



Muka Mukuu Farmers Co-operative Society Limited v Somba & another (Environment and Land Miscellaneous Application E011 of 2022) [2023] KEELC 20846 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20846 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2022
A NYUKURI, J
OCTOBER 18, 2023**

BETWEEN

MUKA MUKUU FARMERS CO-OPERATIVE SOCIETY LIMITED APPLICANT

AND

GRACE MWIKALI SOMBA 1ST RESPONDENT

MICHAEL KYAVI MWANZIA 2ND RESPONDENT

RULING

1. Before court is a Notice of Preliminary Objection dated 20th September 2022 filed by the 1st Respondent. The objection challenges the jurisdiction of this court to hear and determine the application dated 2nd March 2022 filed by the Applicant seeking extension of time to appeal against the decision of the Cooperatives Tribunal. The basis for the objection is that Sections 76 and 81 of the *Cooperative Societies Act* Cap 490 Laws of Kenya only allows an appeal from the Cooperative Tribunal to the High Court and not to the ELC. The 1st Respondent also stated that the application dated 2nd March 2022 lacked merit and should be dismissed.
2. The Preliminary Objection was canvassed by way of written submissions. On record are the 1st Respondent's submissions filed on 26th September 2022 as well as the Applicant's submissions filed on 13th February 2023

1st Respondent's submissions

3. Counsel for the 1st Respondent submitted that this court lacks jurisdiction to determine the application herein and the intended appeal because the application and intended appeal are an abuse of the doctrine of exhaustion and violate Section 81 of the *Cooperative Societies Act*. Reliance was placed on the cases of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR for the proposition that jurisdiction flows from the *Constitution* and the law. Counsel argued that Section 76 of the *Cooperative Societies Act* granted jurisdiction for hearing disputes between



a Cooperative Society and its members, to the Cooperatives Tribunal. Counsel cited the case of *Runka Services Cooperative Sacco Limited v Mbaya* (Commercial Civil Case E646 of 2021 [2022] KEHC 123 (KLR) (Commercial and Tax) (18 February 2022) (Ruling) for the proposition that a dispute between current and past members of a cooperative society or between the society and its members ought to be determined by the Cooperatives Tribunal.

4. It was submitted for the 1st Respondent that the Applicant is involved in the business of buying land and selling to its members and that therefore the dispute ought to be heard by the Cooperatives Tribunal and that the application herein was a calculated move to bypass the Tribunal which has jurisdiction to hear this suit. Counsel referred to the case of *Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others* [2025] for the proposition that where a dispute resolution mechanism exists outside court, the same must be exhausted before jurisdiction of the court is invoked.
5. Counsel argued that they had established that the dispute herein was a dispute on the business of the Cooperative Society and not a dispute concerning land ownership or usage. Counsel contended that Section 81 provides that an appeal from the Cooperative Tribunal should be heard and determined by the High Court. They placed reliance on the case of *Republic vs Karisa Chengo & 2 Others* [2017] eKLR for the proposition that the High Court and the ELC are different and autonomous courts with different and distinct jurisdictions. Counsel argued that any appeals to a dispute before the Tribunal and incidental applications ought to be heard by the High Court.

Applicant's submissions

6. Counsel for the Applicant enumerated prayers sought before the Tribunal and gave a history of the case and stated that the dispute before the tribunal emanates from a land case the subject matter being use, occupation and title to land. Counsel relied on provisions of Article 162 of the *Constitution* and Section 13 of the *Environment and Land Court Act* which vests in the ELC, the jurisdiction to hear disputes relating to the environment, the use and occupation of, and title to land.
7. Counsel submitted that Section 81 of the *Cooperative Societies Act* provides that the High Court has jurisdiction to hear Appeals from the Cooperatives Tribunal and that the ELC is such court as the High Court. They contended that where a matter from the Tribunal touches on the use, occupation and title to land then the ELC has jurisdiction to hear such matter. They placed reliance on the case of *Ufundi Savings & Credit Co-operative Society & Others vs Francis Gitari Ndirangu & 318 Others* [2015] eKLR for the proposition that an appeal from the Cooperatives Tribunal touching on use of, occupation and title to land, ought to be filed before the ELC. They argued that the Appellant had rightfully filed the application to the ELC by dint of Section 81 of the *Cooperative Societies Act*.
8. They prayed that should the court find the application is not in order, then the same be transferred to the High Court. To support this, they placed reliance on the case of *Martin Luther Mc Were v James Mabango Ambundo* [2022] eKLR for the proposition that if a court has no jurisdiction it can place the matter before the High Court for hearing and determination.

