



Otiende v Sacco Societies Regulatory Authority; Mwalimu National Sacco Society Limited (Interested Party) (Petition E530 of 2021) [2024] KEHC 11696 (KLR) (Constitutional and Human Rights) (26 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E530 OF 2021
LN MUGAMBI, J
SEPTEMBER 26, 2024**

BETWEEN

WELLINGTON A OTIENDE PETITIONER

AND

SACCO SOCIETIES REGULATORY AUTHORITY RESPONDENT

AND

MWALIMU NATIONAL SACCO SOCIETY LIMITED INTERESTED PARTY

RULING

1. The instant ruling relates to the Respondent's Notice of Preliminary Objection dated 9th February, 2022 which challenges the Petition dated 2nd December, 2021.
2. The Petition in the main alleges that the removal of the Petitioner from his elective post by the Respondent as the Interested Party's Chairman was malicious, ultra vires, unlawful and irregular. The Petitioner's assertion is that the Respondent lacks the authority to unilaterally remove an elected Sacco official without observing the due process.
3. The Preliminary Objection is based on the ground that:

The Notice of Motion and Petition are bad in law as they offend the doctrine of exhaustion of remedies.

Parties' Submissions

Respondent's Submissions



4. On 22nd March 2022, Rachier and Amolo LLP Advocates filed submissions for the Respondent and identified the issues for determination as: whether the preliminary objection is proper and whether the Petitioner exhausted the available remedies.
5. On the first issue, Counsel submitted that the objection is based on the Respondent’s supervisory powers as envisaged under Sections 48, 49, 50 and 51(c) of the [Sacco Societies Act](#) (No 14 of 2008) and Regulations 66, 67, and 72 of the [Sacco Societies \(Deposit Taking Sacco Business\) Regulations, 2010](#).
6. This law provides for mechanisms for appealing the Respondent’s decision which the Petitioner failed to utilize. As such Counsel argued that this is point of law. Reliance was placed in of *Mukhisa Biscuit Manufacturers Ltd v West End Distributors Ltd* [1969] E.A. where it was held that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
7. On the second issue, it was pointed out that the Petitioner had failed to exhaust the mechanism set out under Regulation 72(8) of the [Sacco Societies \[Deposit-Taking Sacco Business\] Regulations, 2010](#) which requires an aggrieved party to appeal to the Minister following the Respondent’s decision. Further, that exhaustion of a legal mechanism is further stressed under Section 9(2) and (4) of the [Fair Administrative Actions Act](#).
8. It was submitted that the Petitioner had not made an application seeking this Court to exempt him from Section 9 of the Act and neither had he exhausted the available mechanisms.
9. In this regard reliance was placed in [United Millers Limited v Kenya Bureau of Standards & 5 others \[2021\] eKLR](#) where the Supreme Court observed that:

“The Court of Appeal opined that having failed to revert to the internal dispute resolution mechanisms provided for under Section 14A (4) of the [Standards Act](#) and Section 9 (2) of the FAA Act and having also failed to apply for exemption from this requirement as is provided for under Section 9(4) of the FAA Act, the High Court was divested of jurisdiction to entertain the judicial review proceedings. The Court of appeal also found that having reached this conclusion on jurisdiction, the High Court ought to have downed its tools.”
10. Like reliance was placed in [Speaker of National Assembly v James Njenga Karume](#) (1992) 1 KLR 425 , [Republic v IEBC Ex Parte NASA-Kenya & 6 Others](#) [2017] eKLR and [Albert Chaurembo Mumba & 7 others \(sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme\) v Maurice Munyao & 148 others \(suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme\)](#) [2019] eKLR.
11. Counsel further argued that the doctrine of avoidance necessitates that the Court refrain from adjudicating upon a matter if the same can be resolved through another mechanism. To buttress this point, reliance was placed in [Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of](#) [2014] eKLR where it was held that:

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*,



1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

12. Comparable dependence was placed in *Anthony Miano & others v Attorney General & others* [2021] eKLR, *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR, *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and *Jamlick Muriithi Mwenda v Law Society of Kenya & 10 others* [2022] eKLR.
13. Consequently, it was argued that since the Petitioner’s complaint revolves around a question of the decision of the Respondent in exercise of its supervisory and administrative jurisdiction, he has failed to show that the dispute cannot be properly determined through the appeal procedure provided under Regulation 72(8) of the *Sacco Societies [Deposit-Taking Sacco Business] Regulations, 2010*. Considering this, Counsel urged the Court to decline jurisdiction over this matter as there is a remedy provided in law which the Petitioner is yet to utilize thus this Court lacks jurisdiction to entertain this matter. For this reason, Counsel submitted that the Petition is an abuse of the Court process.

Petitioner’s Submissions

14. The Petitioner opposed the Preliminary Objection vide submissions dated 8th May 2022 filed by Prof. Albert Mumma and Company Advocates. Counsel highlighted the issues for determination as: whether the subject Preliminary Objections raise pure points of law and whether the Petitioner failed to exhaust any other available remedy.
15. On the first issue, Counsel submitted that the objection raises contested factual issues which cannot be resolved through a preliminary objection. According to Counsel whether or not a party has exhausted an available mechanism is a factual matter that can only be determined through adducing of factual evidence.
16. Counsel further took issue with the fact that the Respondent had failed to adduce any evidence to support the claim that the Petitioner had not exhausted the available remedy under Regulation 72 (8) of the *Sacco Societies (Deposit-Taking Sacco Business) Regulations*.
17. In fact, Counsel noted that the Petitioner had duly lodged its complaint appeal with the Cabinet Secretary vide a letter dated 7th October 2021. The Petitioner thereafter made numerous follow ups with the Cabinet Secretary to know the status of his appeal which were futile.
18. On this premise Counsel submitted that since the objection is wholly premised on an alleged factual omission being failure to exhaust remedies, then it was clear that the Respondent was arguing a contested factual issue thus not a pure point of law. Reliance was placed in *Mukisa Biscuits v West End Distributors* [1969] EA where it was held:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be demurrer. It raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of a judicial discretion. The improper raising of points by way of preliminary objection does nothing



