



REPUBLIC OF KENYA



KENYA LAW
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**Claudia Mueni Mutungi v Fep Sacco Society Limited, Susan
Kiambati & Sacco Societies Regulatory Authority (Civil Case
52 of 2020) [2021] KEHC 7397 (KLR) (19 March 2021) (Ruling)**

Claudia Mueni Mutungi v Fep Sacco Society Limited & 2 others [2021] eKLR

Neutral citation: [2021] KEHC 7397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 52 OF 2020
MN MWANGI, J
MARCH 19, 2021**

BETWEEN

CLAUDIA MUENI MUTUNGI PLAINTIFF

AND

FEP SACCO SOCIETY LIMITED 1ST DEFENDANT

SUSAN KIAMBATI 2ND DEFENDANT

SACCO SOCIETIES REGULATORY AUTHORITY 3RD DEFENDANT

RULING

1. The plaintiff filed the suit herein vide a plaint dated 3rd August, 2020. The same was amended on 11th September, 2020 and filed on the same day. She averred that she was a long term member of the Kenya Women Micro-Finance Bank, now known as Kenya Women Finance Trust (KWFT), where she held a fixed deposit account and that the 2nd defendant managed her account as a Customer Care Manager. That around November, 2019 the 2nd defendant informed her that she had moved to FEP Sacco Society Limited which offered higher interest rates for fixed deposits compared to KWFT. That the 2nd defendant persuaded her that a smooth transition would be possible as she would handle her account.
2. The plaintiff further averred that on the strength of the 2nd defendant's advice, on 2nd December, 2019, she transferred Kshs. 29,000,000/= from her account at KWFT to the 1st defendant's account at KCB, Koinange street, Nairobi. That upon receipt of the said funds, on 3rd December, 2020 the 1st defendant paid her anticipated interest in advance, amounting to Kshs. 1,136,438.00.



3. She stated that at the time of transferring the said money she did not apply and she was not required to be a member of the 1st defendant. She further claimed that on 28th February, 2020 she notified the 1st and 2nd defendants that she needed her money to be placed in a call account for a period of 1 month after its maturity on 3rd March, 2020. That the 1st defendant responded to the plaintiff's letter on 31st March, 2020 and introduced a mischievous subject known as "intention to withdraw membership of Claudia Mueni Mutungi member No. M01xxxx". That on 6th April, 2020 the 1st defendant gave her a form for allegedly withdrawing from membership and requesting for the withdrawal of Kshs. 20,000,000/=. That she completed the said form.
4. The plaintiff stated that the issue of withdrawal was revisited on 4th June, 2020 by the 1st defendant where it notified her that the notice to withdraw could only take effect from 5th July, 2020 and lapse on 5th September, 2020 and that the 1st defendant was relying on its by-laws number 17(a). She thus claimed that the 1st and 2nd defendants were in breach of their agreement. It was in the light of the above that the plaintiff prays for-
 - (a) Kshs. 29,000,000/=;
 - (b) A declaration that the plaintiff was not a member of the 1st defendant;
 - (c) A declaration that the 1st and 2nd defendants breached the fundamental rights and freedoms of the plaintiff under Article 36(2) of the Constitution;
 - (d) A declaration that the 1st and 2nd defendants breached Rule 15(e) of Sacco Societies (Deposit-taking Sacco Business) Regulations, 2010 and engaged in prohibited business by recruiting the plaintiff and running a fixed deposit in favour of the plaintiff when she was not a member of the 1st defendant;
 - (e) Special damages as pleaded in paragraph 21;
 - (f) An order compelling the 1st defendant its agents, servants, or anyone authorized by them to pay the accrued interest on the principal sum from 5/7/20 to the date of payment of the principal amount;
 - (g) The 3rd defendant be advised to consider administrative actions against the management of the 1st defendant to protect the larger public; and
 - (h) Costs of the suit and interest on c & d at court rates.
5. In response to the plaintiff's claim, the 1st and 2nd defendants filed a Notice of Preliminary Objection dated 21st August, 2020. The preliminary objection was premised on the following grounds-
 - a) That this Honourable Court lacks jurisdiction to hear this matter as per Section 76 of the Co-operative Societies Act; and
 - b) That this Court can only exercise appellate jurisdiction as per section 81(3) of the Co-operative Societies Act.
6. In response to the preliminary objection, the plaintiff's Counsel filed grounds of opposition dated 11th September, 2020 where he stated that the High Court has jurisdiction to deal with this matter as provided under Article 165(3)(a) of the Constitution of Kenya. He also stated that Sections 76 and 81(3) of the Co-operative Societies Act do not apply to the dispute herein since the plaintiff is not and has never been a member of the 1st defendant.



