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CO-OPERATIVE SOCIETIES DISPUTE SETTLEMENT IN TANZANIA AND UNSETTLED POSITIONS OVER COURTS AUTHORITY

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ABSTRACT
Co-operative societies' dispute settlement is among the contentious areas under the current Tanzanian legal machinery. The machinery requires 'co-operative disputes' to be settled through negotiation/reconciliation, reference to the Registrar, and finally appeal to the Minister. The machinery appears to preclude ordinary courts from entertaining co-operative disputes. It defines a co-operative dispute by 'listing' the probable parties to it and their controversies over so called 'co-operative business'. What remains unclear is the scope of the business of a co-operative society. The lack of clarity has resulted into disputes involving co-operative societies in the hands of courts of law. Expectedly, multiple 'Preliminary Objections' are raised on the point of lack of jurisdiction. The High Court of Tanzania has entertained some of these disputes. The study analyses the unsettled legal position on the authority of ordinary courts of law in settlement of co-operative disputes in Tanzania. Inter alia, it highlights the converging and diverging decisions of the High Court on the area. Of interest is the shared understanding that co-operative disputes are resolved through internal mechanisms and departure is as to what follows after the exhaustion of the mechanisms. Noted is the absence of a common understanding on ordinary courts authority over co-operative disputes, the extent of what they can preliminarily entertain and orders to be given. The study analyses the decisions, draw important conclusions and proposes ways forward with considerations seeking to strike a balance between preserving co-operative identity and ensuring equitable justice through access to the courts of law.

Keywords: *Co-operative Dispute, Settlement Mechanisms, Position, Courts' Authority, Tanzania*

1.0 INTRODUCTION
Co-operative Societies play a significant role in the socio-economic lives of members and their families in Tanzania. They immensely contribute to the growth of the country's economy. Recent statistics indicate the existence of about 7,300 co-operatives in Tanzania (TCDC,2023). They include agriculture-based, Savings and credit-based (SACCOS) and the remaining are providing other services.[1] The societies' contribution is evident particularly in the agricultural and financial

[1] Source: Tanzania Co-operative Development Commission (TCDC), The statistics were for the period up to the end of June 2021.

sectors. For example, in the agricultural sector between 2014 and 2019 co-operatives in coffee, cotton, cashew and tobacco growing areas generated foreign income of USD 4,202.20 million.[2] On the side of financial co-operatives, statistics reveal that SACCOS members own shares worth TZS 33 billion, savings worth TZS 105 billion, and deposits worth TZS 289 billion. Total loans issued by SACCOS were worth about TZS 232 billion.[3] Unfortunately, however, the business operations of these societies have not been free from encumbrances. Pertinent to these handicaps are disputes that arise during their business transactions which require co-operative attention and resources. The disputes are mostly between members and they, at times, include non-members who engage in business transactions with the co-operatives, claiming through the relevant persons. These disputes, some of which end up in the High Court of Tanzania, are required to be resolved in accordance with the legal mechanism provided under the Co-operative Societies Act and respective Regulations.

This paper, therefore, discusses the unsettled position regarding ordinary courts authority on the settlement of co-operative disputes. The study analyses the existing legal framework *vis a vis* decision by the High Court of Tanzania in order to make an exposition of the issue. The main objective is to make a critical analysis of the legal and social implications posed by the diverging views of the High Court of Tanzania on the authority of ordinary courts in settling co-operative disputes. The discussion starts with the global position on the significance of co-operative societies. It extends to theories and legal requirements regarding co-operative dispute settlement. Significantly, select decisions of the High Court of Tanzania were revisited in order to expose the diverging views on the ordinary courts' authority over co-operative disputes. The conclusion and way forward mark the closure of the entire discussion.

Data, for the present work, has been gathered by way of documentary review of mainly co-operative and related legislation, case law, research articles, academic dissertations and information from the ongoing strategic research project on co-operative dispute settlement in Tanzania. The sources enlisted are both local and foreign. The next section analyses the global recognition of co-operative societies' significance and the necessity of employing flexible dispute settlement mechanisms that takes aboard not only the amicable approaches but also allows access to courts of law.

2.0 GLOBAL RECOGNITION AND NEED FOR FLEXIBLE DISPUTE SETTLEMENT MECHANISMS

2.1 Co-operatives under the UN and ILO frameworks

The United Nations (UN) and the International Labour Organisation (ILO) have recognised the significance of co-operatives in socio-economic development. The UN for instance, underlines the uniqueness of co-operatives as that serve mostly the socially excluded and vulnerable sects of the population.[4] It considers them as enterprises that are critical to implementing socially inclusive policies that drive inclusive development, particularly in developing countries.[5] Appreciating the various forms in which they exist, the UN links these enterprises with the responsibility of promoting participation of socio-economic development of local peoples and communities,[6] playing critical role in eradication of poverty and hunger.

[2] A.P. Rutabanzibwa, *et al*, *Miaka 60 ya Uhuru, Mchango wa Maendeleo ya Ushirika katika Maendeleo ya Uchumi wa Tanzania*, translated as "60 Years of Independence: Co-operative Societies Contribution to National Economy", A Paper Presented at the Zonal Conference for the Tanzania Mainland 60 years independence celebrations on 6th December 2021 at the Nyerere Hall, Moshi Co-operative University.

[3] *Supra*, note 1

[4] United Nations, *United Nations General Assembly Resolution on Co-operatives in Social Development*, A/RES/72/143 of 19 December 2017

[5] *Id*.

[6] Including women, youth, older persons, persons with disabilities and indigenous peoples,

With regard to the ILO framework, the ILO Recommendation for Promotion of Co-operatives is an important instrument to look at. Under the Recommendation co-operatives are recognised as important enterprises in job creation, resource mobilization, investment generation, and general contribution to the economy.[7] The ILO looks at globalisation pressures, problems and challenges as creating opportunities for co-operatives to address them.[8] For the ILO, the long-term goal is to have vibrant co-operative movement which sustainably supports socio-economic development of members.

In terms of their identity, co-operatives are unique social enterprises. The International Co-operative Alliance (ICA) Statement on the Co-operative Identity[9] identifies the societies as none but autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.[10] They are defined by their values and principles making them different from other association of persons like companies. Co-operatives are established out of members' determination to be organised into self-help, self-responsible, democratic, solidarity, equality and equity values. In addition, thereof, the societies are to comply with ethical values of honesty, openness, social responsibility and caring for others.

