



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA**

**AT MURANG'A**

**CIVIL SUIT NO. E018 OF 2021**

KANGARI UNITED DAIRY CO-OPERATIVE SOCIETY LTD.....1<sup>ST</sup> PLAINTIFF  
KAHURO LIVESTOCK BREEDERS CO-OPERATIVE SOCIETY LTD.....2<sup>ND</sup> PLAINTIFF  
KIGORO DAIRY FARMERS CO-OPERATIVE SOCIETY LTD.....3<sup>RD</sup> PLAINTIFF  
KIARUTARA DAIRY CO-OPERATIVE SOCIETY LTD.....4<sup>TH</sup> PLAINTIFF  
NEW NGINDA DAIRY CO-OPERATIVE SOCIETY LTD.....5<sup>TH</sup> PLAINTIFF

**VERSUS**

COUNTY GOVERNMENT OF MURANG'A.....1<sup>ST</sup> DEFENDANT  
MURANG'A COUNTY CREAMERIES CO-OPERATIVE UNION LTD.....2<sup>ND</sup> DEFENDANT  
KENYA COMMERCIAL BANK LTD.....3<sup>RD</sup> DEFENDANT  
CO-OPERATIVE BANK OF KENYA LTD.....4<sup>TH</sup> DEFENDANT  
EQUITY BANK LTD.....5<sup>TH</sup> DEFENDANT  
UNAITAS SACCO SOCIETY LTD.....6<sup>TH</sup> DEFENDANT  
AMICA SACCO SOCIETY LTD.....7<sup>TH</sup> DEFENDANT  
MENTOR SACCO SOCIETY LTD.....8<sup>TH</sup> DEFENDANT  
MURANG'A COUNTY CO-OPERATIVE COMMISSIONER.....9<sup>TH</sup> DEFENDANT

**RULING**

1. The plaintiffs are all registered co-operative societies. In an omnibus claim dated 16<sup>th</sup> September 2021, they seek 27 prayers for breach of *Milk Purchase Agreements* by the 2<sup>nd</sup> defendant, which is also a co-operative society.
2. They also challenge the decision by the Murang'a County Co-operative Commissioner (the 9<sup>th</sup> defendant) to carry out an audit; or, call for Special General Meetings (SGMs) of the plaintiffs; or, freeze their bank accounts. Those accounts are held by the 3<sup>rd</sup> to 8<sup>th</sup> defendants.
3. Contemporaneously with the suit, the plaintiffs presented a Notice of Motion seeking 13 interlocutory reliefs, *inter alia*, to have the accounts re-opened, to stop the SGMs, to be supplied with audited accounts of the 2<sup>nd</sup> defendant, to injunct the 2<sup>nd</sup> defendant from allotting or transferring their shares and to stop it from repossessing their milk coolers.
4. The motion is predicated upon 17 grounds and a number of depositions by the plaintiffs' directors or chairmen. They include those by

Jimnah Kamau, Paul Mwangi, David Mwangi, Jeremiah Njoroge and Julius Maina all sworn on 16<sup>th</sup> September 2021 together with further affidavits of David Mwangi and Paul Mwangi sworn on 6<sup>th</sup> October 2021.

5. The plaintiffs claim that in 2018 they contracted to supply milk to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The applicants were to “*locate, assemble, and collate milk from their shareholder dairy farmers*”. To facilitate payments between the contracting parties and farmers, the applicants opened bank accounts with the 3<sup>rd</sup> to 8<sup>th</sup> defendants. The plaintiffs plead that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have breached the contract; and, that payments for the milk running into hundreds of millions are owing. But what seems to have broken the camel’s back is the order by the 9<sup>th</sup> defendant to freeze the plaintiffs’ bank accounts.

6. The application is contested by the respondents. The 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> defendants filed Grounds of Opposition and a Preliminary Objection on 28<sup>th</sup> September 2021. They also relied on two replying affidavits sworn by Josephine Mwangi on 4<sup>th</sup> October 2021 drawn by different law firms. In addition, there is an affidavit by Simon Mukunu, the General Manager of the 2<sup>nd</sup> defendant sworn on even date.

