



**Tung'a & 2 others (All sued as Officials of Mutituni Self Help Group - Sokoni) v Mutuku
(Civil Appeal E092 of 2023) [2024] KEHC 9904 (KLR) (Civ) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E092 OF 2023
DKN MAGARE, J
JULY 29, 2024**

BETWEEN

**JOHN TUNG'A – CHAIRMAN 1ST APPELLANT
MUSAU MULEI – TREASURER 2ND APPELLANT
MUSENYA KILATIA – SECRETARY 3RD APPELLANT
ALL SUED AS OFFICIALS OF MUTITUNI SELF HELP GROUP - SOKONI**

AND

PETRONILLA MBITHE MUTUKU RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Micro and Small Enterprises Tribunal at Nairobi Claim No. E002 of 2022 (Dr. J. Bett as Chairman) delivered on 19/1/2023.
2. The Appellants are the officials of Mutituni Self Help Group. The appellant filed 9 paragraph memorandum of appeal. The grounds are:-
 - a. That the Honourable Chairman and the tribunal members erred in law and in fact by assuming jurisdiction over dispute of Mutituni Self-Help Group Sokoni which is a welfare association by simply stating at paragraph 23 of the said judgment that jurisdiction of this tribunal was not contested.
 - b. That the Honourable Chairman and the tribunal members erred in law and in fact by assuming that Mutituni Self-Help Group Sokoni which is a welfare association as per its constitution was a Micro and Small Enterprises organization.



- c. That the Honourable Chairman and the tribunal members erred in law and in fact by assuming a non-existing jurisdiction over a welfare association which as per its Mutituni Self Help Group Sokoni constitution was not Micro and Small Enterprises organization.
 - d. That the Honourable Chairman and the tribunal members erred in law and in fact by disregarding Mutituni Self Help Group Sokoni constitution Rule and Regulations set out at page 5 that a member who leaves the group is only entitled to Merry go round if one had contributed and savings.
 - e. That the Honourable Chairman and the tribunal members erred in law and in fact by awarding the Respondent legitimate expectation damages of Kenya shillings one hundred (Kshs. 100,000/=) an amount more than the total members contributions she was entitled to get from the all members of Kenya shillings twenty-two thousand only (Kshs. 22,000/=) in the event of death in the event the Respondent was not in any debt arrears as per page 5 on the part of death in the said group constitution.
 - f. That the Honourable Chairman and the tribunal members erred in law and in fact by disregarding Mutituni Self Help Group constitution aim of helping one another in matters of life, M.G.R, funeral contribution, sickness contribution and also projects as stated at page 2 of the said constitution.
 - g. That the Honourable Chairman and the tribunal members erred in law and in fact by stating that despite the Respondent having not served her demand letter dated 29th day of October, 2021 to the Appellants nor availing any evidence of the same; it was a proper notice of resignation despite the Appellants disputing service of the said demand letter yet the Respondent's husband death occurred on the 27th day of August, 2021.
 - h. That the Honourable Chairman and the tribunal members erred in law and in fact by stating that from February 2008 up to 29th day of October, 2021 the Respondent has not benefitted from the Self Help Group despite testifying she attended all the said group's function.
 - i. That the Honourable Chairman and the tribunal members erred in law and in fact by stating that despite assuming the demand letter dated 29th day of October, 2021 being what the tribunal termed as official communication of resignation and yet the Respondent made the last 8th day of September 2021 was not in the Mutituni Self Help Group arrears of payment as stated in the said group Rules and Regulations.”
3. The grounds of appeal are prolixious and unseemly. They offend the tenets of a proper Memorandum of Appeal as set out in Order 42 Rule 1 of the Civil Procedure Rules which provides as doth: -
- “1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”



4. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, *Robinson Kiplagat Tuwei* against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

5. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal observed that :-

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

6. There are 4 issues raised that:-

- a. Jurisdiction of the tribunal over Mutituni Self Help Group Sokoni.
- b. Members entitlement.
- c. Damages for legitimate expectation.
- d. Reliefs.



