

DEVOLVING CORPORATE TRIBUNAL: EFFICACY VS. INCOMPETENCY WITHIN SACCO'S

A STUDY ON RELEVANCE OF DEVOLVED CORPORATE TRIBUNALS

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Abstract

In order to protect SACCOs, a corporate tribunal is considered. However, from a business point of view, devolving a corporate tribunal may have more effects on SACCOs than what meets the eye because it places disputes and all other corporate businesses under the watch of local government representatives, who are the governors and county representatives. Devolution of the corporate tribunal seeks to accomplish three major objectives that include; (1) to achieve a system of handling corporate issues beneficial to the business entities involved by limiting the amount of time spent in filing and following up with legal lawsuits, (2) to decentralize the power of the government to entities who can handle issues outside an court setting to cultivate leadership and experience in delivering justice to the public and, (3) to cultivate a corporate landscape that saves time, takes the burden of delayed rulings from the courts, and provides grounds for the development of better business-business relationships.

Keywords: SACCOs, Corporate, Incompetence, Tribunal, Efficacy

INTRODUCTION

At the beginning of the 21st century, businesses around the world came alive to embrace the technological developments associated with the growth of the telecommunications industry. With better channels for communication in place, various investors in both local and international settings took upon this opportunity to start up individual businesses and co-

operatives. Co-operatives are business models that function as a combination of financial powers from different members. Thus, cooperatives are non-governmental business institutions formed as joint ventures. Joint ventures in Kenya have grown since 2000 and since then have incurred positive developments. Cooperatives, well known in Kenya as SACCOs have developed in both urban and upcountry settings and shows that the country's entrepreneurial landscape is dynamic. Following the economic status of the nation, SACCOs are founded by investors to create livelihoods for the workforce employed to accomplish various business goals and objectives. As expected from a business perspective, SACCOs are affected by factors such as market dynamics, customer trends, economic landscape of a nation, and the political forces responsible for drafting and enacting laws that regulate businesses. Additionally, besides regulations, businesses also expect the government to provide them with some form of security and legal cover against various challenges associated with the business sector (Chweya, 2002).

The protection of SACCOs and other business models depends on the size of the business as well as the stakes involved. Within SACCOs, various challenges that need legal or diplomatic intervention include negotiations for acquisitions or mergers, right to work factors, company-employee disputes, public vs. private sector, and unfavorable regulatory directives. To oversee that businesses or corporate entities thrive within the changing business world, the Kenyan government considers a corporate tribunal. A corporate tribunal is a negotiation setting that allows cooperative's to present and settle their disputes. In this case, corporate disputes that can range from land issues to social responsibilities are presented and how they are solved outside the court. Objectively, the corporate tribunal seeks to create a more business friendly landscape within Kenya. Partly, this seeks to invite foreign direct investment as the nation is endowed with vast resources.

The economic situation of the nation also demands more investments so that it can create employment for the over 70% jobless youths. The concept of investment in Kenya seeks to provide the population with the opportunities to join hands in making the nation a better place in terms of development. The political scene has actively been involved with policy drafting to ensure that positive changes influence development. The government feels that adapting a decentralized regime of governance would help the nation to sail forward towards economic maturity. The need for the nation to economically sail forward also depends on the protection of businesses such as SACCOs. A devolved governance regime can only protect businesses by erecting a devolved corporate tribunal to protect investments (Liam, 2001).

In order to protect SACCOs, a corporate tribunal is considered. However, from a business point of view, devolving a corporate tribunal may have more effects on SACCOs than what

meets the eye. A devolved corporate tribunal places disputes and all other corporate businesses under the watch of local government representatives. These include the governors and county representatives. Devolving the corporate tribunal initiates two levels of benefits and two levels of problems. This paper seeks to find out how a devolved corporate tribunal affects businesses in terms of functioning more cost effectively and efficiently. Additionally, it seeks to establish how a devolved corporate tribunal invites corruption and lack of confidence on the government let alone the deteriorating business atmosphere.