7. The 3<sup>rd</sup> and 6<sup>th</sup> defendants filed an appearance and Notice of Appointment of Advocates respectively but did not reply to the motion. The 4<sup>th</sup> defendant filed a replying affidavit sworn by Lawrence Karanja on 6<sup>th</sup> October 2021. The 5<sup>th</sup> defendant filed Grounds of Opposition on 28<sup>th</sup> September 2021 as well as a deposition by Roy Akubu dated 1<sup>st</sup> October 2021. The 7<sup>th</sup> defendant relied on a replying affidavit sworn by Robert Mbau Wairimu on 5<sup>th</sup> October 2021.

8. On 29<sup>th</sup> September 2021, I directed that the Notice of Motion be determined by the affidavits and submissions. The plaintiffs’ skeleton submissions were filed on 6<sup>th</sup> October 2021 together with a bundle of precedents. Those for the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> respondents were lodged on 7<sup>th</sup> and 8<sup>th</sup> October 2021 respectively together with a further list of authorities dated 6<sup>th</sup> October 2021. The 4<sup>th</sup> defendant filed a list of authorities on 7<sup>th</sup> October 2021.

9. On 7<sup>th</sup> October 2021, I heard further arguments from learned counsel for the parties except the 5<sup>th</sup> and 8<sup>th</sup> defendants who did not attend the hearing. Whereas, the 5<sup>th</sup> respondent had replied to the pleadings, the 8<sup>th</sup> defendant never entered an appearance.

10. In the grounds of opposition filed for the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> defendants by *Kimwere Advocate*, it is pleaded that the High Court lacks jurisdiction; and, that the right forum should be the Cooperative Tribunal by dint of section 76 of the **Co-operative Societies Act**. A similar objection is taken in the grounds filed by the 5<sup>th</sup> defendant.

11. There is also a Preliminary Objection taken by *Ngáng’a Mbugua Advocate* for the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> defendants filed on 28<sup>th</sup> September 2021. He opines that under clause 31 of the *Milk Supply Contracts*, the dispute should first be referred to arbitration.

12. I must point out at the earliest that the draftsmanship of the plaint and Notice of Motion is inelegant. The applicants seek a hotchpotch of reliefs. The pleadings are lengthy and argumentative. Some of the prayers appear to be repetitive. Part of the reliefs sought are commercial in nature; some are for writs in judicial review; and, even for constitutional protection.

13. I will commence with the point of law on arbitration. According to the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> respondents, the plaintiffs have not exhausted their remedies. Their case is that the suit is bad in law because under clause 31 of the respective Milk Supply Contracts, the dispute should first be referred to arbitration.

14. Section 6 (1) of the **Arbitration Act** provides as follows-

*A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—*

*(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or*

*(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.....*

15. The plaintiffs in their written and oral submissions stated that “*the purported milk agreement is fake and a forgery. It is, therefore, ab initio, a nullity in law, unknown to the plaintiffs...*”. Accordingly, it cannot found any arbitration proceedings. They denied executing the contracts and pointed out that some of the exhibits bore no signatures. It was also averred that the plaintiffs terminated the contractual relationship last year.

16. I have seen the further affidavit of David Mwangi sworn on 6<sup>th</sup> October 2021. He deposes at paragraph 2 that “*the impugned milk purchase agreement is fake, a forgery, and a falsehood manufactured by the 1<sup>st</sup> and 2<sup>nd</sup> defendants to perpetuate embezzlement, coercion, breach, mismanagement, freezing of accounts, and covert running of the 2<sup>nd</sup> defendant and the creamery*”.

17. Those averments and submissions by the plaintiffs are at odds with the pleading at paragraphs 22 to 24 of the plaint that “*at all material times, the plaintiffs and 2<sup>nd</sup> defendant entered into a contractual relationship with the 2<sup>nd</sup> defendant which obligated the plaintiffs to.....*”.

18. Again at paragraph 2 of the supporting affidavit of Jimnah Kamau sworn on 16<sup>th</sup> September 2021, he avers that-

*That about the year 2018 the 1<sup>st</sup> plaintiff freely contracted with the 1<sup>st</sup> and 2<sup>nd</sup> defendants..... [to] locate, assemble, and collate milk from their shareholder dairy farmers who carry out dairy farming within Kangari area.....I produce an abridged bundle marked JK2 being documents attesting to the contractual relationship". [underlining added]*

19. I am however alive that a preliminary objection should be centered on a pure point of law. **Mukisa Biscuit Manufacturing Company v West End Distributors Ltd** [1969] EA 696. At this juncture, there is conflicting evidence on whether or not there are contracts that ordain an arbitration forum. In a synopsis, it is an issue that calls for further and clear cut evidence. I would disallow the objection but with a caveat: it remains a poisoned chalice for the plaintiffs if, ultimately, the agreements or arbitration clauses turn out to be true.

