



**Mawia v Commissioner for Co-operative Development & 2 others (Petition E185 of 2023) [2025] KEHC 2230 (KLR) (Constitutional and Human Rights) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2230 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E185 OF 2023**

**LN MUGAMBI, J**

**FEBRUARY 13, 2025**

**BETWEEN**

**FAITH MAWIA ..... PETITIONER**

**AND**

**COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT ... 1<sup>ST</sup> RESPONDENT**

**METROPOLITAN NATIONAL SAVINGS & CREDIT CO-OPERATIVE  
SOCIETY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling brief concerns the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' Notice of Preliminary Objection dated 20<sup>th</sup> March 2024 which challenges this Court's jurisdiction to determine the Petition dated 6<sup>th</sup> June 2023.
2. The Petitioner an employee of the 2<sup>nd</sup> Respondent challenges the legality of the Respondents actions which arose as a result of the 2<sup>nd</sup> Respondent's Inquiry Report (CS/No.2628). In a nutshell, following this Report, the 1<sup>st</sup> Respondent through its officers served the Petitioner with a Notice of Intention to Surcharge dated 17<sup>th</sup> April 2023 in accordance with Section 73 of the Cooperative *Societies Act*. The Notice informed the Petitioner of the intention to surcharge her Kshs. 38, 988, 741.00 as indicated in the Report. The 1<sup>st</sup> Respondent alleged that the Petitioner was to pay this amount in relation to the business of the 2<sup>nd</sup> Respondent as set out in the Inquiry Report. The Petitioner was aggrieved by the manner in which the Respondents made the said decision as she was completely unaware when and how it was done as she was never questioned or involved during the aforesaid inquiry. Additionally, that the process that led to the publishing of the Inquiry Report was unlawful, illegal, ultra vires and contrary to the rules of natural justice.



## The Preliminary Objection

3. The Preliminary Objection is based on the grounds that:
  - i. Section 74 of the Cooperative *Societies Act* mandates any person aggrieved by an order of the Commissioner on surcharging to, within thirty days, appeal to the Tribunal.
  - ii. Section 9 (2) of the Fair Administrative Actions Act limits the High Court or a subordinate court to not review an administrative action or decision under the FAA Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
  - iii. The Petitioner has not complied with the said provision hence this court lacks Jurisdiction to hear the matter as it offends Sections 9 (2) of the Fair Administrative Actions Act.
  - iv. The orders sought cannot be issued as the application is improperly on record and is a nullity.

## Parties' Submissions

### 1<sup>st</sup> and 3<sup>rd</sup> Respondent's Submissions

4. Principal State Counsel, Rodgers Sekwe filed submissions dated 24<sup>th</sup> March 2024 and identified the issues for determination as: whether the preliminary objection is sustainable.
5. Counsel submitted that the law on preliminary objections was set out in *Mukhisa Biscuit Manufacturers Ltd v West End Distributors Ltd [1969] E.A.* where it was held that:

“A Preliminary Objection is in the nature of what used to be a 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.”
6. On the other hand, Counsel submitted that the doctrine of exhaustion is codified under Section 9(2) of the Fair Administrative Actions Act. Additionally, reliance was placed in Article 159(2) (c) of the *Constitution* and the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others (2015) eKLR* where the Court of Appeal held that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews... as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of Courts.”
7. Counsel submitted that the jurisdiction of this Court in the Cooperatives *Societies Act* under Section 74 is appellate in nature. Accordingly, Counsel stressed that the administrative bodies created in Statute are intended to be constituted by persons who are specially trained in the field in question so that the disputes that arise are adjudicated appropriately.
8. On this premise Counsel submitted that this Court is barred from entertaining the matter unless there exists an exceptional circumstance as highlighted under Section 9(4) of the Fair Administrative Actions



Act. Counsel contended that the Petitioner had not demonstrated the exceptional circumstance to warrant application of this clause. Reliance was placed in *Krystalline Salt Limited v Kenya Revenue Authority* (2019) eKLR where it was held that:

“What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/ or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile. The *Fair Administrative Action Act* does not define exceptional circumstances. However, this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy.”