The values are enforced through legal frameworks that comprehend seven crucial principles. Under these principles, co-operatives are voluntary associations and they are more often open to new membership provided that they comply with the societies' by-laws. Co-operatives are also democratically controlled by members. They are vessels where members participate to the economic undertaking contributing to capital and equally sharing proceeds of a surplus. The societies shall operate with autonomy and independence. They are principled to attain development and competitive efficiency through education, training and accessing necessary information. Pertinent to their widespread and strength is the principle co-operation among co-operatives. Lastly but not least, co-operatives are supposed to be concerned for the community so as to get assured of their future sustainability.

Co-operatives exist in multiple forms and diverse sectors. They are in banking, insurance, microfinance, agriculture, as well as in intellectual property and other professional based services. The most common are: banks, insurance, SACCOS, Agriculture and Marketing Societies (AMCOS), diary, fishing, housing, consumer as well as multipurpose societies. The diagram below sums up the explanation on the societies' multiplicity and diversity.

[7] ILO, (2002) *Promotion of Co-operatives Recommendation*, (R193), Preamble
[8] *Id*.
[9] ICA, (1995), *ICA Statement on the Co-operative Identity*, Brussels
[10] *Id.*

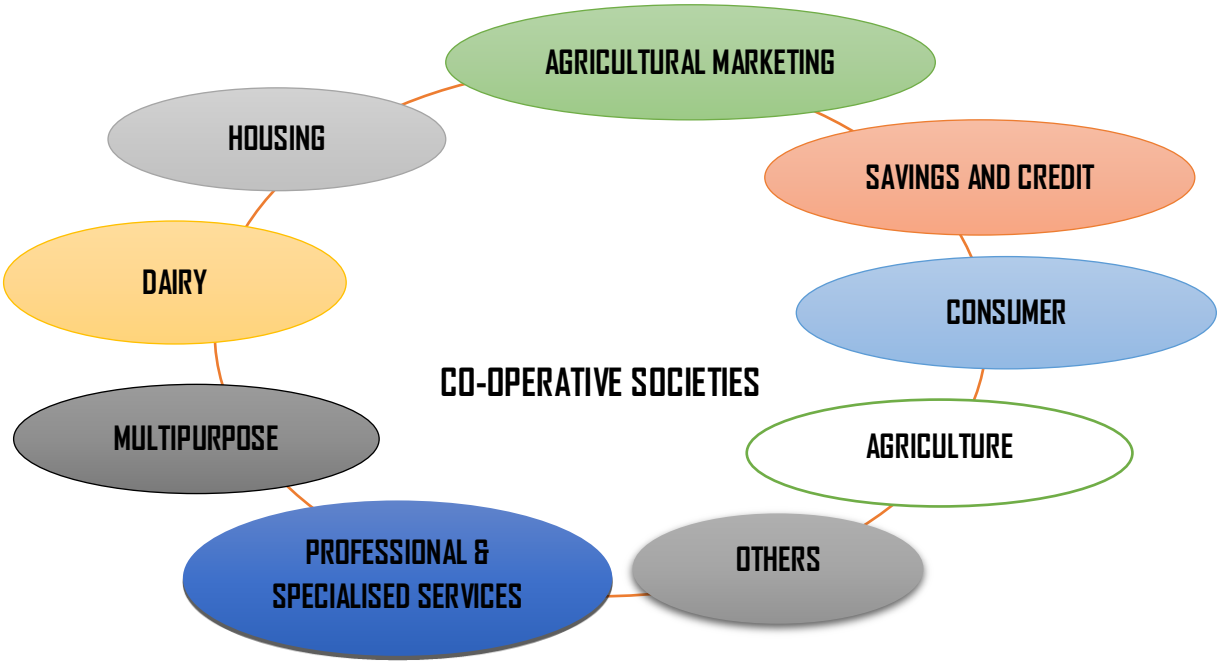

Figure 1: **Co-operative societies' multiplicity and diversity**.

2.2 The Need for flexible disputes settlement mechanisms

Even though there is no universal framework for co-operative regulation, there are some attempts to universally recognise and set standards pertinent to regulating co-operative affairs. The recognition and the standards are necessary to address challenges brought by globalisation and development in science and technology which have necessitated the establishment of inter-territorial co-operative businesses with inter-territorial co-operative membership. With anticipation that the businesses (at the international level) may be coupled with grievances, the international community recognises the need to have mechanisms for settlement in place. Recommended are the mechanisms that are flexible and accommodates the preservation of co-operative identity and access to equitable justice.

The ILO Guidelines for Co-operative Regulation,[11] for instance, recognises amicable and formal settlement mechanisms of co-operative disputes. While the former entails friendly resolution between parties with a view of preserving friendly ties and co-operation amongst them, the latter is considered as a last resort mechanism guaranteeing access to equitable justice to aggrieved parties. The Guidelines underlines the mechanisms as ones prevalent in many countries' legislation.[12] However, the amicable settlement option is stressed on with the reasoning that it's the parties who prefer the procedures because they are cheaper, more expedient and they allow for the consideration of local human and social issues.[13] The provisions in the Guidelines are a good starting point in filling the gap in the ILO Recommendations 193 on Co-operative Promotion. The Recommendation does not contemplate the occurrence of disputes in the course of promoting co-operatives nationally, regionally and internationally.[14]

[11] H. Hagen, (2012), *Guidelines on Co-operative Legislation* (3rd Revised Edition), ILO: Geneva
[12] *Id*.
[13] *Id.*, at p. 101.
[14] ILO Recommendation 193, *supra* note 7.

The proposed East African Community Co-operative Societies legislation is an example of an international (precisely sub-regional) attempt to recognise amicable and formal settlement mechanisms on the disputes.[15] While it requires disputes to be referred to conciliation and later arbitration, it gives room to a party dissatisfied by the decision of the Arbitrator to appeal to the High Court[16] thereby ensuring the flexibility proposed by the ILO Guidelines. Before proceeding to the discussion on the Tanzanian legal framework for co-operative disputes and the analysis of the decisions of the High Court over co-operative disputes (and which stands to be the gist of this paper) it is essential to have an overview of the perspectives on co-operative disputes and their settlement mechanisms. Focus on the overview is the scope and the approaches towards settlement/resolution. Doing so is essential in order to understand the dispute from other disputes which may simply have different approaches in terms of their resolution.