7. On 11th September, 2020, the plaintiff filed a Notice of Motion application dated 11th September, 2020 brought under Order 36 Rule 1(1)(a), Order 51 Rule, 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 and all enabling provisions of law. In the said application, the plaintiff/applicant seeks the following orders:
 - (i) That this Honourable Court be pleased to enter summary Judgment against the 1st defendant for Kshs. 29,000,000/= and interest as prayed under paragraph 27(a) and (h) of the amended plaint and the rest of the claim to proceed to full hearing; and
 - (j) That the cost of the application be provided for.
8. The said application is anchored on the grounds on the face of it and the supporting and supplementary affidavits sworn by Claudia Mueni Mutungi, on 11th September, 2020 and 9th November, 2020, respectively. She deposed that her claim is for payment of Kshs. 29,000,000/= held by the 1st defendant in a fixed deposit and that there are no triable issues on account of the said amount and interest which should go to trial. She deposed that the 1st defendant's by-laws only relate to the relationship between the 1st defendant and its members and not non-members.
9. She further deposed that the 1st defendant issued her with a fixed deposit advice confirming that the maturity date of her deposits was 4th July, 2020 which had since passed. The plaintiff stated that as at 5th September, 2020, the 1st defendant had not paid the principal amount plus interest. In her supplementary supporting affidavit, the plaintiff stated that the 1st defendant had not denied receiving the Kshs. 29,000,000/= as a fixed deposit and that she had made a demand for payment. She denied being the author of the contents of annexure JW-1a and that she had written to the police to subject the said document to forensic investigations.
10. In opposition to the plaintiff's application, the 1st and 2nd defendants filed a replying affidavit sworn by Dr. Jackson Wanjau, the Chief Executive Officer of the 1st defendant on 31st October, 2020. He deposed that the 1st and 2nd defendants filed a joint statement of defence dated 31st October, 2020 stating that the plaintiff applied for membership from the 1st defendant under Rules 9 and 10 of the 1st defendant's by-laws on 2nd December, 2019 through its Mombasa branch office and that she later withdrew from the Sacco by filling the mandatory withdrawal forms. It was thus contended that one cannot withdraw from that which she was never a member of.
11. The 1st and 2nd defendants denied the allegation that the 1st defendant was a deposit taking entity and stated that information relating to their legal status is conspicuously displayed on its website.
12. The 1st and 2nd defendants deposed that the plaintiff's registration as a member of the 1st defendant is what qualified her to transfer her savings since it only transacts with members and not non-members. It was stated that the 1st defendant is a duly registered Co-operative Society Sacco under Cap 490 Laws of Kenya, Co-operative Society No. CS/10033 and has no legal connections whatsoever with KWFT. That prior to the money being transferred to the 1st defendant's account, the 1st defendant's Regional Manager wrote an official letter dated 2nd December, 2020 to KWFT informing it that the plaintiff was a member of the 1st defendant and confirmed her membership number as a measure of good practice.
13. The 1st and 2nd defendants further deposed that the plaintiff deliberately failed to disclose all the interests she had been paid by the 1st defendant on four different occasions between 3rd December, 2019 and 5th May, 2020. They indicated that the plaintiff never denied being a member of the 1st defendant until the date she filed the instant suit demanding a refund. The 1st and 2nd defendants stated that by virtue of the fact that the plaintiff is a member of the 1st defendant, the dispute herein is one that is



