gillingham is that the money is held on resulting trust for a large number of unknown and most unascertainable persons. Most of these persons may have probably long forgotten whether they contributed anything, and if so how much, to the appeal; most of them would certainly be unable to adduce any adequate proof that they had handed over their shillings; most of them would certainly not dream of claiming their money back even if they knew they could, which they most certainly will not; and finally, even if somebody does try to claim his money back, the costs he will incur are certainly bound to be greater than the amount he contributed. Besides if the traditional African belief that education is an investment in an individual for the consequential benefit of the society is accepted, and indeed it should, and further that life belongs to the society rather than to the individual and that when one's life is at stake the society or community at large gets involved and bereaved, then

one sees the justification in holding that a surplus, regardless of the way the fund was subscribed to, goes to the intended beneficiary or his family. The faction of traditional mutual interest dependence and reciprocity among the Africans strongly incline towards such a course.

2.C. Public Harambee Projects:

Applying the English law of trusts to Harambee projects, we may define the public Harambee projects as projects which would be trated under the law as charitable, that is, projects which are of value and importance to the community and therefore entitled to a number of concessions in terms of enforcement, certainty and tax. These are the projects which have played an important role in Kenya's socio-economic development since independence. They enjoy various advantages.

They are purpose trusts and there is no need for human beneficiaries to enforce them as in the case of non-charitable purpose trusts. Public Harambee projects, being purblic trusts, are enforced by the Attorney General in the name of the State, though the general administration is carried out by the Charity Commissioners.

There is no requirement that the objects of the trust must be certain as the court and the Commissioners have jurisdiction to establish a scheme for the application of the funds for specific charitable purposes.

Public Harambee projects may be perpetual. The same applies to funds for their upkeep and maintenance. In fact the purpose of many charitable or public Harambee projects could be said never to be achieved in toto.[24] Many existing charitable projects continue after decades of existence, and schools and churches are dependent on public Harambee donations.[25]

Besides, the public Harambee projects are exempt from taxation of any kind. For example, no capital gains tax arises where a gain accrues to a charity and the gain is applied and is applied for charitable purposes.

The preceeding part has been discussed on the assumption that what we have referred to as public Harambee projects are charitable. But was this a priori assumption correct? In other words, what justification is there to show that what has been designated as public Harambee projects are charitable?

There is a considerable body of case law in Kenya, and East Africa generally, on the subject of charitable trusts.[26] In none of these has it ever been doubted that English law has to be applied in East Africa in determining whether or not a trust is charitable, although its application may be condit9oned by local circumstances.[27] A claim to charitable status is determined by considering whether, as in England, the purpose in question comes within Lord Macnaghten's classification28, as exemplified by the cases decided in accordance with it. In this section of the paper, we intend to look at each one of the headings in turn, considering at each stage how the Harambee

institution fits in. This will ultimately help us in deciding whether or not the institution is a charitable one.

i) The Relief of Poverty:

In Kenya money is usually raised through Harambee efforts by members of the public towards the relief of poverty in drought striken areas and in the country generally. This may be through the annual Freedom From Hunger Walk in which people converge on major urban centres throughout the country to participate, or the annual Nation/Taifa "Help A Sick Child Appeal, or merely through Harambee fund raising meetings. Such money goes towards the relief of the aged, impotent and poor in the country. Thus, money towards the help of homes for the destitute like the Salvation Army Schools for the Blind, Tumutumu Deaf and Dump Unit, Dayanand Home, Turkana Children's Home, and Amukura Orphanage Home would be charitable as providing relief to the impotent. This is supported by the case of RE LEWIS[29] where the testator left to ten blind girls and ten blind boys "Tottenham residents if possible the sum of £100 each" and it was held that the bequest constituted a valid charitable trust. It is with this spirit of relieving the impotent that the Nation Group of Newspapers launches the annual appeal referred to above, and calls upon the public to support the homes for the destitute.[30]

Indeed, relief of impotence is by its nature charitable. When a man is,for instance, both poor and blind, he suffers from two disabilities which reinforce each other; his blindness keeps him under the scourge of poverty and his poverty makes excruciatingly

difficult to relieve his blindness. By giving him money one tends to relieve both disabilities. He can purchase such means as exist, for instance, the Brailla, to help to relieve his blindness.

Similarly, the relief of the aged will be charitable. Harambee funds towards, for instance, the Mabale Destitute Aged Home in Busia Township and any other similar institution in the country would qualify as charitable as these would enable the inmates to be provided with food, clothes and so on. Two English cases support this view. In RE GLYN'S WILL TRUSTS[31] a residuary gift which established a trust to build and endow free cottages for old women of the working classes of the age of sixty or upwards was upheld as charitable. And in Re BRADBURY[32] a gift to pay money from a fund"for the maintenance of an aged person or persons in a nursing home approved by my trustees" was upheld as charitable.

As far as poverty is concerned, an individual is considered to be poor for charitable purposes if he is genuinely in straitened circumstances and is unable to maintain a very modest standard of living for himself and the persons dependent on him. This is shown by Re COULTHURST.[33], A testator provided a fund to be applied "to or for the benefit of such--- of the--- widows and orphaned children of deceased officers and deceased ex-officers of (a company) ---as the bank shall in its absolute discretion consider by reason of his, her or their financial circumstances to be most deserving of such assistance---." This was held to be a valid trust for the relief of poverty. EVERSHED, M.R. had occasion to say what constitutes poverty; he said,

> "It is quite clearly established that poverty does not mean destitution; it is a word of wide and somewhat indefinite import; it may not unfairly be paraphrased for present purposes as meaning persons who have to 'go short' in the ordinary acceptation of that term, due regard being had to their status in life, and so forth."[34]

Besides, a charitable gift for the poor may be expressed in general and indefinite language. Thus, in RE DE CARTERET[35] a trust created by the payment of "annual allowances of £40 each to widows or spinisters in England whose income otherwise shall not be less than or more than £120 per annum,"preference being "given to widows with young children on them" was upheld as charitable.

It does not matter whether or not the class of beneficiaries is wholly outside Kenya.[36] It does not also matter by what means the poverty is caused. Funds to relieve hardship and suffering caused by natural disasters qualify as being charitable trusts for the relief of poverty. It is on this ground that relief for the flood victims in Nairobi and Bunyala Location in Busia in 1977[37] are submitted to be charitable. The legal aspect of the Harambee efforts in these instances is supported by the case of RE NORTH DEVON & WEST SOMERSET RELIEF FUND.[38] As a result of torrential rain, floods were caused over a wide area in the North Devon and West Somerset and an appeal relating to the damage was issued in these terms: "we invite not only the people of the west country, but everyone who has known and loved Lynmouth and the quiet villages of north Devon and West Somerset, which have suffered so grievously in this disaster, to contribute to a fund for the relief of all those who have suffered---." The public response was very tremendous, and it was held that on the wording of the appeal taken as a whole, there was an intention to apply the money subscribed for

relief of hardship and suffering experienced by the people and that the purpose was for public benefit and so charitable.

Similarly, Harambee efforts to provide money to assist in providing dwellings for the slum residents of Mathare Valley or Ngara in Nairobi would be evidently charitable as being for the relief of poverty.[39]

The importance of Harambee efforts to relieve poverty in Kenya becomes evident when one considers the fact that Kenya is not a social welfare state with a good welfare programme ensuring for public assistance and welfare payments, as would be found in very advanced Western countries. Though the Government gives some financial aid towards the relief of distress,[40] it is important to note that relief of poverty is not entirely the duty of the State so that one cannot say that charity fills the gaps which the welfare state programme leaves uncovered; in fact charit supplants state help.[41]

ii) Advancement of Education:

One of the most significant features of developing countries is the demand for formal education. Kenya is not an exception for since independence her Ministry of Education has made special effort to increase school places. This effort has been paralleled, and in places superseded, by a tremendous drive from the people to build local Harambee schools without governmental financial assistance. These schools are established by many self-help groups founded on ethnic bases, and are run by local committees that raise funds amongst the inhabitants of a location or district. The quality of education

offered in the schools aside, it is evident that the most important aspect of development through Harambee efforts has been the manifestation of self-help in the field of education.[42]

The concept of education has progressed a long way since the preamble to the Statute of Elizabeth I spoke of "the maintenance of schools of learning, free schools and scholars in universities" and "the education and preferment of orphans" and now "extends to the improvement of a useful branch of human knowledge and its public dissemination."[43] The concept includes satellite purposes such as the payment of teachers and administrative staff.

Education requires something more than the mere accumulation of knowledge. Research which is likely to produce material benefit to the community, such as medical or scientific research, will be charitable. Thus, in the English case of RE HOPKINS' WILL TRUSTS[44] where a testatrix left by her will a third of her residue to the Francis Bacon Society Inc. "to be earmarked and applied towards finding the Bacon-Shakespeare manuscripts and in the event of the same having been discovered by the date of my death then for the general purposes of the work and propaganda of the society," it was held the bequest was for a charitable purpose because the revelation of the research would probably contribute decisively to a solution of the authorship problem and might lead to improvements in the text and to more accurate dating. The society's main objects were, first, to encourage the study of the works of Francis Bacon as philosopher, lawyer, statesman and poet; also his character, genius and life; his influence on his own and succeeding times, and the tendencies and results of

his writings; and second, to encourage the general study of the evidence in favour of Francis Bacon's authorship of the plays commonly ascribed to Shakespeare, and to investigate his connection with other works of the Elizabethan period.

It is submitted that in Kenya, funds raised on Harambee basis or otherwise to be used towards the discovery of a search or research of the original and unpublished manuscripts of East Africa's greatest poet and novelist, Shabaan Robert, or the devoted Swahili scholar Shihabuddin Chiraghdin,[45] would be of the highest value to history and Kiswahili literature and as such would be doubtlessly charitable. This is more so when one bears in mind that Kiswahili has been declared a national language besides being the language that can be read and spoken fluently by most people in Kenya. Indeed it was due to the peculiarity of Kiswahili as a medium of keeping the people informed of what was happening and why, and of the processes of Government administration, that Crawshaw J. construed a charitable purpose in Re Tanganyika National Newspapers Limited.[46] To be taken considered is also the general development of the country because as Crawshaw J. said in the above case:

> "There is no doubt---that in a country such as this where development, political and economic, is comparatively recent and is moving apace, it is most important that the people should be kept informed of what is happening and why, and of the processes of government administration, if misunderstanding and disaffection is to be avoided. For these reasons, peculiar to such territories as this, I am inclined to think that the trust (for the provision of a newspaper in Kiswahili) can be regarded as being substantially for the purpose of advancing education in the sense of the second class of charitable trusts"[47]

Artistic and aesthetic education would be charitable as education is not confined to the directly inculcative.[48] Thus, funds raised

through Harambee efforts to be used in the excavation and discovery of Kenya's historical antiquities would be of great value to the public and would be charitable.

