



**Jumba & another (Suing as the Chairman and Secretary of Toi Open Air Market Traders Society Respectively) v Machuki & 7 others (Civil Case E023 of 2024) [2025] KEHC 5234 (KLR) (Civ) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5234 (KLR)

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

**CIVIL**

**CIVIL CASE E023 OF 2024**

**SN MUTUKU, J**

**APRIL 7, 2025**

**BETWEEN**

**KENNETH JUMBA ..... 1<sup>ST</sup> PLAINTIFF  
DENIS OOKO OPIYO ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS THE CHAIRMAN AND SECRETARY OF TOI OPEN AIR MARKET  
TRADERS SOCIETY RESPECTIVELY**

**AND**

**FRANCIS NDEGE MACHUKI ..... 1<sup>ST</sup> DEFENDANT  
FATUMA BOSIRE MOHAMED ..... 2<sup>ND</sup> DEFENDANT  
DAVID KOSE OYOMBE ..... 3<sup>RD</sup> DEFENDANT  
HELLEN KASMIR ..... 4<sup>TH</sup> DEFENDANT  
JOSEPH MUYA NGAYAI ..... 5<sup>TH</sup> DEFENDANT  
FRANKLIN OGACHI ..... 6<sup>TH</sup> DEFENDANT  
MOSES ODHIAMBO OKIYA ..... 7<sup>TH</sup> DEFENDANT  
JOSEPH BABU NYERERE ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiffs filed a Notice of Motion dated 31<sup>st</sup> January 2025 seeking orders to restrain the Defendants from conducting and carrying out any business and/or activities intended to substitute Toi



- Open Air Market Traders Society (the Society) and/or take over the entire operations and management of the Society pending the hearing and determination of the Application and the Suit.
2. The Plaintiffs, who claim to be the lawful office bearers of the Society, are accusing the Defendant of conducting an election of the Society's office bearers, contrary to the mandatory structural arrangement requiring the election to be organized or presided over by the Society's Board.
  3. The said Notice of Motion was filed under the Certificate of Urgency and brought before me on 5/2/2025. It was, however, not certified urgent. The Applicants were directed to serve the application and attend court on 19/2/2025 for directions.
  4. On 19/2/2025, counsel for the Defendants informed the Court that the Defendants had filed a Notice of Preliminary Objection (the PO). The PO and the Grounds of Opposition raise the following issues:
    - i. That, the entire Notice of Motion does not disclose a reasonable cause of action against the Defendants.
    - ii. That the Honourable Court does not have jurisdiction to hear and determine this matter.
    - iii. That the jurisdiction to hear and determine the issue between the parties lies with the Office of the Attorney General Department of the Registrar of Societies.
    - iv. That the Motion of 31<sup>st</sup> January 2025 and the subsequent Plaint should be struck out with costs.

### **Opposition to the PO**

5. The PO is opposed by the Plaintiffs through their Grounds of Opposition dated 11/3/2025 in which they have stated:
  - i. That this court is seized with jurisdiction to hear and determine this suit and the Application dated 31/1/2025;
  - ii. That the Defendants are guilty of lack of candor and non-disclosure of material facts in line with the pleadings contained in the Plaint upon which the Plaintiffs are meritoriously entitled to the relief sought in the Application;
  - iii. That the PO does not meet the threshold and essence of a PO as enunciated in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (1969) E.A 696*;
  - iv. That the questions and issues that might arise from the Defendants' Grounds of Opposition dated 10/2/2025 can be dealt with at the hearing and determination of the Plaintiffs' application; and
  - v. That the PO is baseless, ill-advised, lacking in substance and law, misconceived, incompetent and an abuse of the court process and lacks merit and ought to be dismissed.
6. This Court directed that the PO should be argued first through oral submissions and listed the matter for submissions on 13<sup>th</sup> March 2025.