- contemplated under Section 76 of the Co-operative Societies Act Cap 490 Laws of Kenya. They also stated that this Court cannot exercise both original and appellate jurisdiction in matters that the Co-operative Tribunal has the original jurisdiction to hear.
14. The 1st and 2nd defendants further stated that Section 79(g) of the Co-operative Societies Act provides that the Co-operative Tribunal shall have unlimited geographical and pecuniary jurisdiction in matters of Co-operative disputes thus filing the suit before this Court extinguishes the defendants' right of appeal under the provisions of Section 81(3) of the Co-operative Societies Act.
 15. The 1st and 2nd defendants deposed that in the event the Court finds that the plaintiff was not a member of the 1st defendant, then it would lack the power to enforce an illegal contract since the 1st defendant does not have a license to undertake deposit taking business within the definition of *Sacco Societies Act* No. 14 of 2008 and Regulations, 2010.
 16. On 8th October, 2020 directions were given for both the Notice of Preliminary Objection and the Notice of Motion application dated 11th September, 2020 to be canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Munyithya, Mutugi, Umara & Muzna Co. Advocates on 28th October, 2020. The 1st and 2nd defendants' submissions were filed by the law firm of Chimei & Company Advocates on 5th November, 2020 while the 3rd defendant's submissions were filed by Jeremiah J. O. Were Advocate on 4th November, 2020.
 17. The plaintiff's Counsel's submissions were in support of the Notice of Motion application dated 11th September, 2020 and in opposition to the 1st and 2nd defendants' Notice of Preliminary Objection. In citing the provisions of Section 76 of the *Co-operative Societies Act*, he submitted that since the plaintiff is not a member of the 1st defendant, she is not privy to the 1st defendant's Sacco businesses and that the dispute before the Court cannot amount to business of the Society since the 1st defendant is not licensed to conduct such transactions. It was submitted that the relationship between the plaintiff and the 1st defendant is that of a depositor and deposit-taker, thus jurisdiction shifts from the Co-operative Tribunal to the High Court. Reliance was placed on the case of *Ol Kalou West Farmers Co-operative Societies Limited v David Kibue Kinyanjui* [2019] eKLR.
 18. Counsel for the plaintiff also relied on the case of *Tescom Sacco Society v Mary Nyaguthii Ngigi* [2016] eKLR, where the Court defined a member of the Society as per the provisions of Section 2 of the Co-operative Societies Act, which appears to imply that before one becomes a member he or she must sign the application for registration and is admitted as a member. It was further submitted that at the time the plaintiff transferred the said Kshs. 29,000,000/=, she neither applied to be a member nor was she required to be a member of the 1st defendant.
 19. It was submitted for the plaintiff that Order 36 Rule 1(1)(a) of the *Civil Procedure Rules*, 2010 provides that in a suit where the plaintiff seeks Judgment for a liquidated claim and in instances where the defendant has entered appearance but not filed a defence, the plaintiff is at liberty to apply for Judgment for the amount claimed. He also submitted that it was undisputed that the plaintiff indeed made the deposit of Kshs. 29,000,000/= with the 1st defendant on 2nd December, 2019 in a fixed deposit Account No. 1136680195, in the name of Claudia Mueni Mutungi. The said amount was to accrue interest at the rate of 16.5 % equivalent to Kshs. 1,136,438/= and was to expire on 31st March, 2020. Counsel submitted that on 24th April, 2020, the plaintiff wrote a notice to withdraw her funds and filled a fresh form for withdrawal of the funds with effect from 4th July, 2020. It was submitted that for the said reasons, Judgment was being sought herein under the provisions of Order 23 Rule 2 of the Civil Procedure Rules, for a liquidated sum.