3.0 CO-OPERATIVE DISPUTE SETTLEMENT

3.1 Co-operative disputes

Co-operative disputes are normally limited to the business or activities of the co-operative society. Disputes which do not relate or are not directly connected or linked with the business of a given co-operative society are normally considered to be outside the scope of co-operative disputes. The scope is thus a matter to be specified by co-operative law, (which encompasses by-laws of a particular society, the Co-operative Societies Act and Regulations). Delineating scope is critical in order to distinguish co-operative disputes from other disputes which co-operative societies or members may be part to.[17] Elsewhere[18] we have explained almost the same findings that in most countries' legislation, a co-operative dispute is defined as one concerning the business of a co-operative society.[19] Co-operative disputes cover both members and non-members provided that they are or were involved in the particular co-operative business. This is a finding in most of the Anglophone Asia and Africa co-operative societies' legislation (India, Kenya, Tanzania, and Nigeria, to name a few).

Most of these countries' legislation classify disputes in terms of parties focusing on disputes between members *inter-se* (past and present members and persons claiming through them); member and the society/its committee/officer/agent/employee; or the society or its committee and any past society/its committee/officer/agent/employee; or between the society and any other society; or a society and the members of a society affiliated to it; or a society and a person, other than a member of the society, who has been granted a loan by the society or with whom the society has or had business transactions or any person claiming through such a person; or the

[15] The Bill for the East African Community Co-operative Societies Act, 2014 sections 44 to 49.

[16] *Id*. Section 49

[17] As per Munuo J (as she then was) in *Gerald A. Nkya v. Obeid I. Munisi and six others*, High Court of Tanzania (Moshi Registry) Civil Case No. 29 of 1997 (unreported)

See also: *Babati SACCOS and Another v. Reginald Sanka* [Land Appeal No. 67 of 2019, High Court (Land Division) at Arusha (unreported)

The appellants wrongly attached the respondent house (originally not pledged as security) due to his failure to repay the loan. The respondent had pledged different properties (two plots) as collateral for the loan advanced to him by the appellants. The issue before the court was whether the appellants' attempt to sell the respondents house falls within the business of the 1st appellant. Concurring with the decision of the Tribunal, the Court was of the view that the attachment of the said house cannot be taken to fall within business of the 1st appellant. Consequently, the Tribunals decision to the effect that it had jurisdiction to determine the matter presented before it was affirmed.

[18] See: M.S. Nkuhi MS & A.P. Rutabanzibwa (2021), *Co-operative Dispute Settlement in Tanzania: Evolving Concerns, Effects and Thoughts for Reforms*, A Paper Presented at the International Conference on Co-operatives and Industrialization, jointly organised by the Moshi Co-operative University (MoCU) and the Tanzania Co-operative Development Commission (TCDC) from 1st to 3rd September 2021.

[19] See Co-operative Societies legislation for Tanzania, Kenya and Uganda. For instance, section 73 of the Co-operative Societies Act, 1991 (Cap 112, as amended in 2020) (Uganda) makes use of the phrase "disputes touching the business of registered societies".

society and a surety of a member, past member, deceased member or employee or a person, other than a member, who has been granted a loan by the society, whether such a surety is or is not a member of the society; or between the society and a creditor of the society.

There are also decisions by courts of law and equally important academic writings seeking to enlighten on the disputes. The Tanzanian High Court decision in the case of *Asha Iddi v. Babati SACCOS Ltd and another*[20] and the Kenyan High Court decision in the case of *Gatanga Coffee Growers Co-operative Society Ltd v. Gitau*[21] are critical to the present discussion. In the previous, Masara J, referring to, *inter alia,* Regulation 83 of the Co-operative Societies Regulations 2015, held that a dispute has to first concern the business of the Co-operative Society to qualify as a co-operative dispute.[22] The case, however, does not provide a wider scope as to what the business of a co-operative society might be. It is the Kenyan case of Gatanga (*supra*) that attempted to define scope of the business of a co-operative society referring to section 80 of the then Kenyan Co-operative Societies Act 1966. The Court held that the phrase business of a registered society used in the section is not limited to internal management but all activities within the ambit of the society by-laws.

Referring to the Case (*Gatanga's* case), Ogola attempted to delineate the scope of the phrase arguing that disputes on the business of a co-operative societies may include disputes regarding the expulsion of members from their societies; societies refusal to accept members produce; monetary demands by societies; monetary demands by members (dividends, bonuses, deposits and interests etc.); and disputes regarding societies monetary demands on members.[23] Elsewhere, there are explanations made on the way the Indian States co-operative societies' legislation delineate the dispute.[24] Focus is on how most of States' co-operative legislation delineates cooperative disputes as disputes on the societies' by-laws (*alias* constitutions), management or business.[25] These laws have underpinned election of society leadership, deficiency in the assets, employment terms (including working conditions and disciplinary actions), and claims by surety as matters constituting a co-operative dispute. And like the Ugandan Co-operative societies legislation[26], the select Indian States co-operative societies' legislation excludes a claim by a society of a debt from the members as constituting a co-operative dispute (*whether or not the debt is admitted*).

The attempts to define scope of co-operative dispute are noted with, however, some reservations as they are yet to address the problem. We have noted the absence of a watertight definition of a co-operative dispute particularly in most jurisdictions. There is a problem of defining a co-operative dispute and which is largely a result of the diverse nature of co-operative businesses. Besides, the difficulty in providing scope for co-operative business is associated with a conflict of laws. This is because what appears to be regulated by co-operative law is also subject to another law.[27] Thus, the question whether such matters fall within those touching the business of a co-operative society or not, is yet to be resolved.

3.2 Co-operative disputes resolution: Revisiting the approaches

[20] Civil Appeal No. 30 of 2019, High Court of Tanzania (Arusha District Registry) at Arusha (unreported).

[21] [1970] E.A. 361 at p. 362.

[22] *Id*.

[23] J. J. Ogola (1979) *Co-operatives and Arbitration*, LL.M Thesis, University of Nairobi at pp. 43, 44 & 45.

[24] See: A. P. Rutabanzibwa & M. S. Nkuhi, (2022) *Co-operative Business and Membership in Determining Co-operative Disputes: Ladislaus Mashauri Msana v Mashima SACCOS Ltd & TANFIN Consultant Limited*, Case Commentary (unpublished) at pp. 5, 6 and 7.

[25] Section 70 of the Karnataka Co-operative Societies (Amendment) Act 2000; Section 61 of the Andhra Pradesh Co-operative Societies Act, 1964; Section 91(1) of the Maharashtra Co-operative Societies Act, 1960.

[26] *Supra*, note 19.

[27] There are other matters which are to be addressed by specific laws, including land, mortgage and labour laws.