20. I will now turn to the second challenge on jurisdiction. **Black's Law Dictionary**, 9<sup>th</sup> edition, defines *jurisdiction* as the court's power to entertain, hear and determine a dispute before it. *Nyarangi, J.A.* put it more succinctly in **Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited** [1989] KLR 1:

*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...* [Underlining added]

21. I agree with the plaintiffs that under **Article 165 (3)** of the **Constitution**, the High Court has unlimited original jurisdiction in criminal and civil matters. But that does not mean that every dispute should be commenced at the High Court. This was succinctly captured in **Speaker of the National Assembly v Njenga Karume** [2008] 1 KLR 425; [1992] eKLR. The Court of Appeal held-

*[W]here there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed...*[underlining added].

22. From the affidavit of Simon Mukunu, the General Manager of the 2<sup>nd</sup> defendant sworn on 4<sup>th</sup> October 2021, the 2<sup>nd</sup> defendant is a Co-operative Society which draws members from primary cooperative societies including the plaintiffs. He has annexed the milk purchase agreements, a notice for the society's ADM dated 8<sup>th</sup> June 2021, financial statements and *bye-laws*.

23. It is common ground that all the five plaintiffs and the 2<sup>nd</sup> defendant are cooperatives *registered* under the **Co-operative Societies Act**. At the heart of the dispute is the claim by the plaintiffs that the 2<sup>nd</sup> defendant has breached their milk supply contracts and occasioned them losses and damages. In particular, it is pleaded that it has defaulted on payment of hundreds of millions for supplied milk.

24. The core of the dispute in this case thus relates to the *business and management* of a co-operative societies. But it has been framed as a *commercial* case or an action in *constitutional or judicial review* whose remedies properly lie in the High Court. To fully appreciate the substance of the suit, it is important to look at the parties, why they have been sued, the nature of the claims and the remedies sought.

25. I cannot comment on the merits of the action at this stage. But it is clear to me that the essence of the *plaint* and *reliefs* sought revolve around the *business and management* of the co-operative societies. However, the action is *camouflaged* as a pure *commercial suit* between the parties. I can safely refer to the following paragraphs of the *plaint*: Paragraphs 22 to 24 state that the plaintiffs and 2<sup>nd</sup> defendant entered into various contracts for supply of milk. Paragraph 22(a-s) lists the obligations of the plaintiffs. Paragraph 23 (a-v) documents the duties of the 2<sup>nd</sup> defendant. Paragraph 26 to 28 itemize the various breaches of the contract by the defendants including non-payment for the milk supplied by the plaintiffs. That is the basis for the claim for Kshs 148,823,809.89 owed to the plaintiffs plus interests and costs.

26. Up to that point the dispute is clearly between a number of registered primary and secondary cooperative societies over their business or management on one hand; and, on the other a dispute between cooperatives and the County Commissioner of Cooperatives (9<sup>th</sup> defendant), an office rooted in the **Cooperative Societies Act**.

27. What seems to cloud the issues a little is the suit against the Murang'a County Government (1<sup>st</sup> defendant) and the financial institutions (3<sup>rd</sup> to 8<sup>th</sup> defendants). But is the 1<sup>st</sup> defendant a member of the 2<sup>nd</sup> defendant? I do not have to determine that matter at this stage. But I can safely state that the **Constitution** in Schedule 4, Part 2, Section 7 (e) *devolves* the power and functions over cooperative societies to County Governments. It would also seem that the County Commissioner of Cooperatives (9<sup>th</sup> defendant) operates under the umbrella of the County Government. I say that very carefully and without a final finding.

28. An issue for determination in the suit may as well be whether the 1<sup>st</sup> defendant has been properly impleaded. I say this in view of the definitive statement by the 9<sup>th</sup> defendant at paragraph 6 of her replying affidavit sworn on 4<sup>th</sup> October that "*the 1<sup>st</sup> defendant Murang'a County Government does not have shares with the 2<sup>nd</sup> defendant as alleged*"

29. The applicants blame the banks and financial institutions (3<sup>rd</sup> to 8<sup>th</sup> defendants) for breach of their fiduciary duties and of bank-customer relationships. But from the materials before the court, I find that the dispute between the plaintiffs and the financial institutions flows from, or, is a direct tributary of the business contracts between the cooperative societies.