9. Like dependence was also placed in *Republic v Council for Legal Education ex Parte Desmond Tutu Owuoth* (2019) eKLR.
10. To this end, Counsel submitted that the Petitioner is not entitled to the relief sought as the Petition lacks merit. Consequently, Counsel urged that the Petition be dismissed with costs.

### **Petitioner’s Submissions**

11. The Petitioner opposed the Preliminary Objection vide submissions dated 3<sup>rd</sup> October 2024, filed by Litoro and Omwebu Advocates. Counsel highlighted the issue for determination as: whether the Preliminary objection can be sustained as raised. To buttress this element Counsel equally relied in *Mukisa Biscuit Manufacturing Co. Ltd*(supra) which was reiterated in *Samuel Waweru v Geoffrey Muhoro Mwangi* [2014] eKLR.
12. Counsel agreed that indeed Section 74 of the Cooperatives Act is clear in respect of a surcharge Order, however it was argued that the instant Petition does not revolve around the surcharge order. In fact, Counsel pointed out that the alleged surcharge order had not been issued at the time of filing this Petition. He noted that according to Section 74, the Tribunal is approached by an aggrieved party where the Commissioner has issued that surcharge order which is not so in this case.
13. Counsel submitted that the Petitioner’s claim revolves around the violation of her constitutional rights hence properly filed before this Court which has jurisdiction in line with Article 165 (3)(b) of the *Constitution*. Consequently, Counsel argued that the 1<sup>st</sup> and 3<sup>rd</sup> Respondent’s objection is not sustainable. Reliance was placed in *Sella Rose Anyango v Attorney General & 2 others* [2021] eKLR where the Court held as follows;

“... It is no doubt that, in order for a preliminary objection to be successful three elements must be satisfied. The preliminary objection must raise a pure point of law; all facts pleaded by the other side should be correct and agreed upon and that there should be no facts that need to be ascertained.”

14. Additional dependence was placed in *Royal Media Services Ltd v Attorney General & 6 others* [2015] eKLR and *RC v KKR* [2021] eKLR.
15. In closing, Counsel submitted that the Petition ought to be heard on its merits and costs of the matter be made out to the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.



## Analysis and Determination

16. In view of the foregoing, it is my considered view that the issues that arise for determination are:

- i. Whether the Preliminary Objection has met the set threshold.
- ii. Whether the Petition infringes the doctrine of exhaustion of remedies  
Whether the Preliminary Objection has met the set threshold

17. The threshold of a preliminary objection was summarized in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 69. It has since been religiously adopted numerous court decisions. The Supreme Court in *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* (2014) eKLR citing the case with approval stated:

(31) To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors* (1969) EA 696:

“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....a preliminary objection is in the nature of what used to be a 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”.

18. In the case of *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* (2017) eKLR the Court held as follows on what constitutes a proper preliminary objection;

“...a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.”

19. Turning now to the value or usefulness of preliminary objections in the administration of justice, that was explained by the Supreme Court in the *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling) where the Court held as follows:

“21. The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing



scarce judicial time, so it may be committed only to deserving cases of dispute settlement...”

20. Having regard to the above authorities, I discern that the ingredients of a proper preliminary objection can be concretized as follows:
  - a. a preliminary objection that is argued successfully should be capable of disposing of the whole suit.
  - b. It is argued on the assumption that all the facts pleaded by the other side are correct
  - c. It cannot be raised if any fact has to be ascertained by evidence
  - d. It cannot be raised if what is sought is the exercise of judicial discretion.
21. The instant preliminary objection raises a jurisdictional question which is based on the doctrine of exhaustion of remedies. Jurisdiction as held by the Supreme Court in the Matter of the Interim Independent Electoral Commission [2011] KESC 1 (KLR) may be bestowed as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent.”
22. Under the exhaustion doctrine, which is a jurisprudential concept, the Court is barred from assuming jurisdiction in a dispute where a statute or a regulatory regime provides other alternative ways or means of pursuing a remedy instead of directly seeking relief from the Court. This principle also finds Constitutional backing under Article 159 of the Constitution which requires that in exercising judicial authority, courts and tribunals shall be guided by the principles stipulated thereunder among them ‘alternative forms of dispute resolution...’ The issue raised through the Preliminary Objection of the 1<sup>st</sup> and 3<sup>rd</sup> Respondent is thus a jurisdictional question which is a pure point of law and thus meets the legal threshold of a preliminary objection.