BACKGROUND INFORMATION

Devolution

Scholars come up with different definitions of devolution. Besides, devolution is covered by one theme, the dispersion of decision-making powers closer to the people. According to Muia (2008) decentralization provides the people with the right to participate in leadership or governance. Additionally, he offers two definitions of decentralization in which he emphasizes as the process of decision-making and management of affairs to a subordinate entity. Muia (2008) argues that decentralization involves the handover of civic authority from state to sub-state jurisdiction. Rondenelli and Nelli (1998), argue that devolution can be defined as the process of delegating legal or political authority to plan, make decisions, and manage public functions from central governance units to a variety of organizations. These organizations make part of the decision-making units that the devolved government puts in place. In Kenya, decentralization has put in place sub-state governments classified as county representations. Under county representation, governors and county representatives are entrusted with authority.

With reference to the topic at hand, corporate tribunals fall under administration. Thus, devolved corporate tribunal falls under the sub-class of administration decentralization. The background on the administrative decentralization shows that Kenya seeks to benefit from the central defining characteristics of administrative decentralization. Administration decentralization refers to the transfer of decision-making, planning, financing, and management of particular civil resources from the central government and its agencies to grassroots' units of governance. In Kenya, the objective of administrative decentralization is to strengthen field administrative units of civil service, combined with capacity building efforts at both national and local levels (Oyugi, 2006).

Under corporate tribunal, de-concentration of administrative decentralization involves the dispersion of responsibilities for corporate negotiations to regional offices that provide oversight on corporate issues affecting businesses. In this case, the concept of administrative

decentralization under de-concentration aims at providing public servants with the power to make decisions and plan on development on behalf of a central government.

Corporate Tribunal Development

The development of tribunals in Kenya is based on the need to address social and corporate issues that affect the public on behalf of the courts. In this case, tribunals in Kenya are set to help courts administer justice on behalf of courts. Although tribunals are developed to ease the work of courts, they do not have penal jurisdiction. In this regard, the corporate tribunal is built upon the same framework that it can be used to ease the work of courts but does not have the jurisdiction to impose penalties on conflicting parties. Ideally, the corporate tribunal is a functional administrative tool used by cooperates to mitigate spending in court proceedings. Besides the benefit to cut on expenses, the tribunal is developed to encourage best practice within the business sector. This means that corporations faced by issues such as employee strikes, merger or acquisition issues, breach of contract, copyright infringement, and unethical marketing practices can have their issues handled outside the court to foster rewards related with time management, cost effectiveness of handling issues outside the court, and overall business-to-business relationship buildup.

The structure of the corporate tribunal and the nature of contemporary business models differ on several levels that prompt the cultivation of relevance and effectiveness issues. The current or contemporary business landscape has seen the raise of corporations that exercise aggressive trading practices aiming at driving their rivals out of business. In this case, regardless of whether tribunals or courts handle disputes, these business aim at creating value at all levels of a dispute. They give little chance to losing in all proceedings involving disputes. Thus, with this type of business attitude, the development of the corporate tribunal depends on the type of corporations set up in the country, the expected nature of conflicts, and the social influence of the involved parties.

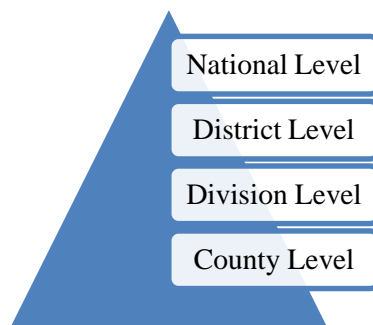
SAVINGS AND CREDIT COOPERATIVES (SACCO)

SACCO is an abbreviation of Savings and Credit Co-operative. A credit union and a SACCO are the same in their functions and development. In Kenya, SACCOs are developed as democratic, special member driven, self-help co-operative units. The management of SACCOs is a task entrusted to the members who have shares of the common bond, working for the same employer, and belonging to the same union. Members of a SACCO have a common footing on the business objectives of the co-operation. The purpose of SACCOs in Kenya is grounded on the fact that various business ventures cannot be undertaken through individual investment.