Pleadings and evidence

7. The Respondent stated that she made contributions to the tune of Kshs. 139,900/= until 29/10/2021 when she resigned. She stated that she was entitled to attendance to the funeral, and support after the demise of her husband on 27/8/2021. The officials made a blatant breach of by laws by resolving to withhold contribution to the claimant during the difficult period. This was what prompted her to resign.
8. She set particulars of breach. She also stated that she decided to resign due to discrimination. She tabulated the claim as hereunder:-
 - a. Benefit for husband's death – 22,000/=
 - b. Weekly contributions – 72,500/=
 - c. Contribution to members events – 35,200/=
 - d. Weekly savings – 10,200/=.
9. The Appellant entered appearance and filed defence and counterclaim. In the defence, the Appellant stated:-
 - i. The Respondent did not communicate any resignation.
 - ii. The claimant was in breach of the by-laws hence was not entitled to support.
 - iii. The Respondent was in loan arrears of Kshs. 6,500/= and as per *the constitution* she did not stand to benefit.
 - iv. They stated that she is not entitled to events contribution as the money is for transportation purposes.
 - v. They stated that she was in arrears and had a fine. The sum of Kshs. 10,200/= is thus not true but exaggerated.
10. They stated that she has never resigned from the group where she was in arrears and stopped giving contributions. They stated that the Respondent was in arrears of Kshs. 76,180/= which they counter claimed.
11. The tribunal heard the matter and awarded the respondent the following claims:
 - a. Benefits arising from death – 22,000/=
 - b. Merry go round – 35,200/=
 - c. Weekly savings – 10,200/=
 - d. Weekly contribution – 75,500/=
 - e. Damages – 100,000/=
12. The counter claim was dismissed. The Respondent was awarded costs.
13. This was the basis for the appeal. The court will have to settle the jurisdiction of the court.



Analysis

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
15. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
16. Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, stated as follows:-

“ .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
17. The court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.
18. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

“ It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
19. The duty of the court is set out in the Micro, Small Enterprises Development [Act No. 55 of 2012](#). The Act sets forth the purpose of the Act, the jurisdiction of the tribunal and the Appeal thereof.
20. The Act was assented to on 31/12/2012 and came into existence through commencement on 4/1/2023. Its long title is an Act of Parliament to provide for the promotion, development, and regulation of micro and small enterprises; to provide for the establishment of the Micro and Small Enterprises Authority, and for connected purposes.
21. This court must be satisfied that the tribunal had jurisdiction. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where [the Constitution](#) exhaustively provides for the jurisdiction of a



Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

22. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.
23. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

24. This court must then ascertain whether the tribunal had jurisdiction. If, it did not, then there was no claim before it. If it had then this court has to evaluate the evidence on record and come with a decision on liability of the Appellants.
25. An enterprise is defined as an undertaking or a business concern whether formal or informal engaged in production of goods or provision of services.
26. The Micro and Small Enterprises are defined by the Act as follows:-

“Micro enterprise” means a firm, trade, service, industry or a business activity--

- (a) whose annual turnover does not exceed five hundred thousand shillings;
- (b) which employs less than ten people; and
- (c) whose total assets and financial investment shall be as determined by the Cabinet Secretary from time to time, and includes—
 - (i) the manufacturing sector, where the investment in plant and machinery or the registered capital of the enterprise does not exceed ten million shillings;



- (ii) the service sector and farming enterprises where the investment in equipment or registered capital of the enterprise does not exceed five million shillings.

"Small enterprise" means a firm, trade, service, industry or a business activity—

(a) whose annual turnover ranges between five hundred and five million shillings; and

(b) which employs between ten and fifty people; and

(c) whose total assets and financial investment shall be as determined by the Cabinet Secretary from time to time, and includes—

(i) the manufacturing sector, where the investment in plant and machinery as well as the registered capital of the enterprise is between ten million and fifty million shillings; and

(ii) service and farming enterprises, where the equipment investment as well as registered capital of the enterprise is between five million and twenty million shillings.

27. Every enterprise is required to be registered by dint of Section 5 of the Act. The said section provides as follows: -

1. Every association or umbrella organization which intends to be registered under this Act shall, within twenty-eight days after its formation, make an application to the Registrar for registration under this Act. 8 No. 55 Micro and Small Enterprises 2012 (2) An application under this section shall be made in the prescribed manner and shall be accompanied by-
 - a. a copy of *the constitution* or other constitutive document of the applicant;
 - b. names and addresses of the founders of the association or umbrella organization;
 - c. the postal and physical address of the principal place of doing business of the applicant;
 - d. the prescribed fee, if any; and
 - e. such other particulars or information as may be required by the Registrar in order to assist the Registrar to determine whether or not the organization meets the requirements for registration under this Act.”



28. The Appellant is not an association and does not meet any of the requirements of section 5 of the Micro, Small Enterprises Development [*Act No. 55 of 2012*](#).
29. The Appellant was registered on 21/5/2019 as a self help group by the Ministry of East Africa Community, Labour and Social Protection. This was by way of a renewal. There was no evidence of being registered as a Small or Micro Enterprise.
30. The tribunal is established under Section 54 of the [*Micro and Small Enterprises Act*](#) as follows:-
54. (1) There is hereby established a Tribunal to be known as the Micro and Small Enterprises Tribunal to deal with claims enumerated in section 56 of this Act.
31. Its jurisdiction is set in Section 55 as follows:-
- Jurisdiction of the Tribunal.
- 55.(1) If any dispute concerning the micro and small enterprises arises—
- (a) among members, past members and persons claiming through members, past members of associations and or administrators of estate of deceased members of the associations;
 - (b) between members, past members or administrators of estate of deceased members of the association, and the Authority, or any of their officers or members;
 - (c) between the Authority and an association,
32. The disputes include:-
- (a) commercial disputes involving micro and small enterprises;
 - (b) failure to comply with the terms and condition of allocation of worksites;
 - (c) election and management of associations;
 - (d) failure to comply with [*the constitution*](#) or rules of a micro and small enterprise association or umbrella organization;
 - (e) unprocedural and illegal allocation, subdivision, subletting of a micro and small enterprise worksite;
 - (f) mismanagement and misappropriation of funds;
 - (g) any other dispute acceptable by the Tribunal.
33. Jurisdiction of this court is set out in Section 60 of the Act as follows: -
60. (1) Any person aggrieved by a decision or order of the Tribunal may, within thirty days of such decision or order, appeal against such decision or order to the High Court.
- (2) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined.