As earlier noted, co-operative societies legislation of various African countries provides for legal framework and mechanisms for settlement of co-operative disputes. Our study of the legislation has led us to classifying them, in terms of the methods, into two major groups namely: the co-operative identity preservation legislation ('co-operative identity group'); and flexible legislation ('equitable justice group'). The co-operative identity group entails legislation which does not allow disputes concerning co-operatives to be entertained in ordinary courts of law. The equitable justice group is the one in favour of access to courts of law as final authorities in dispensation of justice.

The co-operative identity group is built on the spirit of co-operation and the need to preserve relations amongst parties to the disputes. Most co-operative legal jurisdictions which follow the co-operative identity group line of thinking tend to oust involvement of ordinary courts from entertaining co-operative disputes[28]. The group challenges the referring of co-operative disputes to ordinary courts of law to avoid the adversarial approaches and "win-lose" results which would jeopardize the cooperation spirit and consequently the identity and the business. Focus is on amicable settlement so as to maintain the spirit among the members. Amicable settlement mechanisms are preferred and employed encompassing both preventative and curative mechanisms. Preventative mechanisms may be direct and indirect. Direct mechanisms are the ones employed within the co-operative organisation structures with the aim of resolving the disputes using internally designed measures. The intent is to avoid involving 'third' parties or 'outsiders' in order to keep intact the co-operative identity and image henceforth preserving co-operative independence and identity.

The mechanisms are mostly agreed upon and prescribed in the co-operative governance instruments including by-laws, guidelines and policies. In addition, since direct dispute prevention measures are part of the organization by-laws and therefore registered with the office of the regulators (e.g. the office of the registrar of co-operatives, co-operative departments), it implies that they are recognised by the government which is the organ entrusted with the mandate of enforcing the law. Moreover, the act of being registered gives a constructive notice to persons, especially non-members expecting to enter into co-operative business transactions with the co-operative society to be aware of the procedures that will be pursued in case of dispute.[29] These mechanisms fall under the 'self-regulation' category and may include agreeing *ex-ante*, on a list of behaviours that would incite disputes in a co-operative society and prescribing in the by-laws internal amicable remedial measures;[30] dispute control including implementing procedures for negotiation, reconciliation, mediation and arbitration;[31] establishing dispute reference mechanism including referring a dispute to another affiliate co-operative body such as secondary or tertiary which must have a unit dedicated for dispute resolution.[32]

[28] ILC89 - Report V (1): Promotion of cooperatives (ilo.org) accessed on 18th February 2022 at 13:03 hours.

[29] Indeed, the said procedures may be referred in business transactions agreements concluded between the society and non-members.

[30] Such as naming and shaming members responsible for the mischievous behaviour, or admission and repentance, constructive warning or punishment, etc.

[31] J. J. Goton and H. Haapio, *From Reaction to Proactive Action: Dispute Prevention Process*, available at: https://www.researchgate.net/publication/242148632, accessed on 8th June 2021 at 0620 hours.

[32] H.H. Münkner, *Ensuring Supportive Legal Frameworks for Co-operative Growth*, A Paper Presented at the ICA 11th Regional Assembly, Nairobi, 17-19 November 2014. The paper is available at https://www.ica.coop/sites/default/files/attachments/Ensuring%20Legal%20Framework-%20Prof.%20Murkner%20paper.pdf, and the authors accessed it on 17th February 2022 at 1800 hours.

Indirect dispute settlement mechanisms involve measures enshrined in the day-to-day operations of a co-operative society's activities or functions. They are implemented by members unconsciously, i.e. without being fully aware that they are aimed at dispute prevention. When frequently practiced, the mechanisms become part of the co-operative organization culture and values. Risky business allocation to members who can avoid disputes; incentivizing on cooperation among members; creation of partnership among competing members in various society assignments; and preaching a focus on win-win outcomes and complementarity are some of the indirect dispute prevention mechanisms.

Where preventative mechanisms, direct and indirect, have failed to contain a dispute, the invoking of curative mechanisms is inevitable. As earlier stated, the mechanisms are also amicable in nature. Curative mechanisms are classified as internal and external. Internal cure is within the co-operative organisation itself where Alternative Dispute Resolution (ADR) mechanisms are preferred (reconciliation, negotiation, mediation inclusive). External curative measures entail the use of amicable measures administered by third parties and or regulatory authorities to settle the disputes. Independent arbitrators, co-operative departments, registrar's offices, commissions, line ministries are preferred and utilised. Examples of co-operative laws in this group include laws of Tanzania Mainland,[33] Tanzania Zanzibar,[34] Nigeria[35] and Uganda.[36] Critics are pointing fingers to the co-operative identity group and the approaches to co-operative dispute settlement. At the heart of their critiques is the group failure to strike a balance between preservation of co-operative identity and ensuring access to equitable justice. The group firmly believes that the approaches in these countries involve persons less versed with co-operative legal matters ending up with the distortion of the co-operative identity which they set to preserve.[37]

The equitable justice group is comprised of jurisdictions that try to strike a balance between preservation of co-operative identity and equitable justice. Co-operative laws of these countries, apart from having provisions which direct on settling co-operative disputes based on amicable approaches, establish quasi-judicial bodies such as co-operative tribunals to entertain such disputes.[38] Noteworthy, co-operative legislation, in this group, allows appeals against decisions of such bodies be referred to ordinary High Courts of the respective countries. The advantage with the equitable justice group is that it allows access to courts of law as a last remedy ensuring equitable justice. Examples of countries with co-operative legislation which combine preservation of co-operative identity and equitable justice include Kenya[39] and Eswatini.[40] The group path matches the ILO's which was analysed in section 2 above.

We analyse, in the next section, the Tanzania Mainland co-operative societies' dispute settlement framework. The analysis is vital for it offers historical explanations on the framework and its present shape including prerequisite legal requirements.

[33] See: Regulation 83 of the Co-operative Societies Regulations, 2015 (Tanzania Mainland).

[34] See: Regulations 71 and 73 of the Co-operative Societies Regulations 2019 (Zanzibar).

[35] Refer to: Section 49 of the Co-operative Societies Act, 1993, (Cap 98, as amended in 2004) (Nigeria)

[36] *Supra* note 19, sections 73,74 & 75

[37] See: M.S. Nkuhi & A.P. Rutabanzibwa (*supra*) note 18.

[38] With membership drawn from persons versed with co-operative legal matters as well as from the co-operative movement.