Before this section on educational charities is completed, mention must be made of historical establishments in the field of education during the early part of the 1970s. These are the various Harambee institutes of technology throughout the country. Of course this is not to underrate the part played by village polytechnics and adult education institutions which should be seen as providing education for living a better and more profitable life which in the end leads the participant to self-reliance and maturity. These too have benefited heavily from Harambee funds raised by the public.

By 1973 local self-help committees had raised large sums of money for institutes of technology proposed for Kiambu, Kirinyaga, Muranga, Nyeri, Embu, Meru, Mombasa, Kajiado, Kisii, Kisumu, Kaimosi, Kakamega and Sang'alo. The government welcomed these institutions as the most elaborate manifestation of the Harambee spirit in education. It is the policy of the government that these institutions will not run parallel to or duplicate the structural and content of the formal system of education.[49] Though the plans of the institutes are varied, they will basically cater for individuals of widely varying backgrounds and ages and provide more specific forms of training and skill development within a setting that is more responsive to local needs. Moreover, these institutions, by addressing themselves to the more specialised problems of skill development at the community level, will be able to stimulate employment in a flexible and efficient

manner. Doubtlessly, when in full operation these institutions will be of great benefit to the community and nobody can dispute the factum that they are the biggest charitable in the country.

iii) Advancement of Religion:

Several fund-raising functions are held in Kenya to raise money towards the construction of churches,[50] bishops(houses,[51] and so on. It seems that in Kenya trusts for the advancement of religiion with a substantial number of followers would doubtlessly be charitable. The frequency and importance of these functions is a significant reflection of the concept of freedom of worship as enshrined in the constitution.

The question as to what constitutes religion has exercised juristic minds and the absence of a decided Kenyan case on this issue makes the problem rather acute. In England, any form of monotheistic theism is a religion.[52] And in an American case it has been said, "religion simply includes (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organisation within the cult designed to observe the tenets of the belief".[53] In the circumstances of Kenya and for our purpose it will suffice to say that any gregarious association is a religion if it has been registered as a religion under the Societies Act[54], even regardless of its doctrinal basis.[55] Thus, an association whose main object is to maintain the traditional African way of believing in God and

consequently having a form of spirital belief, a faith, and a recognition of some thing or being entitled to worship, will clearly be a religion once it has been so registered.[56] And hence funds raised to help realise such object will be for a charitable object.

Funds raised for use in worship in the form of praise, petition or sacrifice through words, music or ritual acts will be for the advancement of religion. The same is true of funds for says masses.[57]

The case of convents presents problems. The general English view is that funds or gifts to a community of sisters or nuns to be used in prayer and pious contemplation are not charitable as they lack the requisite public benefit in order to qualify as charitable. For instance, in GILMOUR vs: COATES[58] it was held that trust property set aside to be used by cloistered nuns who devoted their lives to prayer, contemplation, penance and self-sanctification was not charitable. The House of Lords reasoned that the benefit of intercessory prayer to the public was not to susceptible of legal proofs on which the court could act. The element of edification by example was too vague and intangible to satisfy the test of public benefit. LORD REID said, "No temporal court of law can determine the truth of any religious belief: it is not competent to investigate any such matter and it ought not to attempt to do so."[59]

Most of student church goers and church leaders interviewed by the writer held the firm view that such a decision as the one in the Gilmour case, supra, greatly underscores the power of intercessory prayer to the individual and the community as a whole. They argued

that the public enjoys stable socio-economic development partly due to intercessory prayers, and that there is nothing like selfish benefit.[60] The writer too is of the view that the decision was much prejudiced in favour of what may be described as material benefit to the society. Besides, it is doubtful if such a problem is likely to arise; but the writer submits that the issue should be viewed against the broad issue of advancement of religion because the saying of masses is only one of the ways and means of promoting religion. The same broad construction should be adopted in the case of funds raised to build a bishop's or priest's house because unless one is advocating a part-time bishop or priest it is important that the bishop should have a house built for him near the church in order that he attends to the public without much inconvenience.[61]

Of course it does not matter what sect benefits from the funds.[62] It does not also matter whether the group of followers is small. Thus, in THORNTON vs. HOWE[63] publication of the sacred writings of Joanna Southcott who claimed that she was with child by the Holy Ghost and would give birth to a new Messiah was held charitable. But funds for a proscribed sect like "Dini ya Msambwa" would not only not be for a charitable purpose but also illegal.[64]

Satellite purposes are part of religious charity. A fund for any part of the fabric of a church building is charitable. In Kenya, it would be more precise to say that Harambee collection of funds for the repair of say a church bell, tomb or window, or for use by the church choir, is in most cases, if not all, limited to the particular church where the tomb, bell or window needs repair.

and attention", these were held to be charitable. ROMER J. said:

> "It seems to me that the care of and consideration for animals which through old age or sickness or otherwise are unable to care for themselves are manifestations of the finer side of human nature, and gifts in furtherance of these objects are calculated to develop that side and are, therefore, calculated to benefit mankind. This is more so--- where the animals are domestic animals." [69]

Similarly, funds raised on Harambee basis to be used by the Wildlife Clubs of Kenya, the Wildlife Management project and the Anti-poaching Unit would definately be of benefit to the community as this would help to conserve some of the rare species of animals in Kenya. The importance of this would be more so following the recent ban on hunting and the subsequent closure of curio and game trophy shops throughout the country.

It is difficult to gauge the precise degree to which social, recreational or sporting activities in Kenya are charitable. This difficulty is caused by the English classification of charity, which has been imported in Kenya, when viewed in relation to ostensibly charitable institutions such as the Kenya National Sports Council, and the Kenya Football Federation, and so on, which are of national importance and have been the objects of many Harambee fund raising functions.[70] Under the English law funds to promote mere sport, whether a particular sport or sport in general are not charitable. Thus in INLAND REVENUE COMMISSIONERS vs. CITY OF GLASGOW POLICE ATHLETIC ASSOCIATION[71] a police association established "to encourage and promote all forms of athletic sports and general pastimes" failed to be charitable on the ground that the association was for the

private advantage of its members only. Some of the officials[72] of the Kenya institutions mentioned above held the view that sport in general is charitable because it is beneficial to the Kenya society. They quoted as cogent evidence, the fame and reputation accorded to Kenya when its athletees and sportsmen win medals in international events.

Harambee funds for the building of hospitals, dispensaries, and health centres are prima facie charitable. This is because the provision of medical care for the sick is, in modern technological times accepted as a public benefit suitable to attract the privileges given to charitable institutions.[73] In a developing nation like Kenya a healthy population is clearly an invaluable asset in its task of nation building; and this partly accounts for the parallel efforts by the citizens to build health centres alongside those provided of free by the government. Similarly, funds raised on Harambee basis for cattle dips or for the Bomas of Kenya to be used towards the preservation and maintenance of culture will be clearly charitable.

It is submitted that it is impossible to close the category of cases which could be included under this fourth head as the decision of what is charitable under it will be in many cases subjective.

2:C.2. The Enforcement of Harambee Projects:

i) The Attorney General:

In England the official charged with the oversight of the working of charitable trusts is the Attorney General, who does it in the name of

the Crown. He is the appropriate officer of the Crown and is supposed to exercise supervisory function over the charitable trusts and is under a duty to compel performance where the trustees have failed.

It is submitted that in Kenya the Attorney General has a similar duty though this is not specifically provided for by any law as such. We have argued above that public Harambee projects are charities. The Attorney General performs therefore the same function as that by the Attorney General in England. Besides the role of the Attorney General as far as charities are concerned is deduced, from the Civil Procedure Act[74] which empowers the Attorney General to institute a suit in the High Court where the direction of the court is deemed necessary for the administration of charitable trusts. Thus, the enforcement of public Harambee projects in Kenya is to be seen as the duty of the Attorney General, on behalf of the Government, to protect property or money devoted to charitable uses. As N.P. Gravells says, where a trust fund calculated to confer on appreciable benefit to a sufficient section of the public, in those circumstances because it is in the public interest that funds should be so expended, the initiative in enforcement proceedings should be taken by the Attorney General or by the most appropriate department of State or other institution.[75] In addition, charity Commissioners are appointed to ensure that the public derives full benefit from the project.

Time and space do not allow us to consider the practical aspects of what has been outlined above. However, it is true to say that the practice is far from theory for, it is submitted, the Attorney General does not seem to take the interest of Harambee projects really at

heart. This is shown, for instance, by the apparent indifference shown by the Attorney General towards the verbal war between the rival factions over the leadership and proper management over the Ramogi Institute of Advanced Technology.[76] One wonders why he could not for instance dismiss the current management and appoint another one in order to ensure that funds collected from the public were not misappropriated or mismanaged![77]

Besides, there is a snag which needs to be pointed out. Section 62 of the Civil Procedure Act[74] provides:

> "In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the court is deemed necessary for the administration of any such trust, the Attorney General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Attorney General, may institute a suit, whether contentious or not, in the High Court to obtain a decree-
>
> a) removing any trustee;
> b) appointing a new trustee;
> c) resting any property in trustees;
> d) directing accounts and inquiries;
> e) declaring what proportion of the trust properly or of the interest therein shall be allocated to any particular object of the trust;
> f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;
> g) settling a scheme; or
> h) granting such further or other relief as the nature of the case may require (emphasis mine)."

The practical effect of this provision is that members of the public are barred in toto from instituting proceedings, to ensure the proper enforcement of the project. In a country where education at mass level is still to be realised and where people are still largely ignorant of their legal rights[78], such ap provision is as beneficial as none.

ii) Cy-Pris:

In the case of public Harambee projects, if the project fails the beneficial interest may be saved by the cy-pris doctrine. The Kenyan courts have had occasion to consider the circumstances in which funds may be applied cy-pris if the initial gift is no longer capable of performance. They have accepted the English rules in toto and there is no statutory limitation.[79] If a trust is initially impossible of performance the funds can only be applied cy-pris if a general charitable intent can be established.

Many Harambee projects fail due to lack of adequate facilities; for instance, a project for the promotion of education may have inadequate funds to keep down expenses of management and maintenance, and so fails. Public Harambee projects can be saved where either the donor has made it clear that he wishes his property to go to charity, which is obvious in the case of Harambee, but has not selected a specific project; or if at the time the f gift to charity is meant to take effect, it is impossible to carry out the precise charitable object intended by the donor if he had a general charitable intent; or if after the property has become subject to a binding trust, it vecomes wholly or partly impossible to continue to apply the property in the same way. Where such a situation arises and the cy-pris doctrine applies, the court is enabled to make a scheme for the application of the property or money for other charitable purposes as near as possible to the project intended.[80] Sometimes the instrument creating the trust may provide for the cy-pris. For instance, the memorandum of association for the RIAT Development Trust, a company[81] limited

by guarantee and not having a share capital, provides:

> "If upon the winding up or dissolution of the Trust there remains, after the satisfaction of all debts and liabilities any property whatsoever, the same shall not be paid to or distributed among the members of the Trust, but shall be given or transferred to some other institution or institutions, having objects similar to the objects of the Trust---."[82]

Thus, we see that Harambee projects serve purposes which are charitable. In the next chapter, we look at the various ways in which funds are raised for these projects.