30. Doubt is removed by the replying affidavit of the 7<sup>th</sup> defendant sworn by Robert Mbau Wairimu on 5<sup>th</sup> October 2011. He avers at paragraph 4 that "*the accounts of the plaintiffs are solely for depositing the proceeds of milk sales which are later channeled to the respective farmers who are also members of the plaintiff*".

31. To fully appreciate the matter, none of the financial institutions has disclosed a dispute between it and the plaintiffs: the dispute is over freezing or closure of their accounts instigated not by the banks, but by instructions from the Murang'a County Commissioner of Cooperatives (9<sup>th</sup> defendant). So much so that if the conduct of the commissioner is finally impeached, there will be no contractual or legal

foundation for the freeze orders.

32. The Co-operative Tribunal has unlimited pecuniary and geographical jurisdiction. It is imbued with wide power so long as the root of the conflict is the *business or management* of a cooperative society or the legality of actions by the Commissioner of Cooperatives which has dragged in the bankers or lenders. I say that very carefully and *obiter* in view of the orders that I propose to make.

33. To further unpack this claim, one has also to dissect the orders or reliefs sought. Those reliefs are four-fold: to injunct the breach of contract for supply of milk; to unfreeze the bank accounts; to stop the audits or Special General Meetings initiated by the 9<sup>th</sup> respondent; and, for payment for milk supplied to the 2<sup>nd</sup> defendant.

34. Those key prayers have then been segmented by the plaintiffs to fall within prohibitive or mandatory injunctions, monetary claims, declarations or remedies for breach of contract. But the draftsmanship has expanded it to the purview of Judicial Review or even couched them as constitutional remedies. For instance, prayer 9 in the plaint is for *certiorari* to quash the letters of 6<sup>th</sup> and 14<sup>th</sup> September 2021 by the 9<sup>th</sup> defendant calling for the SGMs of the plaintiffs. Yet in prayers 2 and 3 of the Notice of Motion, the relief sought is for *injunction* against the implementation of the same letters.

35. I got the distinct impression that the multiplicity of prayers was aimed at justifying the filing of the suit at the High Court and not the Co-operative Tribunal. That informed the submissions by learned counsel for the plaintiffs *Mr. Kang'ata* and *Ms. Ngonyo*, that there are cross-cutting issues that can only be resolved in this court.

36. They implored me to find that the dominant issues transcend the jurisdiction of the Tribunal. Reliance was made on ***Cooperative Bank of Kenya v Patrick Kang'ethe Njuguna & 5 others***, Court of Appeal, Mombasa, Civil Appeal 83 of 2016 [2017] eKLR at paragraph 42 and ***Rameshchandra Somchand Shah & ano. V Palm Healthcare International Ltd & 3 others***, High Court, Nairobi HCCC 448 of 2012 [2019] eKLR.

37. From my analysis so far, I readily find that the *dominant issue* and the *pith* of the dispute is between a number of registered primary and secondary cooperative societies (the plaintiffs and 2<sup>nd</sup> defendant) over their *business or management* on one hand; and, on the other hand a dispute between cooperatives and the Murang'a County Commissioner of Cooperatives (9<sup>th</sup> defendant), an office rooted in the **Cooperative Societies Act**. Her conduct has in turn led to the closure of the plaintiffs' bank accounts with the 3<sup>rd</sup> to 8<sup>th</sup> defendants.

38. I had this to say on a similar matter in ***Kang'iri Farmers' Cooperative Society Ltd v AG & 11 others***, High Court, Murang'a pet 48 of 2018 [2018] eKLR-

*[9]...but it is clear to me that the petition and reliefs sought revolve around the business and management of the co-operative society. However the action is camouflaged as a constitutional and human rights petition. It is a dispute that, in the first instance, belongs to the **Co-operative Tribunal** formed under the **Co-operative Societies Act**. [Underlining added]*

39. For the reasons I have given, the proper forum in the first instance, is the **Co-operative Tribunal** formed under section 77 of the **Co-operative Societies Act**. Any aggrieved party would then be entitled to an appeal to the High Court under section 81 of the Act.

40. Like I stated, the Tribunal has *unlimited* pecuniary and geographical jurisdiction. Section 76 clothes it with power to determine the following disputes:

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. [underlining added]*

41. I would thus strike out the suit but with *leave* to the plaintiffs to lodge the dispute in the **Co-operative Tribunal** not more than 30 days from today's date.