[39] Refer to Part XV (Section 76-81) of the Co-operative Societies Act, 2005 (Cap 490 RE 2012) (Kenya)

[40] Refer to Section 99 of the Co-operative Societies Act, Act No. 5 of 2003 (Eswatini)

4.0 THE TANZANIAN LEGAL FRAMEWORK ON DISPUTE SETTLEMENT

4.1 Evolution of Co-operative Law in co-operative disputes

The Tanzanian co-operative societies' legislation has a long history. The history, however, in the present context, is explained in connection with the evolution of co-operative dispute settlement machinery. The first co-operative societies' legislation was enacted in 1932. The legislation contained no provisions on the societies' dispute settlement procedures. Focus was on the regulation of the societies by the colonial administration without which the colonial interests would be in jeopardy. The legislation was amended several times with significant amendments in the 1940's. Even then, no provisions on the societies' dispute settlement were introduced. Critics of the legislation believed that the absence of such provisions was attributed to the purpose of formation of the societies, which was to aid the smooth availability of raw materials for export. They cite the formation of most agriculture-based co-operatives to substantiate their contentions.[41] The question that is key and which might likely be posed by any ordinary person would be as to how disputes were resolved in the societies in absence of such provisions. The general perspective was that the colonial administration was responsible for the general handling of the societies including the determination of disputes that arose in the societies. Evidence for the colonial masters' interventions hardly exist in substance and numbers.

It took almost three and a half decades to repeal the 1932 legislation. The gap in the law i.e., the missing provisions on dispute settlement was filled in 1968 following the enactment of the Co-operative Societies Act 1968. It was the first ever legislation to encompass provisions on the societies' dispute settlement. It conferred discretional powers to the Minister responsible for co-operative affairs to make Rules for purposes of carrying out the purposes of the Act.[42] Rules by the Minister were to encompass a provision to the effect that any dispute touching the business of a society between the members or past members of the society or persons claiming through a member or past member or between a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration under the Arbitration Ordinance.[43]

It was not that the Minister was to make Rules on dispute settlement but he only had to ensure that the provision aforementioned is inserted in the Rules made. Under the said provision, disputes were to be resolved by the Registrar of the societies or, on his direction, through arbitration. There was a gap in terms of the provision failing to state what would happen if a party to a dispute is aggrieved with the Registrar or arbitral decision. We have argued elsewhere that the provision created a presumption that the Registrar's decision was, by then, final and conclusive.[44] The provision under the 1968 Act was maintained by the 1982[45] and 1991[46] co-operative societies legislation. There were, however, developments in terms of the authority for settlement of co-operative societies disputes. The presumption of the Registrar's finality was dissolved and replaced by a provision on appeal to the Minister, i.e. the line Minister referred to in the foregone discussion.

[41] Refer to: A. P. Rutabanzibwa, *Resilience of Traditional African Co-operatives amidst Foreign Co-operatives: A Reflection on Traditional Co-operative Organisations in the Sukuma Communities of Tanzania*," JCBS, ISSN (Online) 2714-2043, Vol 6 (2) of 2021 at p. 14

[42] Co-operative Societies Act No. 27 of 1968 Section 99(1)

[43] *Id*. Section 99(2) (m)

[44] M.S. Nkuhi MS & A.P. Rutabanzibwa (2021), *supra*, note 18.

[45] Co-operative Societies Act, No. 14 of 1982, section 165 (m).

[46] Co-operative Societies Act, No. 15 of 1991, section 123 (2) (m).

The Co-operative Societies Rules 1991 and those of 2004[47] took aboard provisions for appeal to the Minister.[48] The provision was maintained by the 2003 legislation[49] and the current one, which is the Co-operative Societies Act 2013.[50] The wording of the provision with regard to settlement of co-operative disputes under the 1968 and subsequent legislation was changed in the 2003 Act.[51] The same is preserved in the current Act. Section 141 empowers the Minister, after consultation with the Commission[52] to enact Regulations providing for, *inter-alia,* procedures for dispute settlement in co-operatives.[53] Co-operative Societies Regulations were in place since 2015[54]. Regulation 83 of the said Regulations provides for, *inter-alia,* the procedure for settlement of co-operative societies disputes.[55] The procedure is summed up in the section that follows.

4.2 The prevailing framework for settlement of disputes

Co-operative disputes settlement is a matter regulated by the Co-operative Societies Act 2013 and Regulations made thereunder. Under the law, disputes are classified as disputes between members' *inter-se*, between a member and a board, between a member and the management and disputes between societies. These disputes must be ones concerning the business of a co-operative society. The legal requirement is that they are to be resolved through negotiation/reconciliation; reference to the Registrar; and or appeal to the Minister.[56] The Co-operative Societies Regulations, 2015, provides to the effect that disputes concerning the business of the co-operative society between the aforementioned parties shall be amicably settled through negotiation/reconciliation.

Negotiation/reconciliation presupposes internal regulation mechanism that gives disputants an opportunity to amicably settle the dispute. There is a time limit of thirty (30) days from the first day of the negotiation/reconciliation that within which disputants are to amicably reach out settlement. Where the mechanisms are futile on lapse of the said duration, a dispute is to be referred to the Registrar.[57] Elsewhere we have critiqued the provision focusing on *inter alia,* the non-elaborate character and the limited duration for negotiations/reconciliation.[58] When a

[47] Adopted following the enactment of the Co-operative Societies Act, 2003, No. 20 of 2003 (which repealed the Co-operative Societies Act No. 15 of 1991).

[48] Rule 23 of the Co-operative Societies Rules 1991 provided for mechanisms for settlement of such disputes where first reference was to the Registrar and where a party is not happy with the decision of the Registrar, he/she had to appeal to the Minister and whose decision was marked as final and conclusive. Significant on the provision are the details of who has to refer the dispute to the Registrar and the time limit to appeal to the Minister.

[49] Co-operative Societies Act, No. 20 of 2003.

[50] Co-operative Societies Act, No. 6 of 2013. The Act maintains the 2003 wording.

[51] Section 131 (2) (m) of the Act gave power to the Minister to enact Rules: "*providing for procedures for dispute settlement*".

[52] The Tanzania Co-operative Development Commission (hereinafter the TCDC).

[53] Section 141 (2) (i).

[54] Government Notice No. 272 of 2015.

[55] See: Regulation 83.

[56] *Id*.

[57] Under section 10 of the Co-operative Societies Act, the Registrar is the Chief Executive Officer of the TCDC responsible for management of its affairs including establishing, keeping and maintaining the co-operative register and supervising their operations.