CHAPTER THREE
THE COLLECTION OF HARAMBEE FUNDS.

3: 1. General:

It is the general opinion of the rural Kenyan that Harambee Self-help schemes are not voluntary. It is common to be told of one's blankets, chickens, jembes, sheep and goats being confiscated or School fee receipts being withheld pending a contribution to self-help projects. So that the contribution, in case or kind, towards a project is undertaken upon a threat of objective penalty or through duress and undue influence on the donor or his goods. It would not be an overstatement to say that the ultimate success of many Harambee projects and Harambee self-help is generally supported by coercion of some form or another. This is not only true of collections for larger projects like the institutes of technology, but the same is equally true of smaller local projects like cattle dips, nursery Schools, and health centres.

At the institutes level, the provincial commissioner sets targets for each of his district commissioners, who pass similar instructions on to district officers, chiefs, sub-chiefs, and local headmen (LIGURU). In each area minimum scales of contribution are laid down. In Murang'a,[1] for instance, every male is expected to pay at least Shs. 10 and every female Shs. 5. In addition all employed persons are expected to pay according to salary on a sliding scale ranging from Shs.40 for those earning Shs. 200 per month to Shs. 1000 for those earning Shs. 5000 per month. There are also specific contributions that were expected from special categories of people and of property owners, for instance tea growers, coffee growers, milk co-operatives, Harambee groups, Secondary, primary and nursery Schools, bus-owners, lorry owners, whole salers, retailers, hotel, restaurant and bar owners, petrol station owners, matatu operators, and so on. Those who have several roles are required to make a contribution relating to each of them.

In Nyeri district the collections towards the Kimathi Institute of Technology are done in a most systematic and detailed calibration to ensure that every person in the district contributes[2]. People earning Shs. 200 per month pay Shs. 120, Shs. 700 per month pay Shs. 420, Shs. 2000 per month pay Shs. 1200 and those earning Shs. 5000 per month pay Shs. 3,000. Businessmen are assessed to pay according to the type of business and where the business is being carried on. A sholesale shopkeeper pays Shs. 400 if he carries on his business in the rural areas, Shs. 600 if in a township and Shs. 1000 if in a municipality. And a nightclub owner pays Shs. 200 if in the rural area, Shs. 300 if in a township and Shs. 500 if in a municipality[3]. Landlords pay a half per centum of the value of their property[4].

At the coast workers and teachers were deducted up to 25% of their salaries on six monthly instalments towards the proposed Coast Institute of Technology, to be built in Mombasa[5]. There was also imposed a 20% levy on proceeds of all dances in Mombasa with a view to boosting the Coast Institute funds[6].

Unique, and yet common, to all the institutes of technology is the attempt to raise funds by designating as founder or life members thos who make specific colossal amounts usually in the range of Shs. 2000 to Shs. 5000 and above. Such pressure on elite and prominent members who want to retain local influence is inevitable and irresistible. In Western Province, doctors, businessment, politicians, and prominent farmers became Western College of Arts and Applied Sciences (WECO) founder members by paying a lump sum of Shs. 1000. In Nyeri contributors of Shs. 1000 or more became life members and were also to be listed in the Kimathi Register of Honour, whereas contributors of Shs. 5000 or more would, besides being life members, be enrolled in the Kimathi Roll of Honour, that is, their names would be permanently engraved at the Institute.

Other ways of collecting money for Harambee projects are by organising functions like dances[7], barbecues,[8] football matches[9], concerts and plays, and then the door to door collections. Of course, there are the legendary techniques of Harambee fundraising such as huge meetings chaired by prominent politicians at which names and contributions are named.

Door to door collections are the aone that have aroused a lot of public outcry. Most of these collections are extracted by by coercion and duress by the local chiefs, their assistants, and the local headmen. As we have pointed out above, targets are set for each district commissioner who passes on the instructions to the district officers, the chiefs and their assistants, who are the chief collectors of the funds. It is at this stage that the involvement of the administrative officials in the raising of Harambee funds essentially means that the collections are mandatory. Any sign of reluctance to contribute will mean actual or threatened seizure of property which property may ultimately be sold if no contribution is forthcoming[10]. Individuals who object to or oppose the forced contributions are strongly warned agains "committing the offence of obstructing Government policies".[11] Whether there is such an offence in any of the written laws of Kenya is yet to be seen, but this helps to show the attitude of the administrators towards the methods used by the collectors of Harambee funds. It is evident that all contributions towards Harambee projects, be they in cash or kind and material are to be voluntary. But the high levies and coercive methods of collection of Harambee funds have aroused intense bitterness among the contributors, most of whom feel that the abolished annual taxation was much better[12].

The compulsion and duress applied in order to raise the Harambee funds is not restricted to any one area. In parts of Western Province proof that WECO contributions had been paid were demanded even before a patient was attended to at a health centre or dispensary[13]. In Central Province proof that institutes of technology payments had been made was, and still is, a condition precedent to any official dealings. In fact it was in this province that there was very intense bitterness resenting the methods of collection of Harambee funds. For instance, a Murang'a trader is reported to have p protested, " We are not going to sit and sing 'hallelujah' when our children are expelled from Schools for non-payment of School fees, and we cannnot take them to hospital when they fall sick, all in the name of Harambee spirit".[14] The trader here was referring to the fact that before being issued with a trading licence, he had to contribute up to Shs. 100 towards the proposed Muranga College of Technology. There are so many others, like this Murang'a trader, whose voices are not heard or if they are heard they are not heeded.

The whole movement of Harambee, butteresed and aided and abetted by a formalised and systematic coercive collection, has turned into what Mutiso, Gideon and Philip M. Mbithi rightly call regressive taxation for financing local development efforts.[15] For instance, Mbithi puts it thus:

> "It is possible to view self-help contributions as a form of taxation for financing local devalopment efforts. Where the solidarity of the movement has intensified and become more totalitarian, the degree of individual sacrifice and 'taxation' increases proportionately. In marginal areas where people can ill afford to sacrifice egg after egg, hen after hen and shilling after shilling, this movement (that is, Harambee) could become a negative factor as a protest movement and creates its own counter - protest.
>
> " The implications of the above are more serious when it is realised that the people taxed in this way are those -

> under a more rational approach would not be taxed anyway - the pro-traditional, illiterate poor whose motivation stems from a genuine desire to be included in the modernising trend."[16]

Mbithi's observation is so self-explanatory and, aptly and consisely puts the system of collection of Harambee funds in so proper a perspective that any comment would amount to verbiage and superfluity. Every citizen is not left "to contribute according to his own ability"[17] but a fixed amount is normally set for him, and this has to be realised anyhow. There are various reports of even children having to pay a fixed amount of money per term towards self-help projects, and where they have failed to make the payments they have been refused tuition and barred from classes. For instance, in Western Province School children have to pay between Shs.3 and Shs.5 per term for WECO depending on whether they were primary or Secondary School children[18]. In Kisumu District, the district committee of Ramogi Institute instructed the district education officer, his assistants and headmasters to collect Shs. 2 for Ramogi Institute from every child attending School in the district[19]. And in Machakos District, all Kamba children in Ukambani, from Standard one to Form Six have to pay Shs.2 towards the proposed Ukambani Institute of Agriculture[20]. In all cased the "contributions" were mandatory. When asked why there was this type of duress and coercion that has become so characteristic of Harambee, Peter Kibisu, the WECO administrator rationalised the system by arguing that the relative understanding capacity of the rural population is so low that what the chiefs, subchiefs and other Harambee funds collectors do is merely ti intimidate them gently and show them that they are supposed to contribute; that if the collection were to be purely voluntary it would be very difficult to reckon with the socio-economic demands of the community[21]. But do we really need to say that coercion or any form of intimidation is incompatible with the very essence of the Harambee spirit?

In the next section we briefly look at the licensing and regulation of collections of money from the public. In other words we look at who should collect money or property from the public and how this should be done. We also suggest what should be the legal and/or equitable position where, as we have seen, there has been coercion or undue influence and intimidation in the collection of the Harambee funds.

3: 2. The Public Collections Act.

The Public Collections Act[22] is an Act of Parliament which provides for the regulation of collections of money and property from the public. In order to see to what extent the Act should apply to the collection of money from the public for Harambee projects, we propose to consider the provisions of the Act. There are altogether thirteen sections.

All collections from the public must be licensed by the District Commissioner, the Provincial Commissioner or the Permanent Secretary, and where there is no licence authorising the collection no such collection shall be made[23]. It is also under this same provision that Harambee fundraising meetings are licensed. If the Harambee fundraising meeting is not licensed, the meeting will possibly constitute an unlawful assembly and the police are empowered to disperse people attending thereat[24]. Such a meeting is technically an offence against public order, which offence is cognisable[25]. The licensing authority may refuse to grant a licence or may at any time revoke a licence granted by him if he has reasonable grounds for believing, inter alia, that the grant of a licence would be likely to facilitate the commission of an offence, or that an offence has been committed in connection with the collection, and in perticular that any force, threat or compulsion, direct or indirect, is likely to be, or has been, made or used in order to obtain any contribution for the purpose of the collection[26].

Section 5 provides that unauthorised use of badges, device, emblem and so on shall render the user thereof liable to imprisonment for a term not exceeding three years. Section t requires the collector of the money or property to give his name and address to the police on demand, failing compliance upon which the collector shall be guilty of an offence and liable to a fine not exceeding two hundred and fifty shillings. Section 7 provides for the disposal of money or property obtained by offences. It provides,

> "During or at the concludion of any trial in respect of an offence under this Act or under any regulations made thereunder and relating to the subject matter of this Act, the Court may make an order for the return to its owner, if known, or for the forfeiture, of any money or other property produced before it or in its custody or in the custody of any police officer or of any other public officer, which the court is satisfied was obtained by or in consequence of the commission of an offence under this Act or under any such regulations as aforesaid, whether by the person charged or by any other person".