but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

19. Like dependence was placed in [*Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* \[2020\] eKLR](#).
20. Turning to the second issue, Counsel answered in the affirmative. It was submitted that the Petitioner had appealed the Respondent’s decision to the Cabinet Secretary vide a letter dated 5th October 2021 and served the same on 7th October 2021. Counsel stressed that the Cabinet Secretary is yet till date to issue any response on the appeal. Furthermore, it was noted that this provision although complied with, does not provide clear procedures for pursuing an appeal and within what time frame the Cabinet Secretary is to respond to the appeal.
21. It was also noted that the Respondent in the sustenance of this suit sought to re-constitute the Interested Party’s Board. In view of these factors, Counsel stressed that the Petitioner’s only recourse was this Court lest his claim be overtaken by events and become a mere academic exercise.
22. Reliance was placed in [*Republic v Firearms Licensing Board & another Ex-parte Boniface Mwaura* \[2019\] eKLR](#) where it was held that:

“While exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved -including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the [*Constitution*](#) or law and permit the suit to proceed before it. Factors to be taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate.”

23. Counsel submitted that the Petition seeks to enforce fundamental rights and as such the same would ordinarily not be barred by the doctrine of exhaustion. Reliance was placed in [*Angela Mbugua & 4 others \(Officials of Redhill Kentmere Residents Association\) v KO Holding Limited & 2 others* \[2021\] eKLR](#) where it was held that:

“On 19th November, 2020, the learned Judge of the Environment and Land Court (ELG) delivered a ruling in which she upheld a preliminary objection and struck out the applicants’ suit against the respondents, on the ground that the suit was filed prematurely as the applicants had not exhausted the alternative dispute resolution mechanisms provided under the law...

It is clear to us that the applicants’ intended appeal raises issues regarding the legality of the order striking out their suit without hearing the matter on merit. The intended appeal is therefore questioning the dismissal of the suit for want of jurisdiction on the grounds that there exists another avenue for resolution of the dispute. The question of the applicants’ failure to pursue the alternative dispute resolution mechanism provided, and whether a party can be ejected from the seat of justice is an important matter to be resolved on appeal. We are therefore satisfied that the first limb of arguability has been demonstrated.”

24. Further dependence was placed in [*D.T. Dobie & Co \(K\) Ltd V Muchina*](#) LLR No. 9 (CAK).
25. Moreover, Counsel argued that the Respondent’s argument that the Petition is precluded by the doctrine of constitutional avoidance is misplaced as the same can only apply where there exists another



remedy provided in law that the party can utilize. Reliance was placed in Anthony Miano & others (supra) where it was held that:

“The doctrine of constitutional avoidance, therefore, deals with instances where a Constitutional Court will decline to deal with a matter because there exists another remedy provided in law which the aggrieved party is yet to utilize. That is also referred to as the doctrine of exhaustion.”

Analysis and Determination

- i. Whether the Preliminary Objection has met the set threshold.
- ii. Whether the doctrine of exhaustion applies in the circumstances of this Petition.

Whether the threshold for preliminary objection has been met

26. The threshold of a preliminary objection was summarized in *Parbat Siyani Construction Limited v Kenyatta International Convention Centre (Constitutional Petition E397 of 2021)* [2023] KEHC 1603 (KLR) (Constitutional and Human Rights) (10 March 2023) (Ruling) where the Court citing the classic authorities stated as follows:

54. This Court would wish to remind the parties that it is dealing with a preliminary objection. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

55. The foregoing nature of preliminary objections was discussed in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) EA 696 page 700 when the Court observed as follows: -

'So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.'

56. In Civil Suit No 85 of 1992, *Oraro vs Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* (supra) and stated as follows on the operation of preliminary objection: -

'I think the principle is abundantly clear. A 'preliminary objection', correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to



adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.'

57. In *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, it was observed that a Court in determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that the objection must raise pure points of law. It was held thus: -

'In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion...'

27. Likewise, the Court in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017)eKLR observed as follows:

“...a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.”

28. In this matter, whereas the Respondent insists that the Petitioner did not exhaust the statutory provided mechanism, the Petitioner contests the assertion by stating that he appealed to the to the Cabinet Secretary in accordance with the procedure provided but the appeal to the Cabinet Secretary was not responded to. The Petitioner thus contends that this contestation about a factual issue removes the matter from the realm of a preliminary objection which must be based on settled or uncontested facts. To that extent, I concur with the Petitioner’s contention that a preliminary objection that relies on disputed facts is not sustainable as a preliminary objection.

29. The other issue is the efficacy of the appeal process provided under Regulation 72(8) of the *Sacco Societies [Deposit-Taking Sacco Business] Regulations, 2010* before filing this Petition. The Petitioner faulted the mechanism for not provide clear procedures on the appeal process particularly the period within which the Cabinet Secretary is supposed to respond to act on such complaints hence was not an efficacious remedy for purposes of resolving the matter of violation of rights and fundamental freedoms of the petitioner. The mechanism provided in my view is faulty in that it can keep an aggrieved party in an indeterminate state uncertainty as happened in this case. An administrative action that meets the Constitutional threshold of Article 47 must be expeditious, efficient, reasonable and procedurally fair.

30. For the reasons above, it is the finding of this Court that the instant preliminary objection fails and is hereby dismissed. Costs shall abide the outcome of the Petition.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

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L N MUGAMBI



JUDGE