Thus, joining hands to provide members with better livelihoods helps to mitigate poverty, exploration of the business world, creation of knowledge base, and disbursement of marketing and industry information.

In Kenya, SACCOs are governed through the election of boards that provide structured and democratic approaches in making decisions. These boards are responsible for the staffing and controlling of the co-operations. The standard number of board members ranges from 9-15. A supervisory committee is elected by members to provide the services of internal audit.

Figure 1: Devolved Structure



In Kenya, the process of devolution has affected a number of authorities as well as the level of governance. Prior to devolution, governance was in the hands of law courts that existed in three levels. National level courts would involve courts such as the Milimani Law courts and others of the same caliber. Currently, the government has adapted a governance criterion that provides clear-cut classification of courts. The Supreme Court represents the national level courts. Under the previous governance regime, districts and division level courts provided legal services to entities within those levels for offenses or disputes that fell under their jurisdictions. These courts existed to ensure district and division level cases were handled by administrative entities with the necessary competences to handle them. However, cases or disputes that could be handled at division levels are referred to district level courts and the trend would go on to national level. Currently, courts under the devolved regime provide county level administration services. In illustration 1 above, all levels of administration of the previous government regime are above the county level administration. However, the above levels of administration are replaced with county level administration and the Supreme Court where major cases are appealed in case the county level administrations are unable to satisfy the needs of the conflicting parties.

Under the corporate tribunal, devolution means handing over of power to settle disputes at other level of government closer to the people. In this case, the devolution of the corporate tribunal seeks to accomplish three major objectives that include;

- To achieve a system of handling corporate issues beneficial to the business entities involved by limiting the amount of time spent in filing and following up with legal lawsuits.
- To decentralize the power of the government to entities which can handle issues outside a court setting to cultivate leadership and experience in delivering justice to the public.
- To cultivate a corporate landscape that saves time, takes the burden of delayed rulings from the courts, and provides grounds for the development of better business-business relationships (Chweya, 2002).

Effects of Devolved Corporate Tribunal

As earlier defined, devolution involves the decentralization of power. Earlier studies raise the question of whether devolution aims to foster or to retard development in Kenya (Jeremy, 2002). Either way, devolution has been viewed with differing perspectives that present entities with opportunities and milestones in their social and economic goals. However, devolution may be viewed as a positive government approach considering all effects. However, with reference to corporate tribunal and the development of SACCOs, devolution is as good as it is bad for investment. Some effects of a devolved corporate tribunal include;

Positive effects

- Conflicts can be handled in a diplomatic manner providing each side with sufficient time to present and argue their cases
- Corporates are able to cut down on court expenses involved with filing and following up with proceedings. Time management in this case also affects the productivity of the corporations. Thus, a devolved tribunal provides faster services that save time and increase the productivity of the individuals involved.
- Corporate tribunals under the devolved regime provide a close intervention as the comprising service providers can understand the specifics of a case.

Negative effects

- Conflicting parties may overrule the relevance of a devolved corporate tribunal or any tribunal as a whole.