42. Before I leave the matter, I am minded to address the closure of the plaintiff's bank accounts. The order for freezing operations of the accounts emanated from the Murang'a County Co-operatives Commissioner (9<sup>th</sup> defendant). I have studied her standard letter dated 26<sup>th</sup> August 2021. She relied on Rule 54 under the Co-operative Societies Act "as a measure to improve the management or business methods of the co-operative or to secure or improve compliance". I said earlier that none of the financial institutions raised any other reason for the closure.

43. I also referred earlier to the replying affidavit sworn by Robert Mbau Wairimu on behalf of Amica Sacco (7<sup>th</sup> Defendant). He averred that "the accounts of the plaintiffs are solely for depositing the proceeds of milk sales which are later channeled to the respective farmers who are also members of the plaintiff".

44. From the materials before the court, the freezing of accounts has negatively impacted the operations of the plaintiffs including payment for services, payment to farmers or employees. I have also seen a letter dated 30<sup>th</sup> August 2021 from Co-operative Bank stating that two of the plaintiffs have outstanding facilities with the bank. It sought answers from the 9<sup>th</sup> defendant on how the debts will continue to be serviced.

45. The 9<sup>th</sup> defendant claims the plaintiffs have breached bye-laws and hence the notices for SGMs under powers conferred by section 27(8) of the Act. The transgressions are detailed at paragraph 11 (a – c) of her affidavit. But she also acknowledges that the 2<sup>nd</sup> defendant owes some monies to the plaintiffs and that there is "a payment plan". In view of the proposed orders, it would be prejudicial to make a conclusive finding on these issues. It will be for the trial court to establish whether due process was employed before the 9<sup>th</sup> defendant called for the audit, the SGMs or froze the accounts.

46. To ensure that the ends of justice are not defeated, and as dictated by **Article 159 (2)(d)** of the **Constitution**, as read together with section 63 (e) of the **Civil Procedure Act**, I will *stay* the striking out of the suit, *suo motu*, for a period of 30 days to enable the plaintiffs approach the right forum. Pending that filing I will grant a temporary order unfreezing the accounts of the plaintiffs held by the 3<sup>rd</sup> to 8<sup>th</sup> defendants.

47. My final orders are thus as follows-

- a) That the plaintiffs' suit be and is hereby struck out but with leave to bring proceedings before the Co-operative Tribunal not more than 30 days from today's date.
- b) That in order to prevent the ends of justice from being defeated, and under **Article 159 (2)(d)** of the **Constitution**, as read together with section 63 (e) of the **Civil Procedure Act**, the order in (a) above striking out the suit is hereby stayed, *suo motu*, for a period of 30 days from today's date.
- c) That in the further interests of justice and pending the filing of the fresh suit above, a temporary order is hereby granted unfreezing the accounts of the plaintiffs held by the 3<sup>rd</sup> to 8<sup>th</sup> defendants.
- d) That for the avoidance of doubt, upon the expiry of 30 days from today's date, the suit shall stand struck down and the temporary order in (c) above shall automatically lapse.

48. Costs follow the event and are at the discretion of the Court. In the interests of justice, I order that each party shall bear its own costs.

It is so ordered.

**DATED, SIGNED and DELIVERED** at MURANG'A this 28<sup>th</sup> day of October 2021.

**KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Ms. Ngonyo for the plaintiffs instructed by Ngonyo Munyua & Company Advocates.

Mr. Kimwere, with him Mr. Ng'ang'a, for the 1<sup>st</sup>, 2<sup>nd</sup> and 9<sup>th</sup> defendants instructed by Ng'ang'a Mbugua & Company Advocates and Kimwere Josphat & Company Advocates.

Mr. Kimwere holding brief for Mr. Njenga for the 3<sup>rd</sup> defendant instructed by Muchoki Kangata Njenga & Company Advocates.

Mr. Boma for the 4<sup>th</sup> defendant instructed by Waweru Gatonye & Company Advocates.

Mr. Kimwere holding brief for Mr. Gitonga for the 5<sup>th</sup> defendant instructed by Gitonga Muriuki & Company Advocates.

Mr. Kimwere holding brief for Mr. Mbogo for the 7<sup>th</sup> defendant instructed by J. Ngumo Mbogo & Company Advocates.

No appearance by 6<sup>th</sup> and 8<sup>th</sup> defendants.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.