20. Counsel further submitted that the 1st and 2nd defendants filed a memorandum of appearance and a Notice of Preliminary Objection dated 21st August, 2020 but they were yet to file a defence. He urged this court to grant a summary Judgment in favour of the plaintiff since there was no defence on record. Reliance was placed on the case of *Fairmount Hotel Limited v Margaret Wanjiku Henry* [2020] eKLR, where the court observed that in a scenario where there is no defence to the claim or grounds to oppose the orders sought, it gives an inference that the application and the suit is not opposed. Counsel submitted that the issues raised herein are uncontested and the plaintiff had tabled evidence to show that she was a depositor with the 1st defendant and not a member.
21. The 1st and 2nd defendants' Counsel in his written submissions stated that the plaintiff applied for the 1st defendant's membership on 2nd November, 2019, thus before the transfer of the funds, she was admitted into the membership of the 1st defendant and her name was entered into the register as member No. M0115773. He submitted that membership is a factual issue which the 1st defendant had demonstrated in its replying affidavit and even annexed documentary evidence. He further submitted that the plaintiff withdrew from the membership by filling the mandatory withdrawal forms as per the 1st defendant's by-laws and that one cannot withdraw from that which she was never a member of.
22. He cited the provisions of Section 76 of the Co-operative Societies Act and submitted that this Court lacks jurisdiction to determine the application filed by the plaintiff. He cited the decision in *John Gitbinji Wangondu & Kariuki Kiboi v Othaya Farmers' Co-operative Society Limited & Commissioner of Co-operative Development* [1999] eKLR, where the Court of Appeal held that disputes are to be settled through the Commissioner of Co-operatives whose decisions are appealable to the High Court, hence the said court has only appellate powers and there is no provision for instituting suits in the High Court.
23. It was submitted for the 1st and 2nd defendants that jurisdiction is everything and such a question ought to be raised at the earliest opportunity as was stated in the *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR.
24. Counsel for the 1st and 2nd defendants submitted that the Supreme Court in *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, held that a Court's jurisdiction flows from the Constitution or statute or both. It was submitted that the Co-operative Tribunal is a quasi-judicial body and by dint of Article 165(6) of the Constitution of Kenya, the High Court has supervisory jurisdiction over it. Reliance was placed on the Supreme Court case of the *Law Society of Kenya v Attorney General & Another* [2019] eKLR and the Court of Appeal case of *Law Society of Kenya v Centre for Human Rights & Democracy & 13 others* [2013] eKLR.
25. He was of the view that this Court lacks original jurisdiction to hear and determine this matter due to the reasons highlighted herein hence the application and the suit should be dismissed for want of jurisdiction.
26. The 3rd defendant's Counsel in his written submissions stated that the law governing preliminary objections on points of law was long established in the famous case of *Mukisa Biscuits v West End Distributors* (1969) EA 696. He submitted that this Court has to determine whether the facts relied upon as the basis of the preliminary objection have been admitted by the parties and not contested as to require further investigations or an inquiry. Counsel further submitted that the facts upon which the preliminary objection is premised are seriously contested and cannot be admitted.
27. He also submitted that Section 76 of the *Co-operative Societies Act* require the invocation of the jurisdiction of the Co-operative Tribunal but the party before it must be a member, past member, nominee or personal representative of a deceased member and the Co-operative Society. Counsel also



submitted that there was a dispute as to whether the plaintiff was a member of the 1st defendant and that was a matter that this court has to determine.

28. Counsel for the 3rd defendant cited the provisions of Section 67(3) of the *Sacco Societies Act* No. [...] which provides that all disputes arising out of Sacco business shall be referred to the Tribunal. The 3rd defendant's Counsel maintained that the financial transaction which the plaintiff engaged in with the 1st defendant was not and cannot qualify as Sacco business. Counsel further submitted that as long as the plaintiff contended that she was not a member of the 1st and 2nd defendant then it is automatic that the financial transaction which she undertook cannot qualify as Sacco business which is a matter for further inquiry.

Analysis and Determination

29. I have considered the preliminary objection, the application dated 11th September, 2020, the grounds of opposition together with the 1st and 2nd defendants' replying affidavit and the written submissions in this matter. The issues that arise for determination are as follows-

- (i) If this court has jurisdiction to hear the case herein; and
- (ii) Whether summary Judgment should be entered in favour of the plaintiff as against the 1st defendant.

If this court has jurisdiction to hear the case herein

30. It is trite law that jurisdiction is everything, without it the court has no power to make one more step. That was so held in the case of the *Owners of Motor Vessel Lillian ("S") vs Caltex Oil (K) Limited* (1989) 1 KLR. Indeed, where a court has no jurisdiction, any proceedings taken would be null and void. Therefore, this court must determine the issue of jurisdiction at the outset.

31. There is no dearth of decided cases on what constitutes a preliminary objection. In *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors* [1969] EA 696 it was held that-

"...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point 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." (emphasis added).

32. The provisions that this court must pay regard to, in the objection raised herein are Sections 76 and 81 of the of the *Co-operative Societies Act*. This court must also bear in mind the nature of the claim and the prayers sought in the plaint. Section 76 of the said *Act* provides 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. (emphasis added).

33. It is mandatory for disputes falling within the ambit of Section 76 of the *Co-operative Societies Act* to be determined by the Co-operative Tribunal. Section 81 of the said *Act* confers original jurisdiction to the Co-operative Tribunal to hear disputes outlined in Section 76 of the *Co-operative Societies Act*, while the High Court has appellate jurisdiction as provided under Section 81(1) of the said *Act*. Section 81(1) of the *Act* provides as follows-

“Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court:

Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.”