- Given the fact that a tribunal has no penal jurisdiction, corporates can use the tribunals to escape from taking full responsibility of their actions.
- Corporates thrive to create value and not friends within the business environment and this attitude has a specific negative effect on the proceedings of finding solutions among conflicting parties. Possibilities are that, no decisions can be arrived at to guarantee a win-win situation between or among conflicting parties. For instance, a tribunal whose decision in a case between labor unions and a co-operative may make decisions such that the co-operative is advised to compensate employers fairly by increasing their net incomes by 25%. The co-operative, on the other hand, may view this decision as unfair given various compensation programs that the tribunal may have in place.
- Membership or registration of new members to existing SACCOs may drop as confidence in a devolved tribunal may cultivate the feeling that the government places incompetent service providers.
- The efficacy and competency of a devolved tribunal cannot be relied on given the nature of some cases as well as the lack of penal jurisdiction. Cases that were formally presented and heard in division and district courts can currently be appealed at the Supreme Court. However, cases that have been decided on with a devolved tribunal can only be revisited afresh in another tribunal making the first decision void and a matter of time wastage.
- Since SACCOs are privately owned by the constituting members, government intervention through diplomacy may be detrimental to the core factors define the mission and vision of the specific SACCO. For instance, the transport ministry advices passenger service vehicles to belong to SACCOs so that ethics and traffic rules can be administered from a specified standpoint.

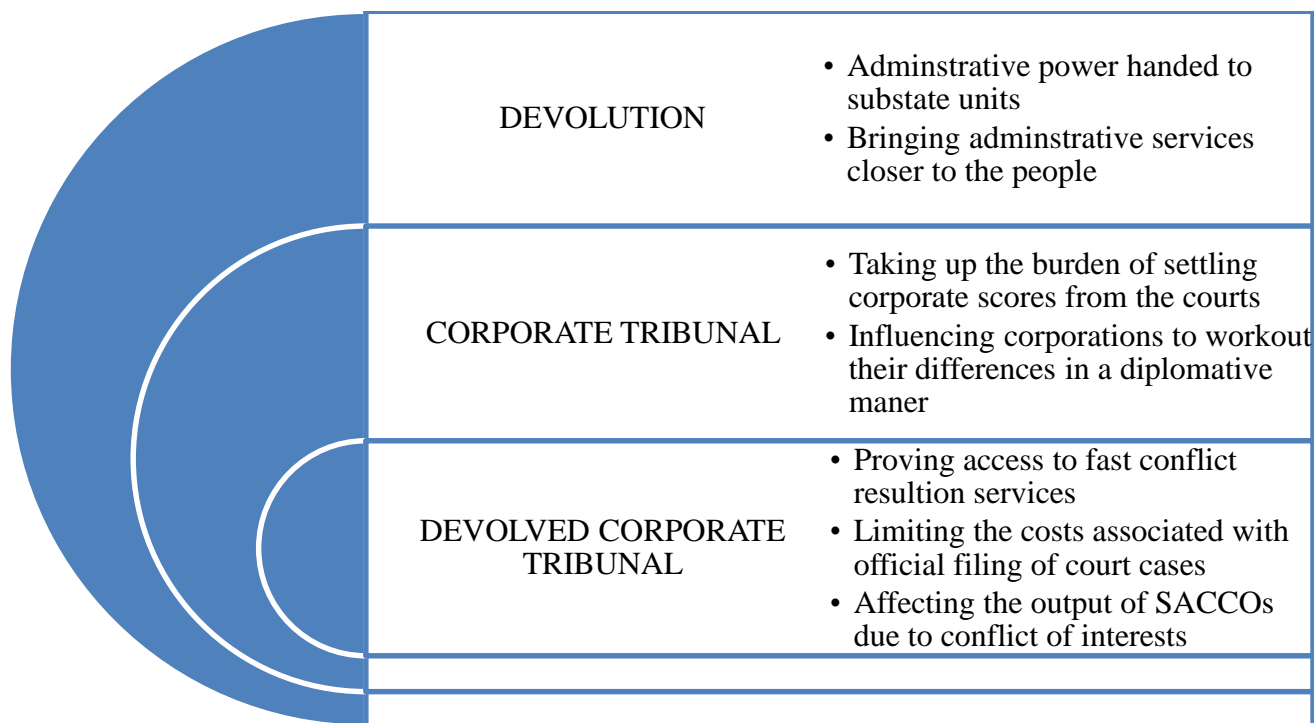
Incompetence of SACCOs under Devolution

SACCOs are co-operatives comprising of members with similar corporate goals and visions. These co-operations seek to create value by combining financial capabilities of various members to create a platform that meets the demands of each member. Shifting from the development of SACCOs, these business entities function as any other business models. In this case, legal and political influences make these SACCOs either more productive or constrained from achieving their full business potentials. Following a PESTEL analysis of a SACCO, political factors are major contributing factors to the future of a business entity. In this case, with minimal regulations from the government, political uprisings or unrests can be destructive to a SACCO or a business model. Thus, under devolution, management of power has raised the bar on