This section assumes that every citizen is knowledgable of his legal rights and that he will have the audacity to rise against the district commissioner, the local chief or sub-chief and report. The fear of being branded a reactionary and being accused of committing the offence of obstructing Government policies will inevitably deter him from doing so[27]. Stressing the need for protection of the citizen, the then Deputy Chief Secretary, R.O. Hennings said, when introducting the Public Collections Bill in the Legislative Council,

> " Sir, this is quite a normal Bill. There is nothing odd or extraordinary about it because in every country it is necessary to have an effective system of controlling and supervising collections of money. It is a very easy way of making a livelihood to collect public money and then to put most of it into your pocket and I think it is quite clear that in a country where a large part of the population is (still) unsophisticated and-

uneducated and illiterate, it is easier than in other places". (Emphasis mine)[28]

This observation applies with equal force even now. As we have seen and are also to show below, the Harmbee institution has become fraught with swindling and embezzlement. Besides, the chiefs, protected by the Chiefs Authority Act[29], wield a lot of powers and make the life of the uneducated and illiterate rural citizen pretty tough. And although the Act, vide section 9, provides that offences thereunder are cognisable to the police, no arrests are made. The police aschew the issue contending that they cannnot prosecute the defaulters unless a victim reports the matter to them. In an interview with the officer commanding police division (OCPD) Kakamega, it was contended that the issue of forced Harambee contributions is purely a matter for the provincial and district administration for they are the institutions that license the collections of money and property from the public[30].

Under section 12 any person who is guilty of offence under this Act for which no penalty is otherwise provided shall be liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment. Section 13 gives the Minister power to make regulations for all or any of the various matters listed thereunder. Acting under these powers the Minister made various regulations covering various aspects of public collections[31]. Two of them are of direct relevance to the issue at hand. Public collections Regulation number 10 provides that any person who makes a collection on private property without the consent of the owner or other person having the control or management of that property shall be guilty of an offence. Regulation number 11 provides that any person who collects or attempts to collect money or property by means of force, intimidation, -

menace or undue influence; or acts in a manner which can reasonably be expected to cause annoyance, distress or inconvenience to the occupant of any premises visited, or to any person attending a public meeting or being in a public place shall be guilty of an offence. As we have seen in the above section, the practice is evidently a flagrant breach of these regulations.

What then is the justification fot the Harambee funds collectors seizing people's people where the people are reluctant or unable to pay or contribute towards a particular project? Do they breach the law with impurity? It is unfortunate that a vital concept and institution like that of Harambee does not have any legal stricture. The Public collections Act that we have just discussed does not apply to Harambee collections. The Act defines "collection" as "an appeal to the public or any section of the public, made by means of visits from premises to premises or of soliciting in a public place or at a public meeting, or by any or all such means, to give, whether for consideration or not, money or other property, not being money or property collected by or under the authority of a recognised representative of a religion or religious community for any purely religious or charitable purpose". It is this lack of legal patronage that has led to the abuse of the spirit of Harambee, itself a people's unmolested willingness to voluntarily embark on the noble task of nation building. Why the Act is not extended to cover Harambee collections is not clear. Yet licences authorising public Harambee fundraising meetings are issued under the Act. The method of collecting the Harambee money and property is essentially the same as that for collections authorised by the Act. The promoters and collectors of Harambee funds are basically the same.

It is submitted that section 2 of the Act should be amended so that the collection of money or property for Harambee projects is also patronised by law. This would be of salutary effect in that the people will be coerced not by the administrators but by the social and economic needs. It will only be then that the Harambee spirit will be said to be truly voluntary.

3: 3. Any Legal Remedy?

After the discussion of the ways and means of collecting Harambee funds we proceed to look at what should be the ultimate effect, and what should be the remedy, where duress, undue influence or threatened or actual force has been used in the collection of Harambee money. We argued in the last chapter that all Harambee funds are used for purposes which are essentially charitable. This fact, that Harambee projects are charitable objects, ousts the application of the Public Collections Act as the Act does not regulate collection of funds that are used for purely charitable purposes[32]. Since there is no law providing for the disposal of money or property obtained by offences, we shall, vide the Judicature Act[33], apply the doctrines of equity.

Robert Goff and Gareth Jones[34] say that duress included actual or or threatened violence to the person, improper application of legal process, duress of goods; and a refusal by those in a public or quasi-public position to fulfil their duty[35]. When duress has been used to effect a transfer of money or chattels, a restitutionary claim lies at the instance of the victim of the duress. Chattels transferred under duress will generally remain the property of the transferor, who will then have his remedies in conversion or detinue. The actual or threatened violence need not be directed to the plaintiff; if it is directed against his wife, child or other near relative or property, it will act to make the transaction undertaken voidable at the instance of the person coerced.

Besides, duress to the person will normally constitute both a crime and tort, in which case the coerced person will have other remedies for recovery of money or restoration of property given under duress[36].

It is submitted that money paid for Harambee projects under the duress of property or seizure of goods should be recovered at law. This is because it will only be possession that will only have been parted with and not the title. This view is supported by two English cases. In ASTLEY vs. REYNOLDS[37] the plaintiff pawned plate to the defendant for £20. At the end of three years he went to redeem it , but defendant insisted on £10 interest. The plaintiff tendered £4, knowing that to be more than the legal interest allowed, but the defendant refused to take it; so latter the plaintiff paid the £10 and recovered the plate. The Court of King's Bench held that the plaintiff was entitled to recover surplus over and above the legal rate of interest. The Court said,

> "---- This is a payment of compulsion; the plaintiff might have such an immediate want of his goods, that an action of trover would not do his business: Where the rule volenti non fit injuria is applied, it must be where the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again".[38]

It is clear that when a person's goods are seized, his children sent away from school, or he is refused a trading licence unless he contributes towards a Harambee project, any subsequent payment will have been made under an evident lack of freedom to exercise an independent will, and therefore not a valid payment. In the case of MASKELL vs. HORNER,[39] the defendant demanded tolls from the plaintiff -

under threat of seizure of his goods if he refused to pay, and on the first occasion the plaintiff objected to pay and actual seizure took place. Thereafter, the plaintiff always paid under protest. Subsequently, whenever the plaintiff challenged the defendant's right, or disputed the amount of tolls, in particular cases there was a seizure followed by payment under protest. The Court of Appeal held that the plaintiff paid only to avoid seizure of his goods and never made payments voluntarily, and accordingly was entitled to recover the money so paid. LORD READING, C.J. authoritatively stated the position:

> " The circumstances of these payments and the conduct of the plaintiff throughout the period of years satisfy me that he never made the payments voluntarily, that he never intended to give up his right to recover the sums paid, and that he only paid because he knew that a refusal to pay would immediately (be) followed by seizure of his goods-----. The pressure of seizure was always present to his mind, and never ceased to operate upon it whenever demand ---- was made. I am also satisfied that the circumstances of the payments and the conduct of the plaintiff were a sufficient indication to the defendant that the plaintiff did not intend to give up his right to recover. If any assertion or declaration of his intentions were necessary it was made to the defendant at the time and in the circumstances of the payments."[40]

It is submitted that Lord Reading's observation applies with more force in the case of Harambee collections in Kenya, where it is invariably true that money is paid in order to prevent a seizure of goods or to prevent a threatened wrongful sale of goods seized by the collectors.

The same principle should also apply where undue influence has has been used in getting the Harambee funds. This is because the payment does not emanate from the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will.

In such circumstances the donor/contributor does not effectually part with the beneficial interest in the money or property.[41] The collection of Harambee funds should be watched with a jealousy almost invincible because in the majority of cases, it has led, and will continue to lead, to an unprecedented wave of frauds.

a duty to invest it in order to produce income and maintain the capital. This duty also applies where the fund has been used and a surplus has remained; this too must be invested. Trustees of harambee funds are neither bare nor depositary trustees so that this duty is inevitable on their part.

In Kenya, the Trustee Act[2] grants the trustees a wide field of choice withing which to operate as far as investment is concerned. The Act, itself a replica of the English Trustee Act 1925, has been amended[3] severally with a view to giving the trustees in Kenya the same investment powers as trustees in England have under the Trustee Investment Act 1961. Trustees in Kenya may invest in any of the following:[4]

> (a) Any securities in which trustees in England are for the time being authorised by the law of England to invest trust funds;
>
> (b) Any securities the interest on which is for the time being guaranteed by the United Kingdom Parliament or by the Government of Kenya, or in any public debentures issued under the authority of and guaranteed by any Act;
>
> (c) Any security given by any city council, municipal council or municipal board established under the provisions of the Municipalities Act[5] which the Minister has, by notice in the Gazette, declared to be a trustee security for the purposes of this Act;
>
> (d) Any security, being a security the price of which is quoted on a recognised stock exchange in Kenya, issued by a company formed and registered under the Companies Act[6] whose total issued and paid-up share capital is not less than ten million shillings and which has paid a dividend on all of its shares which rank for dividend in each of the five years immediately preceding the year in which the investment is made....;

(e) Any units or other shares of the investments subject to the trusts, of a unit trust within the meaning of the Unit Trust Act[7] and registered under section 7 of the Act;

(f) Any security issued by the East African Railways Corporation[8] (now Kenya Railways?)

(g) The purchase of immovable property in Kenya held for an estate in fee simple or for a term of years of which not less than forty years is unexpired and which is not subject to a rent exceeding four per centum of the unimproved value thereof or to any condition of re-entry except for non-payment of rent, or on first mortgage thereon.

Section 3(2) of the Act provides generally that these powers are in addition to any conferred by the instrument[9], and hence it is still permissible to take advantage of any wider powers of investment conferred by the trust instrument. These powers are only exercisable so far as no contrary intention is expressed in any instrument made on or after January 1, 1967. If a trustee intends to invest any part of the trust fund in any securities other than a fixed interest secutiry, the detailed provisions of the schedule to the Act have to be complied with[10].

All having been said, we have to turn to the practical side and leave the purely academic field. The practice is that once the money for a particular project has been collected, it is deposited in a bank immediately to await more in order to realise the target aimed at, or after a portion thereof has remained as a surplus. Ultimately the fund becomes inadequate in times of devaluation of currency or inflation, thus necessitating more collections[11]. In an interview with Francis Drummond & Co., a Nairobi firm of stock and sharebrokers, it was found that the projected institutes for Ukambani (UKAI) and Coast Province (CIT), which have not yet taken off the -

ground or been sited, lose at least KShs. 270874 and KES 420110 per annum by not having invested their respective amounts of KShs. 1354370 and KShs. 2100557[12]. Asked why they do not invest, some of the people interviewed gave the issues of immediacy and the ristky nature of investment as the sole factors militating against taking such a step[13]. Whereas the first reason may be tenable, it is submitted that the second is devoid of conviction especially judging by the amount of income that could be earned through investment in the above authorised securities. Besides, the feared risk can be avoided by investing in several companies in the same field so that the danger of one performing particularly badly is avoided, and also by investing in several kinds of investments suitable for the harambee funds. Of course before investment is done the trustees of the funds have to obtain and consider proper legal advice and exercise due to skill and care in selecting investments so that even in time of economic depression great risk does not arise[14].