[58] See: note 18 (*supra*). The non-elaborate character which describes the provisions is a matter of concern. The law provides for negotiation and reconciliation within 30 days as the only necessary requirement. It does not provide for provisions on the implementation or realisation of the mechanisms. The omission is more serious when one considers the fact that negotiation and reconciliation are supposed to be parts of co-operative self-

dispute is referred to the Registrar, three options are on the table. He/she may decide to resolve the dispute by himself/herself;[59] appoint a committee of experts; or refer the dispute to an independent arbitrator.[60] When the option preferred is that of appointing a committee of experts, the Registrar is obliged to ensure that the committee is composed of persons conversant with co-operative and law matters. From the wording of the Act, it appears that the committee is working to assist the Registrar to reaching a decision and therefore the committee's decision is deemed to be the Registrar's decision.[61]

Alternatively, if the Registrar is to opt for an independent arbitrator, the law requires disputants' consultation. When the matter is referred to the Registrar proceedings are expected to be in the same way as proceedings before the court of law.[62] Parties may therefore be ordered to furnish documents necessary for settlement of the dispute.[63] The authors have critiqued the provisions relating to reference to the Registrar substantially challenging the silence of the law on duration under which the Registrar is to settle the dispute; the unguided discretion on assignment of disputes to either a committee of experts or independent arbitrator and criteria on their choice; and the silence on binding of decision by the committee of experts or independent arbitrator.[64]

At the top of reference to the Registrar is the Minister responsible for co-operative affairs. The Minister is the appellate authority. He/she entertains appeals from parties aggrieved with decisions by the Registrar.[65] It is trite that disputes entertained by the Minister are ones which must have gone through negotiation or reconciliation and later referred to the Registrar. The law limits the lodging of an appeal within thirty (30) days of receipt of Registrar's decision.[66] Significant to this discussion is the provision that the decision by the Minister is final and conclusive.[67] It is this provision which is construed as ousting ordinary courts' jurisdiction on co-operative disputes. In another joint work, we have underlined issues associated with the Minister's appellate authority.[68] The core issue in our discussion is the absence of provisions on the appeal handling process.[69] From the provisions of Regulation 83 of the Co-operative Societies

regulation mechanisms. This implies that co-operatives are supposed to prescribe for the mechanisms in their regulations. Unfortunately, this is not always the case. There is evidence of ignorance of the mechanisms among most society members. There is also evidence of gaps in societies' disputes settlement provisions in the societies' regulations which otherwise would have assisted in doing away with the foregone presumptions.

See for example a study by A. Rutabanzibwa, "*Uanachama na Uongozi kwenye Vyama vya Ushirika*" i.e. Membership and Leadership in Co-operatives; A paper presented during "*Kongamano la Kwanza la Utafiti na Ushirika*" i.e. the First Workshop of Co-operative Research on 16th March 2021 organised by the TCDC and which was held at the PSSSF Conference Hall, Dodoma.

[59] Regulation 83(2).

[60] *Id*. *Sub-regulation (7).*

[61] Sub regulation (7) read together with Sub-regulation (13).

[62] Regulation 83(14).

[63] Regulation 83 (8).

[64] See: Nkuhi, M.S., & A.P. Rutabanzibwa, (2021), *supra* note 18.

[65] Regulation 83(9) of the Co-operative Societies Regulations, 2015 requires a person aggrieved by a decision of the Registrar to appeal in writing against such decision to the Minister responsible for co-operatives.

[66] *Id*.

[67] Regulation 83(9).

[68] Nkuhi, M.S., & A.P. Rutabanzibwa, (2021), *supra* note 18.

[69] It is not clear as to how appeals should be lodged, what should happen when they are lodged and what guides the Minister to reaching a fair decision. Thus, the current setting on appeals to the Minister bars parties from anticipating what will or is likely to transpire and what they should prepare for engaging in the litigation, both of which are contrary to principles of equitable justice.

Regulations, 2015, we have summed up (in pictorial form) the existing framework for resolution of co-operative dispute in Tanzania, as hereunder:

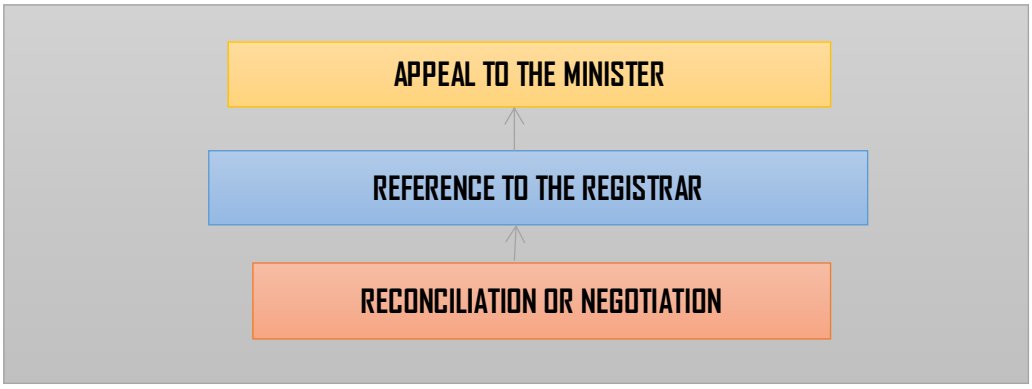

Figure 2: Framework for resolution of co-operative dispute in Tanzania

4.0 THE HIGH COURT OF TANZANIA ON CO-OPERATIVE DISPUTES

The discussion on this part, and which is a crux of the manuscript, is result of in-depth review and analysis of series of decisions by the High Court on cases involving co-operative societies. The decisions involve both co-operative disputes and non-co-operative disputes. The focus however, is on the co-operative disputes and courts authority on their settlement. Generally observed are some converging and diverging views by the Court. The areas of convergence include: the existence of co-operative internal mechanisms for dispute resolution under the Co-operative Societies legislation; the requirement for their exhaustion; and the inclusion of members as well as non-members as parties to co-operative disputes.

On the divergences, it is still unsettled as to whether ordinary courts have jurisdiction to entertain co-operative disputes; whether it is the duty of the Court to determine if it has jurisdiction or not before entertaining a co-operative dispute; whether the Court has a duty to ascertain if a dispute falls in the definition of a co-operative business; orders which should be given by a court when it finds out that it has no jurisdiction to entertain a co-operative dispute; and what legal steps should follow after co-operative disputants have exhausted internal dispute settlement mechanisms. The discussion is in the sub sections hereunder.

