



**Mbacha v Rubbet Sacco Society Limited (Civil Appeal 40 of 2019)
[2023] KEHC 20954 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 40 OF 2019
CW GITHUA, J
JULY 26, 2023**

BETWEEN

BEATRICE WAITHIRA MBACHA APPELLANT

AND

RUBBET SACCO SOCIETY LIMITED RESPONDENT

*(Being an appeal from the ruling of Hon. V. Ochanda-RM delivered
on 11th September 2019 in Murang'a CMCC No. 390 of 2015)*

JUDGMENT

1. By a Memorandum of Appeal dated September 24, 2019 and filed on even date, the appellant proffered this appeal against the ruling of the lower court which dismissed her application which sought to have respondent's suit against her struck out with costs on grounds that the trial court lacked jurisdiction to adjudicate on the dispute subject matter of the suit.
2. In her Memorandum of Appeal, the appellant relied on three grounds in which she complained that the learned trial magistrate erred in law when she failed to hold that she was a member of the respondent Co-operative Society which fact ousted the court's jurisdiction. She also faulted the trial court for ruling that the issue before her was a preliminary objection when it was not and for delivering a ruling which was against the evidence on record. On these grounds, the appellant invited this court to overturn the lower court's decision and allow the Notice of Motion dated 11th September as prayed.
3. The appeal was canvassed by way of written submissions following directions issued by the court on October 1, 2020. The Appellant's written submissions were filed by her advocates Ms. Mwaniki Warima & Company Advocates on 18th March 2022 while those of the respondent were filed by its advocates Ms. Mbue Ndegwa & Company Advocates on 13th June, 2023.



4. In her submissions, the appellant contended that the dispute between her and the respondent was in the category of disputes stipulated under section 76 of the *Co-operative Societies Act* given that it related to a debt owed to the respondent and therefore fell squarely within the jurisdiction of the Co-operative Tribunal.
5. The respondent on the other hand supported the trial court's decision. In its submissions, the respondent inferred that what was before the trial court was a preliminary objection which failed to meet the test of a preliminary objection as defined in the case of *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* [1969] EA 696 as the appellant had raised a factual matter regarding her membership with it which was a matter of evidence. The respondent also argued that the issue before the lower court was not clear whether it related to a contractual obligation or a dispute contemplated under section 76 of the *Co-operative Societies Act*; that even if it was a dispute within the meaning of section 76 of the *Co-operative Societies Act*, the provision did not oust the jurisdiction of the court. Lastly, it was the respondent's contention that the appellant's application was an afterthought aimed at circumventing the cause of justice.
6. The background to this appeal as can be ascertained from the pleadings filed before the lower court is that the respondent, being a Co-operative Society, advanced to the appellant in her capacity as its member, a loan of Kshs. 25,000 on terms that the loan was repayable with interest at the rate of 3% in a period of six months. The appellant defaulted after paying only Kshs. 5,572. The respondent then filed suit in the lower court seeking recovery of the outstanding balance. The appellant subsequently filed an application seeking to strike out the suit on grounds that the court lacked jurisdiction to try the respondent's claim. The court after hearing the application delivered the ruling which is impugned in this appeal.
7. Having duly considered the grounds of appeal and the rival written submissions filed on behalf of the parties, I find that the only issue for my determination in this appeal is whether the learned trial magistrate erred in law in dismissing the appellant's aforesaid application.
8. As I have already stated, the application sought to have the respondent's suit struck out on grounds that the trial court lacked jurisdiction to try it as the dispute between the parties was one of those contemplated in section 76 of the *Co-operative Societies Act* (the Act) which vested jurisdiction in such disputes in the Co-Operative Tribunal (the tribunal).

Section 76 of the Act states as follows: -

“(1) If any dispute concerning the business of a co-operative society arises—

- a. among members, past members and persons claiming through members, past members and deceased members; or
- b. between members, past members or deceased members, and the society, its Committee or any officer of the society; or
- c. between the society and any other co-operative society, it shall be referred to the Tribunal.

(2) A dispute for the purpose of this section shall include —

- a. a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or



- b. a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;
 - c. a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.
9. In her ruling, the learned trial magistrate correctly found that it was not contested that the appellant was indeed a member of the respondent and that the suit was filed to recover a debt owed to the respondent by the appellant which debt was admitted. The learned trial magistrate however clearly erred in her ruling for two main reasons: First, contrary to her finding, it is evident from the court record that what was before the court was not a preliminary objection but a substantive application seeking to strike out the respondent's suit with costs for want of jurisdiction.
 10. Secondly, having established that the appellant was a member of the respondent and what was in issue was a debt allegedly owed to the respondent by the appellant, the learned trial magistrate erred by not appreciating the mandatory provisions of Section 76 of the Act which provides that such a dispute should be adjudicated upon by the Co-operative tribunal. Put differently, the learned trial magistrate erred by finding that she had jurisdiction to hear and determine the suit while such jurisdiction had been bestowed by statute in the Co-operative Tribunal.
 11. The Supreme Court in *Samuel Kamau Macharia & another versus Kenya Commercial Bank Limited & 2 others* [2012] eKLR discussed the issue of jurisdiction and expressed itself thus;

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”
 12. Further, the Court of Appeal in *Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service* (2019) eKLR held that: “Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.”
 13. Given the foregoing and considering that the claim by the respondent was for recovery of a debt owed to it by the appellant who was its member, I have no doubt in my mind that the correct forum for adjudication of the dispute was the Co-operative tribunal which was statutorily clothed with jurisdiction to try such disputes and not the lower court.
 14. From the pleadings filed in the trial court, it is clear that the respondent filed its claim in the wrong forum. The fact that the appellant had admitted the debt or had submitted herself to the jurisdiction of the court did not confer on the lower court jurisdiction it did not have since jurisdiction is a creature of the law and cannot be implied from the conduct of parties. The learned trial magistrate ought to have deferred to the jurisdiction of the tribunal.



15. For all the above reasons, I am satisfied that this appeal is merited and it is hereby allowed. The ruling delivered by Hon. V. Ochanda RM on 11th September 2019 dismissing the appellant's Notice of Motion dated 1st September 2017 is hereby set aside. It is substituted with an order of this court striking out the respondent's suit in Murang'a civil Case No. 390 of 2015 with costs to the appellant.
16. Costs follow the event and are at the discretion of the court. Considering the reasons that necessitated filing of this appeal, the order that best commends itself to me on costs is that each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 26TH DAY OF JULY 2023.

C.W. GITHUA

JUDGE

In the presence of:

Ms. Waititu for the Appellant

Mr. Mbuyi Ndegwa for the Respondent

Mr. Quinten : Court Assistant