corruption and the struggle to attain government positions within the different governance levels. In this case, while power has been distributed to the county and senate governance levels, laxity in terms of enforcing best practice is expected. SACCOs presented with devolved corporate tribunals to oversee their operations and settle disputes with employees and other business platforms do not have confidence on the management and structuring of the tribunals (Vile, 2000).

With reference to the voting cycles of the country, a presidential election after every five years, change in governance is expected to affect the specific laws and rules that guide corporate tribunals. Thus, a change in how things run may affect the manner with which corporates function and create their value. Hence, as a negative outcome of devolving corporate tribunal, incompetency of SACCOs is a foreseen effect of the devolved approach. Ideally, more freedom on the side of corporations invites higher risks with potential to destroy the social footing of a community. More freedom on the sub-state government units influences unprofessional decision-making criteria that affect the functionality of business units and other levels of the community's social structure.

Figure 2: Analysis of devolution and effects of devolving the corporate tribunal



Incompetency within SACCOs can be classified under management, operations, and ability to observe business ethics as provided by various chapters of the Kenyan Constitution. An

incompetent SACCO is one that is unable to meet the needs of its members, unable to attain its maximum value, unable to control its operations, having difficulties in controlling its employees, and one suffering from ethical issues in doing business. With a devolved system of governance, SACCOs are subject to various decision-making criteria applied around their physical addresses. Thus, without the consideration of the function of a corporate tribunal, the political atmosphere created by independent sub-state government units affects the competencies of the SACCOs. Through the consideration of various factors that affect SACCOs and their development, one is the availability of government units with the freedom to implement jurisdictions based on shallow merits (Oyugi, 2008).

For example, Kenya is made of numerous SACCOs that have invested in public transport to provide affordable transportation services to the public. The ministry of transport, which seems to have its own merits, has recently declared that public transportation cannot be executed at night in order to limit accidents. A transportation bill presented to the parliament asserting that public transportation was a hazard claiming more lives each day instigated this directive. A member of the devolved government presented the bill to the parliament and sought support to enact the bill. With like minds within the parliament, the bill was passed with no involvement of the SACCOs that own most of the public transport vehicles. In this case, most of these SACCOs are diversifying their operations to other business areas following the change of governance as it has rendered them incompetent to run their businesses.

With the effects associated with devolution, a consideration of how devolving corporate tribunal presents two major areas of concern. For example, during the struggle to have the court ruling reverted following the ban on night travel shows that no corporate tribunal representation was offered to the involved SACCOs and owners of public transport vehicles. Ideally, regardless of whether it was there or not, the tribunal's vector on delivering justice functions under jurisdictions provided and enforced by the government. Thus, for any decisions made by a government representative and with the potential to affect Sacco's negatively cannot be intercepted by the corporate tribunal. This means that, devolved government agencies can make whatever decision they need expecting that the devolved corporate tribunals would support them regardless of their immediate or ripple effects to the involved SACCOs (Tiebout, 1956).

Benefits of Devolving the Corporate Tribunal

Hypothetically, devolving the corporate tribunal means added advantages to the entities affected. Logically, each benefit acquired from any business or governance decision has an underlying cost. With reference to the dynamics of a market or an industry, factors such as time

management, conflict resolution, chain of command, intellectual capabilities, and levels of innovation are considered resources of the respective business entity. Corporate tribunals provide organizations with room to handle their businesses outside of the court. These tribunals offer legal services that aim to establish the causes of conflict and the best solutions available. Time wasted filing court cases is mitigated at the tribunal level as the causes of conflict and their merits are identified prior to the issue of judgment (by referral to a court of law).