5.1 General consensus on internal mechanism and parties to co-operative disputes

From analysis of the decisions, the foremost observation is the general consensus by the Court (High Court) that co-operative disputes are to be resolved using internal mechanisms prescribed under the Co-operative Societies laws. It is supplemented by Judges' accord that parties in such disputes must exhaust the mechanisms prescribed. These are evident from the decisions of the High Court in *Evatha Michael Mosha v Shalom SACCOS*;[70] *Arusha Soko Kuu SACCOS & Another v. Wilbroad Urio*;[71] *Asha Iddi v Babati SACCOS and another*;[72] *Babati SACCOS and another v Reginald Sanka*;[73] and *Ladislaus Mashauri Msana v. Mashima SACCOS Limited and another* [74] and *Daudi Gerald Kilinda v. Chama cha Msingi Kalemela*[75] cases, among multiple others. Reference, at large, is to Regulation 83 of the Co-operative Societies Regulations 2015. On the other hand, in most of the decisions, it is agreed, commonly, that both members and non-members can be parties to the disputes. The position is that if a person is not a member of the society, he may also qualify where such person claims on behalf of a member of the board of the co-operative societies or when

[70] Civil Appeal No 40 of 2016, High Court of Tanzania (Arusha District Registry) at Arusha (unreported)
[71] Civil Appeal No. 06 of 2019, High Court of Tanzania (Arusha District Registry) at Arusha (unreported)
[72] Civil Appeal No. 30 of 2019, High Court of Tanzania (Arusha District Registry) at Arusha (unreported) p. 6
[73] *Supra*, note 17
[74] Land Case Appeal No. 16 of 2018, High Court of Tanzania, (Moshi District Registry) at Moshi (unreported)
[75] Civil Appeal No. 5 of 2019, High Court of Tanzania (Tabora District Registry) at Tabora (unreported)

business transactions are undertaken between co-operative societies.[76] What remains unsettled, however, is whether ordinary courts have authority to entertain co-operative disputes. A detailed discussion on the issue is provided for in the subsection below.

5.2 Ordinary courts authority on co-operative disputes: diverging decisions

This study has taken note of diverging High Court decisions on the issue as to whether ordinary courts of law have jurisdiction on co-operative disputes. One side of the divergence encompasses decisions to the effect that ordinary courts have no jurisdiction to entertain co-operative disputes. The cases of *Daudi Gerald Kilinda v. Chama cha Msingi Kalemela*,[77] *Asha Iddi v. Babati SACCOS and another,*[78] and *Ladislaus Mashauri Msana v. Mashima SACCOS Limited and another*[79] are construed and analysed as belonging to the position that ordinary courts are not clothed with jurisdiction to entertain co-operative disputes.

In *Daudi Gerald Kilinda's* case the High Court of Tanzania, at Tabora, dismissed an appeal concerning a co-operative dispute on the ground that co-operative disputes are within the exclusive jurisdiction of the Registrar of co-operative societies.[80] The court was of the firm view that the existing machinery is there to encourage harmony and peace within the societies and allow the thriving of co-operative business.[81] In *Asha Iddi's Case* Masara J held that courts would have no jurisdiction where the dispute concerns the business of a co-operative society by a member or any person claiming on behalf of a member, board or when business transactions are undertaken between two co-operative societies.[82] To the court, the regulation i.e. Regulation 83 excludes all other incidents and which ultimately have to be dealt with in a normal suit.

In *Ladislaus Mashauri Msana's Case,* the High court entertained an appeal from the decision of the District Land and Housing Tribunal striking out an application for want of jurisdiction. The appellant substantial ground of appeal was on his non membership to the SACCOS and him not having had any business with the SACCOS. To the Court, the law regarding settlement of co-operative societies' disputes is settled to the effect that negotiations are a must. "*Since it has been proved that the first respondent is a registered society, I find no reason to fault the tribunal's decision*". The decisions are silent on the judicial review and supervisory powers of the High Court.

It is the case of *Manager Majengo SACCOS v. Medrad Prosper Nyakulima*[83] where the High Court of Tanzania contemplated the challenging of the decision by the Minister through judicial review. The Court reiterated the need to exhaust the procedure under Regulation 83. To the Court, when the said procedure is dispensed with, the proper avenue would be the High Court. Consequently, the Court invoked its revisional powers and nullified the proceedings, decisions and orders of the trial and first appellate courts on the reasoning that the matter "was prematurely" taken to the court with no competent jurisdiction to entertain it (as it involved a co-operative business).

[76] Masara J, in *Asha Iddi v. Babati SACCOS and another* (supra) at p. 6; see also: Cases in notes 69, 70, 72 and 73 among multiple others.

[77] *Supra*, note 75

[78] *Supra* note 72

[79] Supra, note 74

[80] Kihwelo, J (as he then was) was of the firm view that co-operative business and co-operative societies are to be governed in accordance with the Co-operative Societies Act, 2013 including the existing system for dispute settlement which is clearly stipulated under the Act and Rules made thereunder.

[81] *Id*. at p. 5

[82] *Id*. at p. 6.

[83] PC Civil Appeal No. 7 of 2020, High Court of Tanzania (Dodoma District Registry) at Dodoma (unreported).

The other side of the divergence represents the position that ordinary courts of law have jurisdiction to entertain such disputes. Appearing to diverge from the decisions above is the decision of the High Court in *Arusha Soko Kuu SACCOS & another case.*[84] The case completely rejected the notion of ousting courts' jurisdiction to entertain co-operative disputes. Mzuna J rejected the notion setting a diverging path from the decision in *Daudi Gerald Kilinda's* case[85] and other cases taking the same position.[86] His lordship acknowledged the existence of internal mechanism for settlement of co-operative disputes noting, however, the exhaustion of internal remedies as a prerequisite to accessing any further remedy.[87]

To him, where the internal remedies are exhausted, parties are entitled to access courts. Troubling in the decision is the Judge's holding that *the authority to entertain co-operative disputes is not only for the High Court in its revisional or supervisory powers.* The Judge held that *even the trial court had the powers to entertain the dispute* (blessing the entertaining of a co-operative dispute by the Court of Resident Magistrate of Arusha). The decision by the Court was at large seeking to maintain the 'jealous' character that courts should always have on its constitutional powers on the administration of justice.[88] It creates a precedent that even subordinate courts have authority to entertain co-operative disputes. The implication is that, where internal remedies are exhausted i.e. Minister has determined the appeal, parties may go to subordinate courts. Elsewhere we have argued that the holding that the subordinate court has powers to deal with the matter (not necessarily the High Court alone) has to be looked at cautiously especially when it is the Minister's decision in question.[89] However, the decision is a binding precedent.

