



**Oyaro v Nyabomite Farmers Co-operative Society Limited (Civil Appeal E1178 of 2024) [2025] KEHC 1458 (KLR) (Civ) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1458 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1178 OF 2024**

**AC MRIMA, J**

**FEBRUARY 19, 2025**

**BETWEEN**

**JOSIAH OYARO ..... APPELLANT**

**AND**

**NYABOMITE FARMERS CO-OPERATIVE SOCIETY LIMITED RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Preliminary Objection dated 13<sup>th</sup> November, 2024. It was taken out by the Respondent. The objection was vehemently opposed by the Appellant.
2. The objection was heard by way of written submissions. All parties were represented by Counsel. The objection was tailored as follows:
  1. That the Honourable Court lacks jurisdiction in law to hear the Appellant/Applicant on the false appeal pursuant to the provisions of Section 81(3) of the *Co-operative Societies Act* (No. 12 of 1997).
  2. That the Applicant having appealed the decision of the Co-operative Tribunal in CTC No. 228 of 2019 to Nyamira High Court in HCCA No. 13 of 2020 whose decision was rendered by Lady Justice Maina on 1<sup>st</sup> July 2021, effectively this Honourable Court cannot have the second bite on the same subject matter.
  3. That the Applicant has not come to this Honourable Court with clean hands and has deliberately concealed the status of the Tribunal Case No. 228 of 2019. The Applicant deliberately misled the Honourable Court to issue Orders without jurisdiction and out of material non-disclosure by the Applicant.
  4. That the Application is an extreme abuse of the judicial process of this Honourable Court.



3. The objection impugned the jurisdiction of this Court on the basis of provisions of Section 81(3) of the *Co-operative Societies Act*, Cap. 490 of the Laws of Kenya [hereinafter referred to as ‘the Act’]. In urging that this Court lacks jurisdiction over the instant appeal, Counsel averred that an appeal similar to the current one was preferred by the Appellant in the High Court of Kenya at Nyamira in Civil Appeal No. 13 of 2020 against the decision in Co-operative Tribunal in CTC No. 228 of 2019 and that the appeal was determined by a judgment rendered on 1<sup>st</sup> July 2012 and as such, this Court is functus officio and cannot exercise any other jurisdiction over the matter.
4. Counsel further referred to several decisions captured in the written submissions. In the end, this Court was urged to down its tools by striking out the appeal with costs.
5. The Appellant expressed his intention to oppose the objection and on 28<sup>th</sup> November 2024, this Court granted parties the liberty to file and exchange written submissions. However, the Appellant filed submissions in respect of his application by way of a Notice of Motion dated 11<sup>th</sup> October 2024 and not the objection. Therefore, the objection is unopposed. Nevertheless, this Court must determine the objection in accordance with the law.
6. From the foregoing and in consideration of the record and the decisions referred to, this Court hereby discerns the following two issues for determination: -
  - i. Whether the preliminary objection is sustainable in law.
  - ii. In the event the answer to (i) above is in the affirmative, whether this Court has the jurisdiction over the instant proceedings.
7. The issues will be dealt with as under.
  - a. Whether the preliminary objection is sustainable in law:
8. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.
9. To that end, the locus classicus decision in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd* (1969) E.A 696. At page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.



10. The Supreme Court weighed in on the issue in *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others* [2015] eKLR and stated thus: -

.... Thus 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.

11. Ojwang J, as he then was, emphasized the finding in *Mukisa Biscuit -vs- West End Distributors* case (supra) in Civil Suit No. 85 of 1992, *Oraro -vs- Mbaja* [2005] 1 KLR 141 when he observed as follows: -

..... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed....

12. In *John Musakali -vs- Speaker County of Bungoma & 4 others* (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

.... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....

13. Finally, in *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

..... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant’s costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion....

14. On whether the issue of jurisdiction is a pure point of law, the Supreme Court in *Petition No. 7 of 2013 Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis.

15. Returning to the objection, and as held by the Supreme Court, the issue of jurisdiction of a Court or Tribunal is a pure question of law. Further, the objection is capable of disposing of the appeal if sustained. Therefore, the objection raised proper question and is capable of being dealt with as a preliminary objection.