It may be encouraging perhaps to mention that the only step taken towards long-term investment has been the purchasing of large coffee farms particularly by institutes in Central Province[15]; the income from these farms aids in alleviating the pecuniary ambarrassment of the institutes.

4:3 Terms of Instrument Creating the Project:

The Board of trustees of the Harambee project is under a duty to follow the provisions of the instrument creating the project and, " as a rule the court has no jurisdiction to give, and will not give, its sanction to the performance by the trustees of acts with reference to the (project) which are not, on the face of the instrument creating the (project), authorised by its terms".[16] Indeed it would be unconscionable for the committee of trustees to apply the harambee fund to a different purpose from that for which it was intended, particularly where this is provided for in the instrument.

In Kenya it is not uncommon to find that the board of trustees or executive board of a certain harambee project has spent harambee funds on organising lavish parties or buying luxurious presents for prominent politicians chairing harambee fundraising meetings[17]. Such expenditure of harambee funds is unwarranted and constitutes a breach of trust.

The only exception to thr above rule is that provided by statute. Section 56(1) of the Trustee Act[18] provides,

> "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, investment, acquisition, expanditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees either generally or in any particular instance the necessary power for the purpose, and subject to such provisions and conditions, if any, as the court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transansaction, are to be paid or borne as between capital and income".

Thus, it is only the court which has the power of varying terms of the instrument. Interpreting an identical provision in the English Trustee Act 1925 (section 57), EVERSHED M.R. said that the purpose of the section is:

> "to secure that the trust property should be emanaged as advantageously as possible in the interests of the beneficiaries (read public) , and, with that object in view, to authorise specific dealings with the property which the court might have felt itself unable to snction under the inherent jurisdiction either because no actual "emergency" had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen, but it was no part of the legislative aim to disturb the rule that the court will not re-write a trust or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction.[10]

As there is no Kenyan case reported interpreting the Kenyan provision, any conclusion would be mere speculation and guesswork. But it is probable that the Kenyan Courts may, should the provision come up for interpretation, follow the English way.

4: 4. Conflict of Interests and Duty:

It is obligatory upon the Harambee fund trustees to avoid placing themselves in a situation whereby their innate private interests conflict with their duties and so prejudice the public's interest in the particular project. The board of trustees or any one of them cannot make an unauthorised profit from their administration and management of the harambee fund, and neither are they entitled to any remuneration[20], however trivial the amount. As trustees, they are forbidden to purchase trust property whether directly or indirectly or to appropriate it secretly. The purchase, however honest in the circumstances, is void for the general interests of justice require it to be destroyed. In Kenya, it is trite to see that it is the committee members who buy goats, chickens or sheep when these are contributed at a harambee fundraising meeting in aid of a project. This amounts to a breach of trust for the committee members are not only forbidden to purchase trust property, but are also under a duty to obtain the best price for the trust property[21]. And obviously the best price cannot be obtained where they themselves are the ones purchasing.

Besides the trustees of the Harambee funds are not supposed to borrow the funds nor use it with a promise to refund later. The reason is that they occupy a fiduciary position in relation to the funds and so should not let themselves be swayed by their interests rather than their duties and hence prejudice the public whom they are bound to protect.

But more often than not, the committee in whose hands the Harambee fund is entrusted has turned the institution of swindling syndicate. This is evidenced by the recent public outcry that led to a crackdown on some harambee projects in Eastern[22] and Central Provinces[23]. This led to a similar action being taken by the Nairobi Area Provincial Commissioner[24], who issued a directive that all money collected by individuals in Nairobi for Harambee projects must be handed in at his office. The aim was to streamline the process of collecting the funds[25]. In fact these steps taken by the respective provincial commissioners were long overdue and one may be permitted to ask whether it was at this time that the various people entrusted with the Harambee funds had for the first time deviated from the provisions of the instruments and so led to a conflict of interests and duty. And the fact that nobody was apprehended[26] and punished may point to the fact that there has been nothing done to deter or stop the swindling; most committees who administer the Harambee projects do not seem to know what sacred position they occupy in relation to the Harambee projects' funds and do not seek a lawyer's advice on how to manage the funds[27].

4: 5. Accounts, Audit and Information:

We shall consider this under two headings. First, under the common law as received in Kenya, per section 3(1) of the Judicature Act[28], and secondly, under the Trustee Act[29].

(2) Common Law: At common law, it is the duty of trustees to keep accounts of the property confided to their keeping, whilst the beneficiaries have a corresponding right to ascertain how the funds are being utilised. Accounting is an integral part of trustees' duties. The accounts must be proper, faithful and accurate. Thus, the accounts of every harambee fund must contain particulars of all receipts and all payments and care must be taken not to suppress or conceal any information, otherwise the trustee will be responsible for improper accounts rendered in his name.

An accurate picture of both income and expenditure during the period covered, normally one financial year, and of the state of investment of the fund, if any, during and at the end of that period, must be rendered by the trustees. Both receipts and payment must be supported. Besides, a trustee for Harambee funds must provide information to the beneficianries concerning the state of the funds. Documents connected with the funds are, strictly speaking, the property of the beneficiaries and the latter are therefore entitled to them. The harambee funds trustees do not enjoy any discretionary power: rather they are quasi-public officials and as such are duty bound to account to the public[30]. If they decline accounts and information when called upon, the public, as beneficiaries, has a right to apply to the court and the trustee will then be ordered to pay the costs of application personally. For the beneficiaries have a right to inspect and investigate the accounts and vouchers relating to the harambee fund. They can even take copies of the accounts and vouchers.

In Kenya, it would not be overstating the reality when we say that in very rare cases are the accounts kept, auditing done, and information given to the public as regards the harambee funds. And where these are done, they are devoid of skill and are erroneous. For instance, as early as 1966 it was reported that in Harambee Schools the control of school funds by the headmasters was an insurmountable task. Very few, if any, were trained or experienced in accounts and auditing was left to School commitees or boards and was often haphazord[31]. The same report suggested that special accounting procedures for harambee projects be designed and be combined with a properly run audit system to be organised on a national basis[32]. The fact that the suggestion has not been implemented up to now accounts largely for the prevalent misappropriation of harambee school funds and funds for other projects also[33]. And as we have seen above, the crackdown on some harambee projects in some parts of the country was attributed to lack -

of any accountability on the part of those entrusted with the duties of keeping the harambee funds. In his directive the provincial commissioner for central said that the management committees of any self-help group must, with immediate effect, begin a scheduled tabulation for all cast collected for their projects" and stressed that the annual balance - sheet, which would be read at public meetings should indicate clearly how the money was spent[34]. This action was precipitated by a lot of public outcry not only in central province but in many parts of the country[35].

This section cannot be completed without a brief look at the most controversial project as regards the trustees' duty to account for funds collected from the public - Ramogi Institute of Advanced Technology (RIAT). The issue of RIAT is the most highly complex in the history of Kenya's harambee self-help movement. Time and space do not allow us to engage into an elaborate analysis, but we will only highlight a few issues. Since its inception at the end of 1971 the institute has suffered from serious instances of pecuniary embarrassment as a result of misappropriation. And as from 1973 when the project committee incorporated the RIAT Development Trust as a limited company, the question of the company's accountability has been a spark of contention. Funds raised from members of the public have not been adequately accounted for[36]. In June 1976 a commission under the chairmanship of the Town Clerk for Kisumu Ojuang' K'ombudo, the K'ombudo Commission, reported that there had been no misappropriation of the RIAT funds[37]. This sparked off a serious split between the project officials and the Lou Union and as a result another commission was appointed to investigate into the funds. This commission reported at the end of October 1976 that the institute was short by Shs. 2,000,000 and further noted that the accounts of RIAT for the period 1971 - 1974 "were riddled with serious irregularities for below the level acceptable for good accountancy.

They do not appreciably reflect the efforts the community and puplic made to raise funds for RIAT".[38] The commiddion was merely echoing the words of a firm of auditors that had been to certify the 1972-73 accounts; the firm had observed:

> "No receipt books and statements of accounts in respect of fundraising activities, such as dances, gala nights, etc., and purchases, sales and holdings of T-shirts, badges, calendars, and brochures, were produced for audit ... The statements of all expenses incurred have not been properly filed and many of the supporting statements are missing.
>
> ... (T)he control over receipt books was completely inadequate ... and no receipt books were produced for audit ..... The cash book has been written up from banking slips."[39]

It is submitted that it is because of this non-accountability and gross mismanagement of funds that the project ran into various problems,[40] and was almost grinding to a halt towards the end of 1977 when it was saved by more than one million shillings raised at a harambee meeting conducted by the Vice-President[41].

(22) The Trustee Act:

The Kenya Trustee Act enacted in 1926, is a stereotype of the English Trustee Act 1925. Provisions as to accounts found in the English Act are reproduced more or less verbatim in the Kenya Act. Section 23(4) provides that trustees may, in their absolute discretion, from time to time, but not more than once in every three years unless the nature of the trust or any special dealings trust property make a more frequent exercise of the right reasonable, cause the accounts of the trust property to be examined or audited by an independent accountant, and shall, for that purpose, produce such vouchers and give such information to him as he may require. As we have seen above the nature of the harambee trust no doubt makes frequent accounting and auditing necessary.

There is so far no reported judicial interpretation of this section and so it is difficult to predict with certainty how the section may be construed by the Kenya Courts. However, two things seem clear. First, that if the trustees of harambee funds escape liability under common law for negligence of their duty to account, they cannot escape under this Act. Second, that what is most likely is that the courts will be content to follow the English decisions interpreting the identical section in the English Act[42].

4: 6 Remedies:

Where any one, or all, of the duties above discussed is not discharged, the trustees of the harambee funds will stand liable for breach of trust and the beneficiaries will be entitled to take an action against them for sufficient redress, for equity will not suffer a wrong without a remedy.

The trustees' liability for breach of trust duties under this section may be considered undert two headings: (i) criminal remedies, and (22) civil remedies.

(2) Criminal Remedies:

The Penal Code[43] imposes liability upon a trustee and any person who frandulently disposes of trust property. Section 327 (1) provides,

> "Any person who, being a trustee of any property, destroys the property with intent to defraud, or, with intent to defraud converts the property to any use not authorised by the trust, is guilty of a felony and is liable to imprisonment for seven years".

For the purposes of the section "trustee" is given an extremely wide meaning ranging from trustees upon express trusts created by will, deed, or instrument, to official managers, assignees, executors, personal representatives, administrators, liquidators or other like officers acting under the authority of any written law relating to bankruptcy or joint stock companies[44].

This section subsumes the offence of theft by trustees into the general offence of theft.

A criminal conviction can have useful compensatory consequences for the public, or mambers thereof, aggrieved by a trustee's breach of trust. The criminal court may either order compensation for less of trust property caused by the offence or make a restitution order where necessary.