Analysis and determination

9. The court has considered the Preliminary Objection and the rival submissions by the parties. The question before court is whether the Preliminary Objection is merited.
10. A Preliminary Objection is a pure point of law raised on the pleadings on the basis that the facts relied upon are not in dispute. In the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 the court held as follows;



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 submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.a preliminary objection is in the name of what used to be 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.

11. In the mind of the court, it is clear on what would constitute jurisdiction of the ELC, as opposed to the jurisdiction of the High Court as regards matters from the Cooperatives Tribunal. While Section 81 of the [Cooperative Societies Act](#) places on the High Court the jurisdiction to hear and determine appeals from the Cooperatives Tribunal, it should be borne in mind that the [Cooperative Societies Act](#) was enacted in 1997, way before the [Constitution](#) 2010 and the [Environment and Land Court Act](#) that established the ELC, were enacted.
12. Part 2 paragraph 7 (1) of the sixth schedule to the [Constitution](#) provides on existing obligations, laws and rights as follows;

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this [constitution](#).
13. It therefore follows that the laws enacted before the promulgation of the 2010 [Constitution](#) including the [Cooperative Societies Act](#), must be interpreted in conformity with the [Constitution](#) by allowing necessary alterations, adaptations, qualifications and exceptions as the case may require. Therefore, it is not automatic that everywhere where the High Court is mentioned in the pre-2010 legislations, other superior courts have no jurisdiction. If a dispute is about the use and occupation of, and title to land, even if the legislation mentions the High Court, such legislation ought to be interpreted to mean the ELC. Therefore, as regards Section 81 of the [Cooperative Societies Act](#), my view is that where a dispute before the Cooperatives Tribunal is in regard to the use and occupation of, and title to land, then an appeal therefrom would lie to the ELC. However, where a dispute before the Cooperatives Tribunal touches on other matters not envisaged under Article 162 (2) (b) of the [Constitution](#), such appeal should not be filed before the ELC.
14. For this court to be able to determine whether the decision of the Cooperatives Tribunal is a matter touching on use and occupation of, and title to land, the court ought to be furnished with evidence about the nature of the dispute, for the court to know whether the dispute is one which ought to be determined by the High Court, or this court.
15. The 1st Respondent has contended that this court lacks jurisdiction to determine the application for extension of time to appeal against the decision of the Cooperatives Tribunal. The basis of that argument is that Section 81 of the [Cooperative Societies Act](#) which provides that an appeal from the Cooperatives Tribunal should be preferred at the High Court. Counsel for the 1st Respondent insists that the dispute between the parties is in respect of a decision of the business of the Cooperative society and not on use, occupation or title to land. On the other hand, The Applicant argues that the appeal is in respect to use, occupation and title to land. In short, facts relied upon by the 1st Respondent are highly disputed facts. Having considered the application, it is clear that none of the parties herein annexed a copy of the ruling intended to be appealed against. Consequently, no effort was made by the parties to avail facts upon which the Preliminary Objection could stand. All I see is a



contradictory version of alleged facts from each party as contained in each party's submissions. In my view, submissions are not a medium for conveying facts to the court, as they are merely a persuasive tool and nothing more.

16. In the premises, I find and hold that the Preliminary Objection is based on disputed facts and therefore it does not constitute a proper Preliminary Objection. Consequently, the Preliminary Objection is hereby dismissed with costs to the Applicant.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Munene holding brief for Mr. Ayieko for the Applicant

Ms. Karue holding brief for Mr. Kemei for 1st Respondent

Abdisalam - Court Assistant

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