16. The first issue is, hence, answered in the affirmative.

b. Whether this Court has the jurisdiction over the instant proceedings:



17. Speaking on the doctrine of jurisdiction, the Court of Appeal in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (2022) KECA 15 (KLR) in a decision rendered on 8<sup>th</sup> February, 2022 had the following to say: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

...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 pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

39. The Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by *the Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

40. In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a



court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

(68). A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

18. The jurisdiction of a Court is, therefore, so cardinal that it must be settled once its raised in a matter. In this case, it is contended that Section 81(3) of the Act prohibits this Court from dealing with the instant appeal given that an initial appeal was determined vide High Court of Kenya at Nyamira in Civil Appeal No. 13 of 2020.

19. Section 81 of the Act provides as follows: -

#### **Appeal to High Court:**

1. 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.

2. Upon the hearing of an appeal under this section, the High Court may: -
  - a. confirm, set aside or vary the order in question;
  - b. remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
  - c. exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
  - d. make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.
3. The decision of the High Court on any appeal shall be final.

20. On a careful reading of the above provision, for the objection to succeed, it must be proved that the issues in the instant appeal are similar to the ones in the Civil Appeal No. 13 of 2020. That, therefore, calls for a review of the record.

21. Briefly, the Appellant herein, was, among others, adjudged of misappropriating the Respondent's funds by the Commissioner of Co-operatives and was accordingly surcharged. The Appellant was found liable to the sum of Kshs. 769,163/89. In an effort to recover the sums, the Respondent instituted Co-operative Tribunal Case No. 228 of 2019 Nyabomite FCS Ltd vs. Josiah Oyaro. The case was concluded in favour of the Respondent and surcharge orders made against the Appellant. Dissatisfied with the order, the Appellant preferred an appeal to the High Court of Kenya at Nyamira. That was Civil Appeal No. 13 of 2020. The appeal was determined through a judgment rendered on 1<sup>st</sup> July 2021 where the decision of the Tribunal was upheld. The Respondent then commenced execution



proceedings before the Tribunal and in December 2020 the Tribunal issued warrants of execution against the Appellant.

22. As the Respondent initiated the execution of the warrant of arrest against the Appellant, this appeal was filed. The appeal inter alia challenges the issuance of a warrant of arrest by the Tribunal on 12<sup>th</sup> March 2024 against the Appellant on the basis that the Tribunal declined, refused and neglected to enforce Section 27 of the Act against a resolution of the Respondent passed in an Annual General Meeting to the effect that the Respondent stops pursuing the recovery against the Appellant and the others as the process was flawed. It was that decision by the Tribunal that the Appellant was aggrieved with, hence, the filing of the current appeal.
23. It is, hence, discernible that Civil Appeal No. 13 of 2020 was against the decision of the Tribunal in surcharging the Appellant. However, the current appeal challenges the execution process on the ground that the entire dispute was resolved by the Respondent in favour of the Appellant and such that no execution proceedings ought to issue or at all. The current appeal is, therefore, not similar to Civil Appeal No. 13 of 2020. As such, the doctrine of *functus officio* does not apply. The High Court is properly seized of the appeal pursuant to Section 81(1) of the Act and the Court ought to determine it. However, the High Court ought to be the High Court of Kenya at Nyamira and not in Nairobi.
24. The second issue is, hence, settled in favour of the Appellant with the result that the objection fails.
25. Having found that the objection suffers a false start, the following final orders hereby issue: -
  - a. The Notice of Preliminary Objection dated 13th November, 2024 is hereby dismissed with costs assessed at Kshs. 20,000/= [Kenya Shillings Twenty Thousand Only].
  - b. This appeal is hereby transferred to the High Court of Kenya at Nyamira.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**A. C. MRIMA**

**JUDGE**

Ruling No. 1 virtually delivered in the presence of:

Mr. Mbuthia, Learned Counsel for the Appellant.

Mr. Getange, Learned Counsel for the Respondent.

Maurice – Court Assistant.