### **Whether the Petition infringes the doctrine of exhaustion of remedies**

23. I need to restate for benefit of clarity that this doctrine simply requires the Court to refrain from entertaining a dispute where a statute or a regulatory regime provides administrative or alternative ways of redressing the matter instead of approaching the Court directly for the relief.
24. The Supreme Court in Sammy Ndung’u Waity vs Independent Electoral & Boundaries Commission And Three Others (2019) eKLR explained the principle as follows:

“(63) Where the Constitution or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and



not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

25. Equally, the Supreme Court in *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] KESC 83 (KLR) stated as follows:

“...We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”

(118) In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.

(119) Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.”

26. That said, courts have also discussed instances where an exception is justified in application of this doctrine. The Court in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others: Muslims for Human Rights & 2 others (Interested parties)* (2020) eKLR observed as follows:

“60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the *Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created



by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

27. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents' contention is that the Petitioner has failed to exhaust the mechanism set out in the *Co-operative Societies Act* but the Petitioner accuses the 1<sup>st</sup> and 3<sup>rd</sup> Respondents' of having misapprehended the gist of the Petition which is founded on violation of her constitutional rights. The petitioner emphasized that at the time of filing the Petition, the surcharge Order had not been issued thus Section 74 of the Cooperatives Act does not apply.

28. The Co-operatives Act provides:

Section 73 - Inquiry by Commissioner

1. Where it appears that any person who has taken part in the organization or management of a co-operative society, or any past or present officer or member of the society
  - a. has misapplied or retained or become liable or accountable for any money or property of the society; or
  - b. has been guilty of misfeasance or breach of trust in relation to the society, the Commissioner may, on his own accord or on the application of the liquidator or of any creditor or member, inquire into the conduct of such person.
- (2) Upon inquiry under subsection (1), the Commissioner may, if he considers it appropriate, make an order requiring the person to repay or restore the money or property or any part thereof to the co-operative society together with interest at such rate as the Commissioner thinks just or to contribute such sum to the assets of the society by way of compensation as the Commissioner deems just.
- (3) This section shall apply notwithstanding that the act or default by reason of which the order is made may constitute an offence under another law for which the person has been prosecuted, or is being or is likely to be prosecuted.

Section 74 - Appeal against order

1. Any person aggrieved by an order of the Commissioner under Section 73(1) may, within thirty days, appeal to the Tribunal.
2. A party aggrieved by the decision of the Tribunal may within thirty days appeal to the High Court on matters of law.

Section 75 - Recovery of Surcharge



1. Subject to Section 74, an order made pursuant to Section 73 for any moneys to be repaid or contributed to a co-operative society shall be filed with the Tribunal and shall, without prejudice to any other mode of recovery, be a civil debt recoverable summarily.
  2. Without prejudice to the powers by the Committee of a society to take action for recovery of the sum surcharged under Section 73, the Commissioner may, on behalf of the society, institute such action.
29. A careful scrutiny of the instant Petition obviously reveals that the underlying reason behind the filing of this Petition is the 1<sup>st</sup> Respondent's indication that it was considering to surcharge the Petitioner Kshs.38,988,741 pursuant to Section 73 of the Cooperative *Societies Act* per the inquiry Report prepared and released by the 2<sup>nd</sup> Respondent. This is position even fortified by the nature of prayers sought, all of them except one are directed at the decision to surcharge.
30. Section 73 of the Cooperatives Act is explicit. It provides that a person who is aggrieved by such a decision of the Commissioner to surcharge has a right to appeal to the Co- operative Tribunal. If further aggrieved by the Tribunal's decision, a party is at liberty to lodge an appeal at the High Court.
31. It is thus manifest to this Court that this Petition offends the doctrine of exhaustion of remedies. As was held in *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR;
- “... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation...”
32. The preliminary objection is upheld and the inevitable consequence is that the instant Petition is struck out with costs to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**L N MUGAMBI**

**JUDGE**