(22) Civil Remedies: Where the harambee trustees negligently mismanage the harambee funds, the measure of their liability is the actual loss sustained by the public without regard to any loss which would have been sustained if they had strictly performed their duties in managing the funds scrupulously. By section 9 of the Trustee Act, this is subject to the qualification that where a trustee improperly advances money on a mortgage security which would at the time of investment be in all respects a proper one for a smaller sum than that actually advanced, the security is deemed as authorised investment and this shall not be chargeable as breach of trust. Besides, section 60 gives the court the power to relieve the trustee from personal liability where it appears to it that the trustee had acted honestly and reasonably and ought fairly to be excused.

Where the breach consists in using the harambee funds for their own private purposes or for lavish parties and presents to guests, the trustees must not only replace the capital but must also account for the income which they would have made by use of the funds, or income that would have accrued if the money had been put to its proper use. This is what is known as an action for account. The damages awarded must be such as to put the beneficiaries in a good a position as if the trustees had carried out their duties diligently.

The other remedy is that of tracing[45]. This is the -

beneficiary's right to follow and recover the trust property from a person not lawfully entitled to it. This can be done both at common law and in equity. The remedy of tracing arises as an alternative in circumstances where the bringing of an action for breach of trust against a trustee is unsatisfactory, as where the trustee may be insolvent and hence unable to reimburse the trust funds.

As we saw in chapter 2, the Attorney General is the custodian of the harambee projects. He represents the State which has a supervisory jurisdiction over the projects. He is therefore the one able to establish that the public's right has been infringed and therefore the one entitled to sue on behalf of the public, because a member of the public lacks the locus standi to sue on his own. But it is with courage and pride that one views the practices of the trustees of harambee funds because no legal action has been taken agains them.

CHAPTER FIVE.

CONCLUSIONS AND SUGGESTIONS.

It has been attempted in the preceding chapters to expose and discuss the weaknesses of the harambee institution and where possible suggestions for improvement have been made. It remains to observe here, the salient features of the institution.

1 The first concerns the apparent distinction between the so-called private Harambee projects and public ones. In chapter two we proceeded to categorise harambee projects according to the purposes they serve and argued that they are charitable trusts. However, it would be more fitting to say that these are not trusts the way they are understood in advanced Western Countries because in Kenya the most pressing needs, such as the relief of poverty and advancement of education or religion are not served by established charities but, inter alia, by the all embracing extended family system whereby a man contributes for the benefit of all the members of his clan or tribe living in a particular community. But despite this, there are some trusts established particularly by the non-indigineous communities and some cases on the subject have been reported[1].

When we adopted the argument that harambee projects are charitable projects, we followed the English classification and tried to differentiate them from non-charitable harambee functions like the collecting of money for the purpose of sending someone abroad for studies. It is submitted that in Kenya, such distnction as between public (charitable) and private (non-charitable) harambee purposes is meaningless and should not be maintained. There are two reasons that do support the view agains this distinction. First, the distintion, if maintained, ignores the social reality in Kenya. The reception and subsequent application of the -

doctrines of equity were conditioned upon the fact that they shall be in force so far only as the circumstances and inhabitants permit and subject to such qualification as local circumstances may render necessary. Thus the doctrines of equity, in applying to harambee projects in Kenya, should take changes with respect to the circumstances of Kenya. The outstanding difference between the socio-economic set-up in Kenya and England render the modification of the doctrines a step in the right direction[2]. It is simply axiomatic to say that Kenya is not a welfare state, so that any need is satisfied by voluntary mutual assistance, joint effort, and mutual social responsibility for community welfare. There are no social welfare laws to protect the aged and infirm. Progressive taxing statutes to effectuate a degree of radistribution of wealth, laws against usury and money lending to protect the economically weaker classes from ruinous interest rates are all wanting. In fact the concept of harambee itself embodies the traditionally cherished value of mutual self-assistance, be it in educational, religious or other spheres of life. It is equally true that when members of the public are called upon to contribute money towards sending someone abroad for studies, they are in a sense ivesting in that person for it is invariably believed that in the long run the community will benefit from the education of that person; it will not benefit him as an individual alone. Similarly, when money is raised on harambee basis to send someone abroad for medical treatment, it cannot be said that it will be the patient to benefit. The community stands to benefit when life is saved. In essence, therefore, the social realities in Kenya are such that various communities are interdependent and as such it cannot be useful to distinguish between non-charitable and charitable harambee purposes.

Secondly, the distinction is made necessary under the English law due to the concessions granted to charitable trusts.

Under the English law charitable trusts are purpose trusts and do not need buman beneficiaries to enforce them. Besides, their validity does not depend on the certainty of objects, nor is it effected by the rule against perpetuities. More important is the fact that the charitable trusts enjoy fiscal privileges. The trend has invariably been that the validity and fiscal privileges are concubeant so that in the absence of the latter the former disappears, and the recognition of the former automatically calls for the latter[3]. Thus, charities are exempt from income tax on rents, interests, dividends and annual payments, provided that the income is applied for charitable purposes only.

As we have seen, in Kenya all the objects of harambee funds enjoy these concessions,[4] so that any denial of fiscal privileges to them would be both intellectually dishonest and misleading. Besides, it would militate against, and be restrictive of, any concerted community effort to forge ahead in nation-building. It is accordingly submitted that in Kenya any such distinction as between charitable and non-charitable trusts in the case of harambee is objectionable not only on the grounds of policy, but also that policy cosiderations argue positivelly in favour of non-separation and hence the consequent validation of a wider range of purpose trusts than that obtaining under the English charity laws.

2 We briefly noted the involvement of politicians in harambee projects as being assentially for the purposes of personal aggrendisement and self-preservation. Usually thate is a sharp conflict between civil servants especially those working at the local levels, and the politicians. The politicians, especially those in influential positions, feel that they are the representatives of the aspirations of the people and hence greatly resent being superseded in authority and influence by civil servants who seem to increase-

this authority at the politicians' expense. On the other hand, the civil servants feel that they represent not only the Government but also the President and so feel justified to wield the powers they wield[5]. Whereas the politicians may prove vary useful in stimulating the people to come together and agree on their problems while the civila servants my help in deciding how the people's efforts could be hernessed, it has become clear of late that when a civil servant assumes leadership in a particular project he is given a free hand to take any decisions affecting the project and the other committee members merely accept all that he says for fear of government reprisal[6]. He therefore overrules everybody. Such a state of affairs invariably is incompatible with the success of the project. It is with this in mind that it is hereby submitted that the rule of unanimity should be extended to the harambee institution so that all the committee members have the right and/or power to determine unamimously what is right and beneficial to the community as regards the management of the affairs of the project. The administrators tend, currently, to extend the exercise of their bureaucratic powers into the institution of harambee with the result that these powers are abused.

3 The question of the methods of collection of funds for harambee projects is perhaps the most touchy and sensitive issue as far as the harambee institution is concerned. We have discussed at length the question of coercion in the contribution of money towards various projects and suggested what should be done to alleviate the injustice done to the wananchi by the collectors of the harambee funds. It remains to be reiterated that everybody should be left to contribute according to their ability, for it is a fact that a good amount of the drive and initiative for development through the harambee spirit can only emanate voluntarily from the people themselves by pooling togehte their resources to satisfy their various needs.

4 We have seen that harambee projects are for the benefit of the public. We have further seen that in case of mismanagement of the funds, the public do not have a direct access to the High Court for a remedy where the breach of trust has occasioned loss because they have to receive consent in writing from the Attorney General, the official charged with the oversight of the working of the harambee projects. This requirement has two disadvantages. The first is that is is axiomatic that the majority of the Kenyans, the rural peasants, are illiterate and unaware of their legal rights, so that a complaint, if any, about the mismanagement of the harambee projects will not go beyond the local level. We do not need to mention that the law by resting jurisdiction in the High Court, and not a subordinate court, puts it out of the powers of the simple peasant to enforce his right and get a remedy.

The second disadvantage is that the requirement that the High Court can decree on a matter related to public charity when either the Attorney General, or two or more persons having an interest in the trust and having obtained the consent in writing have petitioned, is more of a snag than of any salutary effect to the public. In the first place, it would not be an overstatement to state that the Attorney General does not have a keen interest, as the custodian of charities, in the way most of the Harambee projects are run in the country. The overseeing of the working of most of the projects has been left to the committee members, which has in most cases turned the harambee institution into a fertile ground for the cultivation of feuds. This is evidenced by the case of RIAT that we have seen above. Ever since the inception of the institute there has been a vicious tug of war involving the politicians, the administration, and the Luo Union over the proper management of the affairs of the institute. Misappropriation of funds seems -

to be the routine. It is the public that suffers. And why the Attorney General has not taken action to save the institute from the imminent collapse is not easy to comprehend. He has the powers, on behalf of members of the public, to remove dishonest and fraudulent trustees and to appoint others. In the second place, the obtaining of the Attorney General's written consent, as stipulated by the Civil Procedure Code[7], is very difficult. The institution of harambee, though acclaimed to be the main driving force in Kenya's rapid nation-building, is a highly sensitive and explosive one. Any individual though having an interest in the project, will not dind it easy to get the consent; it will be refused him for whether the consequences may be beneficial to the public, this will be constried to mean sabotage of government policies. And even if the consent were granted, the expenses and length of time of the suit militate against any individual action. As it is now an individual, though suitable to initiate enforcement proceedings, are institute a suit, is reluctant to do so.

As a government representative, the attitude that has been shown by the Attorney General, reflects a lot on the policy or general attitude of the government towards Harambee projects in general. We saw that the government is keen to support various self-help projects started on the people's own initiatives by dishing out some money whenever it has been possible. However, it is submitted that the government has not done enough, if at all, to ensure proper and smooth management of harambee projects and so facilitate and pursue nation-building to its logical ramifications. The lack of any follow-up on the money dished out to various provinces by a machinery or special official with powers to require that accounts of the expenditure of this money be rendered to the government attests to this[8].

With this in view, it is suggested that the requirement of the Attorney General's written consent to the institution of a suit agains, or prosecution of, a trustee for breach of trust be abolished. Of course, it might be argued that this perhaps would be a retrograde step because then the possibility of a consistent prosecuting policy co-ordinated by the Attorney General would thereby be removed. But, it is submitted that this would consequently make the trustees of the harambee funds more responsible and in a position to discharge their duties with due prudence, and thus aiming at higher standars to prevent the taint of criminality visiting them; now they are protected by the statute. And the fact that the Attorney General's consent is discretionary is fraught with unpredictability so that a member of the public interested in the project is not able to tell whether or not the Attorney General will give consent to prosecute a culprit who has been squandring public funds. Besides, the beneficiary's ability to bring a private prosecution would be a useful corrective to the fact that a police prosecution of a trustee under the Penal Code[9] will only take place, if at all it does, if the offence comes to their notice: in the absence of a complaint many actions which technically constitute breaches of trust are rarely known to the police. This, coupled with the police discretion not to prosecute, means that an innumerable number of offences go unpunished.