Ratione Materiae

34. The appellant's is not an enterprise, is an unregistered group collecting money and remitting as and when death occurs. There is no value addition. It is a rudimentary social meeting to pass time, collect funds and disburse. The same was not registered under the Act. The Act requires registration.



35. There are no businesses carried out. It does not mean that a self help group cannot be registered as a Micro and Small Enterprise. These are enterprises that promote commerce and have less than 10 employees. There is no known business the self help group was involved in.
36. It is important, in establishing the jurisdiction to take into consideration four aspects:
- i. Number of employees
 - ii. Being an enterprise or involved in business.
 - iii. Being registered or being in the process of registration. This includes an association that has been denied registration.
 - iv. The purpose of the organization.
37. In the case of Mutituni Self Help Group it was an ad hoc. *The constitution* deals with domestic matters, life, MGR(sic), funeral contribution, sickness and also projects. The only project is the Merry go round. The organization is so rudimentary that it cannot pass for a micro and small enterprise.
38. In the circumstances the tribunal did not have requisite jurisdiction to hear the matter. The claim related to social welfare. The orders for visiting and being compassionate are not within the realm of the Micro and Small enterprises.
39. The self-help groups being registered under the Ministry of East Africa Community, Labour and Social Protection falls outside the realm of the tribunal. The tribunal must desist to hear cases that do not involve enterprises.
40. An enterprise is defined in Black Law Dictionary page 672 as – An organization or venture especially for business purposes. People involved in Enterprises, of whichever status are called entrepreneurs. For an enterprise to fit the status of an enterprise, it must meet all the 4 principles of production:
- j. Labour
 - k. Entrepreneur
 - l. Land
 - m. Capital
41. Even in the loosest sense the Appellant does not have any of the 4 means of production. It is a consumption based life-end part of the food chain – life and death, social welfare. They produce and trade in nothing. They do not trade and are not involved in any kind of service provision or production of goods.
42. It is neither advisable nor prudent to have a poverty based association contributing a total 22,000/= for death and Kshs. 6,500/= for other contributions be classified as an enterprise and dealt with under the Act. They neither desired nor applied for registration.
43. Before leaving the judgment I noted that the tribunal purported to award damages. It has no power to do so. Damages are only covered under section 39 of the Act as follows: -
- “ 40. The provisions of section 39 shall not relieve the Authority of the liability to pay compensation or damages to any person for any injury to him, his property or any of his interests caused by the exercise of any power conferred by this Act or any other written law or by the failure, wholly or partially, of any works.”



44. Even those damages are not awarded by but against the tribunal.
45. In the circumstances I find the appeal merited. There is no need of going into the other issues given lack of jurisdiction. The tribunals must, ipso facto satisfy themselves of jurisdiction whether or not raised, before proceeding.
46. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -
- (18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
47. The order that commends itself is that each party bears their own costs both in this court and the tribunal. The court notes that matters involved in this case are better handled under the AJS system instead of inflaming emotions over life and death matters.
48. I thank the advocates for lengthy submission. However, they were fairly long and as such the court subsumed them in the analysis as it is apparent from the foregoing paragraphs.

Determination

49. In the circumstances the court makes the following orders:-
- a. The Appeal is allowed. Judgment given on 19/1/2023 by the Micro and Small Enterprises Tribunal in Claim No. E002 of 2022 is set aside in toto. In lieu thereof I strike out Claim No. E002 of 2022 for being filed in a tribunal without jurisdiction.
 - b. It is declared that unless an entity or association is registered or in the process of registration, the tribunal has no jurisdiction over it.
 - c. The tribunal has no jurisdiction over non trading no-employee member based self help groups involved only in domestic, social welfare, sickness, religion and death matters.
 - d. Each party shall bear their own costs in this court and in the tribunal.
 - e. Ipso facto, the Respondent’s counterclaim is equally struck out with no order as to costs.
 - f. This file and the tribunal files are closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF JULY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE



JUDGE

In the presence of:

No appearance for parties

Court Assistant – Jedidah

