



**Meli v Land Registrar, Mombasa Land Registry & 4 others (Land Case
Petition E009 of 2024) [2024] KEELC 6357 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE PETITION E009 OF 2024
SM KIBUNJA, J
OCTOBER 2, 2024**

BETWEEN

SHADIA MOHAMED KIPKORIR MELI PETITIONER

AND

LAND REGISTRAR, MOMBASA LAND REGISTRY 1ST RESPONDENT

THE CHIEF LAND REGISTRAR 2ND RESPONDENT

**STRATEGIC UREMBO SACCO SOCIETY LTD T/A STRATEGIC DEPOSIT
TAKING SACCO LTD 3RD RESPONDENT**

HAIDER SULAYMAN BADAWI 4TH RESPONDENT

JEPHYS AUCTIONEERS 5TH RESPONDENT

RULING

[notice Of Preliminary Objection Dated 25th April 2024]

1. The 3rd and 5th respondents filed the notice of preliminary objection dated 25th April 2024 to the petitioner's application dated 9th April 2024 raising the following grounds:
 - a. "That the Honorable Court has no jurisdiction to hear and determine both the petition and the application as the same is a 'Co-operative dispute' pursuant to the provisions of the *Co-operative Societies Act* (No. 12 of 1997) as amended Act No. 2 of 2014.
 - b. The petitioner and 4th respondent are bonafide members of the 3rd respondent and the proper forum of the dispute arising from the loan default on the part of the 4th respondent is the Cooperative Tribunal established under the provision of the *Co-operative Societies Act* (No. 12 of 1997) as amended Act No. 2 of 2014.



- c. The effect of the petition and the application is to encroach into the jurisdiction of the Co-operative Tribunal, which is a specialized court established to handle co-operative disputes.
 - d. There is a misjoinder of the 1st and 2nd respondents in the proceedings herein.
 - e. The application and the petition is an extreme abuse of the judicial process of this honourable court. “
2. The petitioner opposed the preliminary objection, through the grounds of opposition dated 20th May 2024, as summarized herein below:
 - a. That the Preliminary Objection is bad in law, speculative, misconceived, misplaced, misinformed, frivolous, vexatious, unfounded in law, and an abuse of the court process.
 - b. That it does not consist of any points of law, is repugnant to the applicable principles of law set in *Mukisa Biscuits Manufacturing Company Ltd versus West End Distributors (1969) E.A 696*.
 - c. That the petitioner’s claim is on breach of rights and not loan repayment and or default thereof.
 3. Following directions issued on 29th April 2024, the learned counsel for the 3rd & 5th respondents and the petitioner filed and exchanged their submissions dated the 16th May 2024 and 20th May 2024 respectively, which the court has considered.
 4. The issues for determinations by the court are as follows:
 - a. Whether the preliminary objection raises any points of law that if upheld would determine the application and or the petition.
 - b. Whether the preliminary objection arises from the uncontested facts in the pleadings and whether it could be determined without calling evidence in support.
 - c. Who pays the costs?
 5. The court has carefully considered the grounds on the notice of preliminary objection and of opposition, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
 - a. The superior courts are unanimous that for a preliminary objection to be upheld, it must meet the principles set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696*, where Law J A stated that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the 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.”

Sir Charles Newbold P. further 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 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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

The Court of Appeal in the case of Attorney General & another v Andrew Maina Githinji & another [2016] eKLR, reaffirmed the tests set out in the case of Mukisa Biscuit (supra) and held that,

“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

The notice of preliminary objection herein has raised several grounds, which the court has to consider whether they meet the threshold set in the case of Mukisa Biscuit case (supra).

- b. On grounds (a) and (c), the 3rd and 5th respondents have maintained that this court has no jurisdiction to hear and determine the petition and its application. The ground of jurisdiction is indeed a pure point of law that if upheld, would not only determine the pending application, but also the petition. A question of jurisdiction does not require the court to consider any factual evidence but only the law, and therefore passes the test in the Mukisa Biscuit case.
- c. The 3rd & 5th respondents have also taken the position that the cause of action in the petition is a cooperative dispute and ought to be heard by the tribunal as provided in Section 76 of the Cooperative [Societies Act](#):
 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;
 - (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 license or any other due, from the Authority.”