We now turn to the project committees. The inevitable conclusion is that they do not generally know thwir legal duties. As we have seen there is no investment done; there are no proper records of accounts; and no reliable information is available as regards the management of the projects. The committees do lose sight of the need to avoid wasteful expenditure by not adhering to the terms of the harambee project instruments, with the consequence that the harambee institution is being greatly undermined. Money-

collected from members of the public is not harnessed properly in order to warrant the spirit of selflessness that underlies the harambee institution. The public's money is not collected to be used by individuals for their own ends through embezzling and swindling. Nor is the public called upon to contribute money for the purpose of buying presents for guests of honour attending fund-raising meetings, at the expense of the projects which are supposed to benefit, so that ultima-tely tely the difference between money collected for the project and money spent on gifts does not justify holding fundraising meetings. Neither do the public contribute the money to be banked instead of being used for the particular project for which it was intended, or being invested in authorised investments where it is not enough to embark on execution of the project so that income is raised and the capital maintained.

As we have seen above the public, as beneficiaries of the harambee funds, have a right to investigate the accounts, vouchers, title deeds and other documents relating to the management of the harambee funds. They have a right to demand full and accurate information as to the amount and state of the harambee funds, the modes in which the funds have been dealt with, where the funds are now, and where invested, a right to information which should be available to a registered shareholder of companies whose shares are included among the trust assets. In the absence of all this information the committees are liable to be sued for breach of trust, and made accountable to the public; and the courts should have the powers to grant judgements quod computet.

It is suggested that in order to curb the rampant misuse of harambee funds, and the negligence and irresponsibility of the harambee committees, a harambee commission with supervisory, managerial and even judicial powers be set up on a national basis to act as an overseer of the harambee projects.

Under the umbrella of such a mission can also be set up an accounting section[10] responsible for harambee projects' funds with powers to follow up money dished by the government and collected from the public for harambee projects, analyse how it is spent and report back to the commission. It is pathetic that neither the Department of Social Servvices in the Ministry of Housing and Social Sertices nor the provincial and district administration that licenses the harambee fundraising meetings, have come up with any comprensive machinery to supervise and control the funds collected for harambee projects. For the department of social s services, it is not enough to simply dish out the money. And for the administration it is not enough simply to issue licenses for harambee fundraising meetings. Much more needs to be done; if not on the above lines, then by invoicing the doctrines of equity for it is submitted that even in the absence of statutory provisions governing the collection and keeping of harambee funds, the doctrines of equity are adequate to ensure proper management of those funds.

The implementation of the suggestions above may require some legislative measures and some reorganisation in the relevant institutions. But it the Harambee institution is to continue to play a viable role in national development programmes, then the legislative measures and reorganisation would be justified.

FOOTNOTES:

CHAPTER ONE.

1 Jomo Kenyatta, Harambee: The Prime Minister of Kenya's Speeches 1963 - 1964 (From the Attainment of Internal Self-Government to the Threshhold of Kenya's Republic) , Oxford University Press, 1964.

2 In a personal interview with the Senior Community Development Officer in the Ministry of Housing and Social Services Nairobi, Mr. Andrew Musumba, on the 14th. October, 1977, the office pointed to the writer that once money is dished out by the National Community Development Committee, there is no effort made to follow up this money and ensure that it is spent on the self-help projects and nothing else.

3 I bid.

4 The Judicature Act, 1967 (Cap. 8 of the Laws of Kenya) , section 3(1) provides for the residual application of the substance of common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897 in Kenya so far as the inhabitants and circumstances permit.

5 Henry Biecen, Kenya: The Politics of Participation and Control, Princeton University Press (1974) pg.8. Bienen's assertion becomes evident when one considers the great involvement of politicians in their own area's institute when the various institutes of technology were being established in the first half of the 1970s, and the submission by one of the prominent -

politicians from Western Province the "politics and development go hand-in-hand and I cannot see how they can be separated without confusing the people" (see the Daily Nation, October 19, 1977).

6 The Political Economy of Self-Help: Kenya's Harambee Institutes of Technology by E.M. Godfrey and G.C. M. Mutiso, IDS Working Paper No. 107 June 1973, University of Nairobi.

7 Sunday Nation, September 4, 1977.

8 Personal interview with the First Information Officer, Nigeria High Commission Nairobi, Mr. S.A. Bakre on August 30, 1977. For a detailed discussion on the Universality of the concept of Harambee self-help, see B.R. Bolnick: Comparative Harembee: History and Theory of Voluntary collective Behaviour, IDS Discussion Paper No. 198, April 1974.

9 Alushula, A.J.P., The Concept of Self-Help as a Method of Development, Bachelor of Arts Dissertation, University of Dar-es-Salaam, 1969.

10 Kenyatta, Jomo op. cit 7 - 10.
See also, generally, Owino - Ombudo; Harambee: Its Origin and Growth, Academic Publishers Nairobi (1974).

11 Rasmus Rasmusson, Social Empasis of People's Priorities in Rural Development: Case Studies in Kenya on Results of Decentralised Planning, Stockholm School of Economics, Sweden (1975) pp. 1 - 2.

12 Government Printer, Ministry of Co-operatives and Social Services, Department of Social Services Annual Report 1975.

13 A recent and clear manifestation of the Harambee spirit in the field of education is the establishment of the colleges of technology in various parts of the country.

14 Daily Nation, October 20, 1977

15 On the 8th January, 1974, two eggs were sold for K£ 15 each in Kakamega during a fundraising meeting in aid of Western College of Arts and Applied Sciences (Daily Nation 9th January 1974) ; and in Kiambu at Gatundu in 1977 a man paid K£ 100 for one banana during a fundraising meeting (Daily Nation, 5th July 1977).

16 Frank Holmquist's studies (Towards a Political Theory of Rural Self-Help Development, 1971) in Nyanza Province indicate that Harambee project choice articulates and dramatizes local level perception that government planning and development approach for the region is, in essence, unaware of local needs. Government help tended to be focused on projects whose inception had been completed rather than on those the people felt they needed and were trying to implement.

CHAPTER TWO:

1 Philip H. Pettit, Equity and the Law of Trusts (Butterworth 3rd ed. 1974) pp. 1 - 15; H.G. Hanbury and R.H. Maudsley, Modern Equity (Stevens 10 ed.) (1976) pp. 3 - 34.

2 Hanbury and Maudsley, op cit cap. 15; George Keeton & Sheridan, The Law of Trusts (10th ed.) pp. 156 - 159.

3 43 Elizabeth 1, c.4, (1601)

4 I bid.

5 (1888) 51 & 52 Vict. c. 42

6 (1891) %A.C 531

7 I bid. at 583

8 (1957) E.A. 616

9 Now cap 470 Laws of Kenya (Revised 1977)s. 13(1)

10 (1959) E.A. 1057

11 I bid. at 1060

12 Supra, note 4 chapter one.

13 All the names used herein, unless stated to the contrary, are fictitious and do not bear any resemblance to people either living or dead.

14 See Baby Joan Otieno Appel Fund in The Standard, 7th & 9th May, 1977.

15 Ahmed Emergency Rescue Fund in the Daily Nation June 15, 1977.

16 Gray, Rule Agains Perpetuities (4th ed.) s. 201; Lewin, Lewin on Trusts (12th ed.) p.71

17 Supra, footnote 15.

18 Supra, footnote 14.

19 (1946) 1 All E.R. 689; (1946) ch. 217.

20 Supra, footnote 15.

21 (1958) 1 All E.R. 37; (1957) 3 W.L.R. 1069

22 See P.S. Atiyah, 74 L.Q.R 190

23 (1905) 2 ch. 48

24 For instance, educational institutes like Alliance -

Boys School and Nairobi Girls School, which were established several decades ago still have pressing problems that have to be solved through Harambee efforts (see Daily Nation, November 25, 1977)

25 I bid.

26 For a discussion of the cases, see Stephen Cretney, "The Application of Equitable Doctrines by the Courts in East Africa" (1968) 12 J.A.L. 131.

27 I bid.

28 Supra, footnote no. 6

29 (1954) 3 All E.R. 257

30 In 1977 cash donations to the Appeal Fund reached KES 15,000 plus several items and 60 institutions housing sick less fortunate children benefited from the fund, Daily Nation, December 28 1977.

31 (1950) 2 All E.R. 1150n.

32 (1950) 2 All E.R. 1150n.

33 (1951) Ch. 661

34 I bid. at pp. 665 - 666.

35 (1933) ch. 103

36 Supta, footnote no. 8

37 The Standard, 4th, 10th, 14th, 19th and 24th, May 23, 1977.

38 (1953) 2 All E.R. 1032.

39 Daily Nation, May 27, 1977.

40 For instance, in the years 1974 - 1976 the total financial aid towards the relief of the distress amounted to KES 83,000 in Western Province (Ministry of Housing & Social Services, Dept. of Social Services , Western Province Annual Reports for the respective years). This is a very small grant shich cannot compare with help of members of the public.

41 Supra, chapter 1: 2.

42 J.E. Anderson, Report on Conference of Harambee School Headmasters, Faculty of Education, University of Nairobi (1966).

43 INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES vs. A - G. (1971) 3 W.L.R. 853.

44 (1965) ch. 669

45 The Standard, May 3, 1977.

46 Supra, footnote no. 10

47 I bid. at 1062.

48 Re BRITISH SCHOOL OF EGYPTIAN ARCHELOLOGY (1954) 1 W.L.R. 540.

49 1974 - 1978 Development Plan, Kenya, Government Printer, Nairobi (1974) para. 196, p. 406.

50 The Standard, 8th & 9th August 1977, 7th & 26th September 1977; Daily Nation, July 5th, and October 12, 1977.

51 Sunday Nation, July 3, 1977.

52 BOWMAN vs. SECULAR SOCIETY (1917) A.C. 406.

53 FELLOWSHIP OF HUMANITY vs. COUNTY OF ALAMEDA, 153 cal. App. 2d. at 693.

54 Cap. 108 (Laws of Kenya, Revised 1970)

55 The proscribed "Dini ya Musambwa" Sect was registed even though its constitution provided for no doctrinal basis, see Audrey Wipper, Rural Rebels: A study of two Protest Movements in Kenya, pp. 333 - 334.

56 I bid.

57 Re CAUS (1934) ch. 162.

58 (1949) A.C. 426; (1949) 1 All E.R. 848.

59 I bid. at p. 455 and p. 860.

60 Personal interview with the St. Andrews Church Minister Nairobi on the 6th November, 1977. Students were also interviewed during the same month.