Corporate tribunals do not have the mandate to issue judgments, demand the payment of fines, or sentencing of conflicting parties. Thus, the relevance of corporate tribunals at the national or county levels is to ensure that conflicts that can be handled outside the court are dealt with to save time and resources. Additionally, for cases seeking legal or court interventions, the involved parties can be referred to specific courts where their facts are relevant and backed with substantial evidence. In this case, besides time management, provision of employment and cultivation of experience, and handing the opportunities of governance and leadership to sub-state units; it is seen that devolving corporate tribunals is as good as it is unfavorable to SACCOs and various other businesses that seek their intervention.

CONCLUSION

The protection of SACCOs and other business models depends on the size of the business as well as the stakes involved. Within SACCOs, various challenges that need legal or diplomatic intervention include negotiations for acquisitions or mergers, right to work factors, company-employee disputes, public vs. private sector, and unfavorable regulatory directives. To oversee that businesses or corporate entities thrive within the changing business world, the Kenyan government considers a corporate tribunal. From a business point of view, devolving a corporate tribunal may have more effects on SACCOs than what meets the eye. A devolved corporate tribunal places disputes and all other corporate businesses under the watch of local government representatives. However, this analytical research finds out that devolved corporate tribunal affects SACCOs more than it benefits them. Examples of corporate tribunal devolution include fewer investors forming SACCOs, the possibility of corporate misconduct due to relaxed measures of handling conflicts, and time wastage if the results of a case are not satisfactory to all stakeholders of the case. Additionally, government unit's collaboration with the corporate tribunals cultivates higher level of incompetency within SACCOs as this collaboration provides more regulations and exposes the SACCOs to primitive governance decisions.

The benefits of devolving the corporate tribunal, which comprise of efficiencies of the system, do not compare with the outstanding business incompetence of SACCOs cultivated by the devolved governance as well as devolved corporate tribunals. The cons outweigh the

benefits; therefore, SACCOs are deemed incompetent considering the devolution of corporate tribunal. The business landscape differs from the leadership and political landscapes. Thus, if courts benefit from handling fewer cases, the government should be able to identify the costs of those benefits. This research establishes that corporate incompetency is the cost of legal system efficacy. SACCOs can do better if a tribunal with penal capacities was appointed to oversee the behaviors of the SACCOs while at the same time offering solutions based on the magnitude of conflict, the party on the wrong, and the best solution to guarantee the development of fair business-business relationships.

REFERENCES

- Chweya, L. (2002), *Electoral Politics in Kenya*, Nairobi: Claripress.
- Jean-Jacques, R. (1968), *The Social Contract*, Maurice Cranston Trans.
- Jeremy, W. (2002), 'Legal and Political Philosophy', in: Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford.
- Liam, M. (2001). 'The Political Question of the Concept of Law', in: Jules Coleman (ed.), *Hart's Postscript: Essays on the Postscript to the Concept of Law*, 371(2001).
- Muia, D. (2008). *Decentralization of governance to districts in Kenya*. University of Nairobi Press.
- Oyugi, L. (2008). *Planning and budgeting at the grassroots level: the case of Local Authority Action Plan*. Nairobi: Institute of Public Policy Analysis.
- Republic of Kenya (2007). *Kenya vision 2030: a Globally Competitive and Prosperous Kenya*. Nairobi: Government of the Republic of Kenya.
- Tiebout. C. (1956). 'A Pure Theory of local Expenditures'. *Journal of Political Economy*, 65 (5); 416-424.
- Vile, M.J. (2000). 'Constitutionalism and the Separation of Powers', in: Francois Venter (ed.), *Constitutional Comparison: Japan, Germany, Canada & South Africa as Constitutional States*, Cape Town: Juta & Co., Ltd, 2000.