As jurisdiction in judicial proceedings is everything, the court must make a determination on it whenever it is raised, before taking any further step.



- d. Jurisdiction flows from either *the Constitution* or legislation, or both and a court cannot confer jurisdiction on itself. As discussed by the Supreme Court of Kenya in the case of Samuel Kamau Macharia & another V Kenya Commercial Bank Limited & 2 others (2012) eKLR,

“ A court’s jurisdiction flows from either *the constitution* of 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 submissions 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.”

In her petition dated 9th April 2024, the petitioner has pleaded that she jointly purchased Land Parcel No. MN/1/8822/3 with her former husband, the 4th respondent. She claims that the suit property was declared matrimonial property in Mombasa Kadhi’s Court Petition No. 184 of 2021, upon the dissolution of their marriage. That the 4th respondent charged the suit property to the 3rd respondent without her spousal consent, and had threatened to evict her from the suit property. She further claims that the 1st respondent, in collusion with the 3rd and 4th respondents, have removed the caution she had registered against the title of the suit property. She urged the court to find that the respondents have violated Articles 2, 3, 20, 21, 22, 23, 40, 47 and 50 of *the Constitution*, and inter alia compel the 1st respondent to register her as the registered proprietor of the suit property.

- e. The jurisdiction of this court is anchored on Article 162 (2)(b) of *the Constitution* and Section 13 of the ELC Act No. 19 of 2011 among other statutes. The issues raised herein fall within the jurisdiction of this court. Section 76 of the Cooperative Act does not confer the cooperative tribunal with jurisdiction over title to land, even in cases where the same is in dispute between a Sacco and its members. Article 162 (2)(b) of *the Constitution* is clear that any dispute relating to the use and occupation of land or title to land is a matter to be determined by this court and no other. The 3rd & 5th respondents’ preliminary objection to the application and petition on the basis of jurisdiction of this court therefore fails.
- f. Grounds (b), (d) and (e) in the preliminary objections, raises the issues of the petitioner and 4th respondent being bona fide members of 4th respondent, misjoinder of 1st & 2nd respondents, and abuse of judicial processes respectively. Unlike the question of jurisdiction that I have addressed above, these grounds raise questions that would require factual evidence to be adduced, and considered before a determination can be made one way or the other. The 3rd and 5th respondents are inviting the court to ascertain the facts and to probe the evidence presented. For instance, the objection to the petition on the ground that the petitioner and the 4th respondent are bonafide members of the 3rd respondent, is an invitation for the court to evaluate the evidence before it, and exercise its discretion to determine whether or not that is the position. This evaluation has to consider whether or not the petitioner admits to, or there is evidence to prove that she alongside the 4th respondent are members of the 3rd respondent.
- g. Once the court steps into its role of exercising judicial discretion on an issue, then that issue stops being a pure point of law. Where there is a need for authentication of facts through the calling of evidence, and for the court to exercise its discretion, that such an issue stops being a pure point of law and cannot be sustained through a notice of preliminary objection. The issues raised in grounds (b), (d) and (e) should be canvassed during the hearing of the petition, where



the parties will have the opportunity to present their evidence, and the court will thereafter determine whether the petitioner's rights have been violated or not. For the foregoing reasons, the 3rd & 5th respondents' notice of preliminary objection dated 25th April 2024 is devoid of merit.

h. That in view of the nature of this proceeding, I am of the view that justice will better be served by an order that the costs in the preliminary objection should abide the outcome of the petition.

6. Flowing from the above conclusions, the court find and orders as follows:

a. That the 3rd & 5th respondents' notice of preliminary objection dated the 25th April 2024 is without merit and is rejected.

b. That the costs to abide the outcome of the petition.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2ND DAY OF OCTOBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioner : M/s Nyaboke

Respondents : Mr. Getange For 2Nd And 3Rd Respondents.

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