61 I bid

62 Cf. SUNNI JAMAT vs. C.I.T. (1964) E.A. 590.

63 (1862) 31 Beav. 14

64 My colleague Mr. Salim W. Machio in his paper, "Fredom of Conscience in Kenya: A case study of the Banned Dini ya Msambwa" has given a comprehensive expose' on the nature of the sect and why it was banned.

65 Cf. NATIONAL ANTI-VIVISECTION SOCIETY vs. I.R.C. (1948) A.C. 31

66 (1947) A.C. 447

67 (1915) 1 ch. 113

68 (1949) 1 All E.R. 495

69 I bid. at pp. 497 - 498

70 The most notable being the 1976 Olympic Fund.

71 (1953) A.C. 381; (1953) 1 All E.R. 747

72 Personal interviews with M/s. Niva and Oisebe of Kenya National Sports Council.

73 Re RESCH's WILL TRUSTS (1969) I.A.C. 514

74 Cap. 21 (Laws of Kenya, Revised 1972) section 62.

75 (1974) 40 M.L.R. 397 at 413 - 416

76 see The Standard, 1st November, 1976 and 13th December, 1976; Daily Nation, June 2, 1976

77 See The Standard, May 31, 1976, November 1, 1976, and December 12, 1977; Daily Nation June 2, 1976, October 30, 1976.

78 O.K . Mutungi, "Communication of the Law under conditions of Development", (1973) 9 E.A.L.J. 11

79 Cf. SUGRABAI MOHAMED ALIBAHAI KARIMJEE CHARTABLE TRUST (1960) E.A. 521; Re SMITHSON (1943) 20 K.L.R. 13; and Re MAYERS (1954) K.L.R. 13.

80 The 1976 Olympic Fund would have provided a relevant illustration, but for reasons not clear to the writer, the officials of the Kenya National Sports Council were not ready to say what happened to the money that had been collected when the project turned out to be a fiasco in the wake of Kenya's withdrawal from Olympics.

81 RIAT Development Trust is a company limited by guarantee and having no share capital registered under section 21(1) of the Companies Act, Cap. 486 (Laws of Kenya) . The company was inforporated on 30.1. 1973.

82 Memorandum of Association ch. 9.

CHAPTER THREE:

1 E.M. Godfrey & G.C.M. Mutiso op. cit. pp. 18-19.

2 Kimathi Institute of Technology prospectus, pp. 5-8

3 I bid.

4. I bid.

5 The Standard, June 14, 1972

6 Daily Nation, September 20, 1972

7 The Standard, April 29 1977

8 Daily Nation, September, 29, 1975

9 Daily Nation, March 15, 1977

10 The conclusion is arrived at as a result of the writer's personal observation in Bunyala, Kabras, Wange Wanga and Butsotso Locations fof Kakamega District. Though these four locations covered in September 1977, cannot be taken as representative of Kenya, they generally show the trend adopted by collectors of Harambee funds. In a personal interview with the GEMA Secretary General Mr. Stanley Ireri Njem on October 17, 1977, it was admitted that this practice is rampant and country-wide.

11 A district officer in Busia district was reported to have warned people who discourage others from paying, or were themselves unwilling to pay, that they were committing that "offence" - see The Standard, September 22, 1977.

12 Supra, footnote no. 10

13 In May 1975 the writer was refused medical treatment at a local dispensary due to the fact that he could not produce a receipt for WECO contribution.

14 East Africa Standard, February 8, 1973

15 Phillip M. Mbithi, Rural Sociology and Rural Development: Its application in Kenya (E.A.L.B. 1974)

16 I bid. at pp. 194 - 198.

17 Per Duncan Ndegwa, Daily Nation, August 9, 1977

18 The Standard, April 2, 1975; Daily Nation, May 19, 1975.

19 Daily Nation, May 4, 1977

20 The Standard, August 29, 1977

21 In a personal interview at the college on September 6, 1977.

22 Cap. 106 (Laws of Kenya, Revised 1972)

23 I bid., s. 3

24 See for instance report of a dispersal of a purported Harambee fundraising meeting in Desai Memorial Hall, Nairobi, in the Sunday Nation December 11, 1977.

25 Penal Code, Cap. 63 (Laws of Kenya) sections 78, 79; First Schedule to the Criminal Procedure Code, cap 75 (Laws of Kenya).

26 Cap. 106, supra, s. 4(5) (c)

27 Supra, footnote no.11

28 Kenya Legislative Council Debates, vol, 86 cols. 572 - 573, 16/11/1960.

29 Cap. 128 (Laws of Kenya, Revised 1970)

30 Personal interview with Mr. Elikana Chituyi, OCPD Provincial Police Headquarters Kakamege on September 16, 1977.

31 Public collections Regulations 1961 and 1963, L.N. 27/1961 and 604/1963.

32 Cap. 106 supra, s.2.

33 Cap. 8 (Laws of Kenya, Revised 1968)

34 The Law of Restitution (1966)

35 I bid. at p. 143

36 I bid.

37 (1731) 2 Str. 915

38 I bid., at p.916

39 (1915) 3 K.B. 106

40 I bid., at p. 121; ephasis added.

41 Per COTTON L.J. in ALLCARD vs. SKINNER (1887) 36 ch. D. 145 at 171 - 175 et. seq.

CHAPTER FOUR.

1 Alushula, supra, makes a case study of two harambee projects in Kisa Location of Kakamega District and shows how one collapsed due to mismanagement.

2 Cap. 167 (Laws of Kenya, Revised 1962)

3 See Trustee (Amendment) Act, No. 22 of 1967; Statute Law (Miscellaneous Amendment) Act, No. 10 of 1969; and Statute Law (Miscellaneous Amendment) Act, No. 13 of 1972.

4 As per section 4 of Cap. 167, supra.

5 Cap. 136 (1948) , now repealed.

6 Cap. 486 (Laws of Kenya Revised 1962).

7 Act No 30 of 1965.

8 As per Statute Law (Miscelaneous Amendment) Act, No. 13 of 1972

9 cf. The memorandum and articles of association of RIAT Development Trust, which confers, vide cl. 3(L), the powers of investment on trustees.

10 Section 4(2), Cap. 167, as introduced by Act No.22 of 1967.

11 This observation is made from a personal experience. In 1975 when the Kenyan shilling was devalued to Shs. 8.36 in one U.S. dollar, many harambee projects almost ground to a halt due to lack of -

adequate funds and an appeal had to be made for more collections. Such state of affairs would not possibly have arisen had the funds been invested instead of being banked. Inflation in the same year had a similar effect.

12 The interview was conducted on February 9, 1978. The figures quoted represent the totals collected as at August 15, 1977 and July 24, 1977 respectively.

13 Personal interviews with Mr. G. Muguiyi, Executive Officer, Kimathi Institute of Technology, Nairobi Branch, and Mr. Peter Kibisu, WECO Administrator, on August 30, 1977 and September 6, 1977.

14 (1975) 39 Conv. (N.S.) 318.

15 For instance, Kiambu Institute of Science and Technology is situate on a 200 acre coffee farm.

16 Per ROMER L.J. in re NEW (1901) 2 ch. 534 at p. 544.

17 The Standard, February 6, 1978

18 Cap. 167, supra.

19 Re DOWNSHIRE S.E. (1953) ch. 218 at p. 248.

20 The only exceptions are where the court has so ordered, or where the statute so provides (cf. s.42, cap. 167).

21 (1975) Conv. (N.S.) 177

22 The Standard, April 28, 1977

23 The Standard, May 30, 1977

24 Daily Nation, November 25, 1977.

25 I bid.

26 In 1976 an official of Luo Union (East Africa) was charged with stealing Shs. 25000 received by him on account of RIAT but he was discharged when a nolle prosequi was entered by the prosecution - The Standard, November 11, 1976.

27 This advice, to seek a lawyer's advice, was given -

by the Attorney General, see Daily Nation, September 22, 1977.

28 Cap. 8 (Laws of Kenya).

29 Supra, footnote 2

30 See, Peter Kibisu stating that the WECO balance sheet was open for inspection by members of the public The Standard, January 25, 1978.

31 J.E. Anderson, Report on Conference of Harambee School Headmasters (Faculty of Education, University of Nairobi, 1966) p. 16.

32 I bid.

33 Interview with Mr. Andrew Musumba of the Ministry of Housing and Social Services, supra, chapter 1, footnote 2.

34 Supra, footnote 23.

35 See, for instance, Daily Nation, April 18, 1977, May 25, 1977 and The Standard, May 28, 1977.

36 Weekly Review, December 19, 1977, and January 16, 1978.

37 Daily Nation, June 2, 1976 .

38 Daily Nation, October 30, 1976 and The Standard, November 1, 1976.

39 M.H. Shah, quoted in Weekly Review April 12, 1976.

40 The most notable were the closure of the Nairobi Branch Office due to rental arrears, and students at the institute boycotting lessons due to lack of staff, equipment and good food - The Standard, August 9, 1977. Shortly afterwards, the Luo Students League called for a return of RIAT to the Luo Community - The Standard, August 19, 1977.

41 Daily Nation, November 28, 1977.

42 Re RIDS DEL, (1947) ch. 597.

43 Cap. 63 (Laws of Kenya, Revised 1970).

44 I bid. s. 327 (2)

45 For a detailed treatment of this remedy, see Petitt, supra.

CHAPTER FIVE:

1 cf. THE SHEIKH FAZAL ILAHI NOORDIN CHARITABLE TRUST, supra; SUNNI JAMAT vs. C.I.T (1964) E.A. 590; Re SMITHSON (1943) 20 K.L.R. 13.

2 Robert Seidman, Reception of English Law in Colonial Africa Revisited, Vol.2 E.A.L.R. 47.

3 per LORD CROSS OF CHELSEA In DINGLE vs.
5 TURNER (1972) A.C. 601 at pp. 624 - 625

4 Cap. 470 (Laws of Kenya, Revised 1977) section 13(1).

5 Some writers have attributed this to the fact that the provincial administration is now relieved of its tax-collecting function, and so this acts as a way through which to exercise their powers, e.g. J.E. Reynolds and M.A.H. Wallis, "Self-Help & Rural Development in Kenya", IDS Discussion Paper No. 241

6 A case in point is Coast Province where the provincial Commissioner, being the main mover and administration Co-ordinator of Coast Institute of Technology, has had an upper hand in the affairs of the institute.

7 Cap. 21 (Laws of Kenya), section 62.

8 Interview with Mr. Andrew Musumba, supra.

9 Cap. 63 (63 (Laws of Kenya) , section 327.

10 This is also the proposal that was given to the Ministry of Housing and Social Services by the Nyanza Provincial Commissioner - The Standard, February 6, 1978.

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