From the foregone, the study underpins three important observations. Foremost is the existence of decisions that supports the internal mechanisms provided under co-operative legal framework (without stating the aftermath post its exhaustion). The second is that which holds that only the High Court has authority through judicial review. The last one is that which holds ordinary courts, not necessarily the High Court alone, as having authority to entertain such disputes. These observations are part to the unsettled position the study is referring to in this paper. The position is coupled with other uncertainties in connection with same area, i.e. courts authority on the disputes. These are explained below.

5.3 Determining the nature of a dispute and appropriate orders: Pending uncertainties

There are critical other uncertainties revolving the settlement of such disputes. Pertinent to the foregone discussion on the divergences are the pending issues as to whether courts are to determine if a dispute is a co-operative dispute i.e. whether it is the one on the co-operative business. This is especially when a preliminary objection is raised. The logic behind the ascertainment is simply that not all disputes in which co-operative societies or members thereof are involved are co-operative disputes. In this respect, there is a position, on one hand, that when the court is satisfied that a co-operative society is part to the dispute, it suffices to declare the lack

[84] *Supra*, note 71.
[85] *Supra* note 75.
[86] *Supra* notes 78 and 79.
[87] *Id*. at p.7, according to his lordship, the disputing parties had exhausted the internal remedies and were therefore entitled to access the ordinary courts.
[88] His decision was based on the constitutional mandate that is given to the courts by Article 107A of the Constitution of the United Republic of Tanzania, 1977 (As Amended from time to time). To him, the power to entertain a dispute which parties have exhausted internal remedies extends to the trial court.
Reference was made to the case of *James F Gwagilo v Attorney General*, (1994) TLR 73 HC *where the High Court of Tanzania (Mwalusanya J)* held statutory clauses ousting courts' jurisdiction as ineffective to exclude the High Court in discharging its judicial review and supervisory power.
[89] M.S. Nkuhi & A.P. Rutabanzibwa, Courts' Jurisdiction over Co-operative Disputes: *Arusha Soko Kuu SACCOS Ltd & another versus Wilbard Urio*, Case Commentaries (unpublished), at p. 7

of jurisdiction on part of the court.[90] On the other hand, there is a diverging position that the court has to ascertain the nature of a dispute including the subject matter prior to ruling out whether it is clothed with jurisdiction or not.[91]

Besides the ascertainment, there appears to be contradicting position on which order should be given when the court finds that it is not clothed with jurisdiction to entertain a co-operative dispute. The question as to whether courts are to strike out or dismiss the case when they establish that they are not clothed with jurisdiction is no longer an issue following the Court of Appeal decision in *Mabibo Beer Wines & Spirits Limited Versus Fair Commission Competition and 3 others*.[92] Even with the settled position on which order should be given when a court find itself that it is not vested with jurisdiction to entertain a particular matter, there is a troubling decision of the High Court on the same regarding co-operative disputes. In September 2020, about two years after the aforementioned CAT decision, the High Court of Tanzania held, in *Nzumbi Mashauri v. Chama cha Akiba na Mikopo Roots and Shooting SACCOS*[93] that where a court is satisfied that it is not clothed with jurisdiction it has to dismiss the case.

Interestingly three months prior to the Nzumbi Mashauri's case decision, Masara J, had correctly reiterated the CAT position in *Asha Iddi v Babati SACCOS*[94]that where a court is satisfied that it lacks jurisdiction, the proper order would be to strike out so that the parties would have a chance to re-file the suit in a court or board or competent jurisdiction. The Judge relying on the *Mabibo Beer Wines & Spirits Case* (*supra*), concluded that the trial magistrate was unjustified for issuing a dismissal order when the case before her was not considered on merits.[95] The decision in *Nzumbi Mashauri case*, however *per incuriam* it may be a source of confusion to the co-operative legal fraternity. It may wrongly be relied upon unless something is done to correct the position set forth by it.

5.0 CONCLUSION AND WAYS FORWARD

In this paper ideal requirements on settlement of co-operative disputes were discussed touching, *inter alia,* the requirements on the involvement of courts of law when amicable settlement fails. The Tanzanian framework on settlement of co-operative disputes on the historical and current perspectives was also discussed. The unsettled position over the authority of ordinary courts of law over such disputes has also been analysed. From the analysis, the decisions of High Court judges are diverging on ordinary courts authority on such disputes. The divergence paints a picture of lack of a defined precedent on the area and raises several question marks on co-operative dispute settlement framework generally. It is our opinion that a settled position is inevitable for the societies' sustainability. The High Court, may choose to depart from its earlier/previous decision (s) or the Court of Appeal may act on the same. Critical to bringing the position are responses to the questions whether the Tanzanian co-operative legislation infringes the cardinal principles of rule of law requiring co-operative disputes to be finally determined by government authorities; and whether the framework restricts access to court as a last remedy.

In addition, thereof, the scope of co-operative dispute has to be addressed. So far it is not clear as to what is a co-operative dispute as opposed to other disputes which co-operative societies may be parties thereof. The intent to protect the co-operative enterprise identity may unnecessarily lead to a conflict of law because some of the areas within the scope of co-operative disputes are equally regulated by critical other principal legislation which provides for different mechanisms. Courts have a role to play to ensure the scope of co-operative dispute is expounded and well

[90] Mkapa J, in *Ladislaus Mashauri Msana Case*, *supra*, note 74.

[91] Masara J, in *Asha Iddi's Case* (*supra*).

[92] Civil Application No. 132 of 2015 (unreported).

[93] Civil Appeal No. 5 of 2018, High Court of Tanzania (Shinyanga District Registry) at Shinyanga (unreported).

[94] *Id*. at p. 10.

[95] At p. 9 & 10

defined. The same may be possible with the borrowing of experiences from decisions of courts in other jurisdictions addressing most of the grey areas in the Tanzanian co-operative disputes settlement regime. Consequently, it is our opinion that courts should not end up with striking out disputes brought before them, they have to go beyond expounding on whether a dispute is a co-operative dispute and guide as to where they should be handled.

This study incites a need for further studies on co-operative dispute settlement in Tanzania. Scholars and practitioners in relevant fields may carry out studies on, foremost the definition and scope of co-operative disputes. This is currently a contentious area. Studies may also be carried out to delineate scope for co-operative business. The latter is key to understanding the scope of co-operative dispute. Related to this is failure of the Tanzanian cooperative legal regime to give a clear legal exposition on what amounts to "cooperative business" from which a cooperative dispute may arise. Lastly, yet of prime importance, is a study on what should be an appropriate legal machinery for cooperative dispute settlement in Tanzania that would strike a balance between preservation of the cooperative enterprise identity and a need to attain ends of equitable justice among the disputants.

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