34. The plaintiff submitted that at the time of the transfer of Kshs. 29,000,000/= to the 1st defendant, she did not apply to become its member. That it was not a requirement for her to be a member before the funds could be transferred. The plaintiff however failed to explain under what circumstances the said transfer was made other than stating that she was a depositor and that the 1st defendant was a deposit-taking institution.
35. The 1st and 2nd defendants on the other hand submitted that prior to the transaction that was made on 2nd December, 2019, the plaintiff applied to be a member of the 1st defendant. In support of these allegations, the 1st defendant annexed a copy of a duly filled and executed application form dated 2nd December, 2019 in favor of the plaintiff, her passport photograph, copies of her KRA pin and her identity card (ID card). The heading of the application form reads Fep Sacco Society Limited. The 1st defendant went further to exhibit a membership register which shows that the plaintiff is member No. M0115773 and a duly filled and executed Fep Sacco Ltd withdrawal form. In further support of the assertion that the plaintiff was a member of the 1st defendant, it annexed a letter marked as exhibit JW5 dated 2nd December, 2019 addressed to KWFT indicating the name of the plaintiff and her membership number M01xxxx.
36. The plaintiff denied having any knowledge of the membership application form, the membership number and the membership register. She averred that she did not fill the said membership application form or recognize the handwriting and signature thereon. It was averred that she had written to the police to subject the said document to forensic investigation. She however did not support her claim with any documentary evidence such as the letter written to the police requesting them to undertake investigations. The exhibits marked JW1E and JW1F are FEP Sacco Ltd withdrawal forms duly filled



and signed by Claudia Mueni Mutunga. The said forms are dated 24th April, 2020 and 6th April, 2020, respectively.

37. The position of the law is that he who asserts must prove his case. No evidence such as copies of account opening forms was adduced by the plaintiff to prove the allegations that she was a depositor and the 1st defendant a deposit-taker. On the other hand, the 1st defendant adduced evidence in support of its claim that the plaintiff was its member. In the said circumstances, the burden of proof lies with whoever would want the court to find in his favour, in support of what he claims.

38. Section 107 of Evidence Act succinctly states:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

39. In light of the above, it is my finding that the plaintiff was and is still a member of the 1st defendant herein.

40. On whether the transaction between the plaintiff and the 1st defendant formed part of the “business of the society”, the court defined the said term in the case of *Gatanga coffee Growers v Gitau* (1970) EA 361 as-

“... business of the society is not confined to the internal management of the society but covers every activity of the Society within the ambit of its by-laws and rules.”

41. In my view the issue herein arose in the course of a transaction where the 1st defendant was receiving non-withdrawable deposit from its member which deposit was not available to the member for the duration of the membership. This is evidenced by the fact that the plaintiff filled withdrawal forms so that she could access her money That was in line with the provisions of Section 2 of the Sacco Societies Act, which provides as follows:-

“Sacco business” means financial intermediation and any other activity by a Sacco society based on co-operative principles and in accordance with this Act, or in compliance with Islamic law by way of—

- (a) receipt of withdrawable deposits, domestic money transfer services, loans, finance advances and credit facilities; or
- (b) receipt of non-withdrawable deposits from members and which deposits are not available for withdrawal for the duration of the membership of a member in a Sacco society and may be used as collateral against borrowings providing finance and domestic money transfer services; (emphasis added).

42. The 3rd defendant submitted that the preliminary objection did not meet the threshold and standards of what would legally be a preliminary objection on the basis that the plaintiff denied being a member of the 1st defendant therefore the Court has to investigate further to establish this aspect.

43. Having considered the issues raised, I hold that they fall in the confines of Section 76 of the Co-operative Societies Act. This court therefore lacks jurisdiction to hear and determine the case herein.

44. In the said circumstances, I down my tools in order for the dispute herein to be heard by the Co-operative Societies Tribunal under the provisions of Section 81 of the Cooperative Societies Act. I will therefore not proceed to consider the merits of the application filed on 11th September, 2020 seeking entry of summary Judgment against the 1st defendant. The 1st and 2nd defendants’ preliminary objection



that this court lacks jurisdiction to hear this case is upheld. Consequently, the plaintiff's suit is struck out with costs to the defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 19TH DAY OF MARCH, 2021.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE
OUTBREAK OF THE COVID-19 PANDEMIC.**

NJOKI MWANGI

JUDGE

In the presence of –

Mr. Mkomba holding brief for Mr. Joseph Munyithya for the plaintiff

Mr. Malenya for the 1st and 2nd defendants

Mr. Were for the 3rd defendant

Mr. Oliver Musundi – Court Assistant.