### **Oral submissions**

7. Mr. Maosa for the Defendants, except the 3<sup>rd</sup> Defendant who is acting in person, submitted that this court lacks jurisdiction to determine this matter because issues pertaining to Societies in Kenya fall under the *Societies Act* (Cap. 108 Laws of Kenya) which provides for the office of the Registrar of Societies. That the Office of the Registrar of Societies receives applications for registration, vets names,



- approves the applications, registers societies and issues certificates of registration as well as cancelling of registrations. He submitted that this office also handles disputes pertaining to societies.
8. Counsel submitted that elections were held, and the Registrar of Societies notified of the outcome of the elections; that it is incumbent upon the Applicant to lodge any complaint with the Registrar because this court lacks jurisdiction to hear and determine this matter. Counsel asked this court to strike out this case for having been filed in the wrong forum.
  9. Mr. Arika, appearing for the Applicants opposed the PO and submitted that this court has unlimited and unfettered jurisdiction in all matters of civil nature. He relied on *Kamau Thiong'o and 2 others v. Mary Wambui Mbugua & 2 others*, Nairobi Civil Case No 119 of 2017 and *Mombasa Civil Case No. 100 of 2012 Alfred Obuya Obengo & another v The National Chairman National Nurses Association of Kenya The Chairperson Electoral Committee*.
  10. Mr. Arika submitted that this case has raised many issues which require intervention of the court; that the facts before the Court require determination by the court and that the case has not raised any issue that require the Registrar to act. Counsel urged that this PO be dismissed with costs for want of merit.
  11. Mr. Davis Kose Oyombe, the 3<sup>rd</sup> Defendant herein, agreed with Mr. Arika that this court is seized with jurisdiction to hear and determine this matter.
  12. In rejoinder, Mr. Maosa accused Mr. Arika of failing to address the Court on the substantive issues and reiterated that the jurisdiction to hear and determine this matter lies with the Registrar of Societies and not with this court.

### **Analysis and determination**

13. I have read the Notice of Motion and the Supporting Affidavit, the Replying Affidavit, the PO and the Grounds opposing the PO. The Application seeks restraining orders against the Defendants/ Respondents from conducting any business or activities of the Society pending the hearing and determination of the Notice of Motion and the main suit.
14. To my mind, the Defendants are claiming that the Notice of Motion dated 31/1/2025 does not disclose a reasonable cause of action and that the jurisdiction to determine the dispute herein lies with the Registrar of Societies and not with this Court. The Plaintiffs argue the opposite. This leads me to one major issue arising from these two positions: Whether this court is seized with jurisdiction to hear and determine the Application and the suit.
15. If this court finds that it is not seized with jurisdiction to hear and determine this matter, then it follows that the Application, and the Plaint will face tragic end by being struck out as intended in the PO.
16. The Applicants claim to be bona fide office bearers and accuse the Defendants of conducting elections without following procedure. The Defendants on the other hand have not denied holding elections. They contended that the elections were held, and the Registrar of Societies notified of the results. They claim that this court lacks jurisdiction to entertain this application and the suit as such jurisdiction lies with the Registrar of Societies.
17. When a PO is raised in any court proceedings, the court must determine whether that PO meets the threshold as set out in *Mukisa Biscuit v West End Distributors Ltd* case, cited above. In that case, what constitutes a Preliminary Objection was stated as follow:

“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 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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

18. In the same case, Sir Charles Newbold P., stated 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 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....”

19. What presents itself from the Mukisa Biscuits case is that for a PO to meet the threshold, it must have the following characteristics:

- a. It must raise a pure point of law which has been pleaded, or which arises by clear implication out of pleadings.
- b. The PO, if argued as a preliminary point may, dispose of the suit.
- c. The PO is argued on the assumption that all facts pleaded by the other side are correct.
- d. The PO cannot be raised if any fact must be ascertained or if what is sought is the exercise of judicial discretion.

20. To my mind, and as defined in the Mukisa Biscuits case, the jurisdiction of a court to handle the matter before it, is a point of law. If argued successfully, it has the impact of disposing of the case. This leads me to pose the question whether the Defendants, save the 3<sup>rd</sup> Defendant, are correct in asserting that this court lacks jurisdiction to hear and determine this matter?

21. In his oral submissions, Mr. Maosa did not point out to this court where in the *Societies Act* is the jurisdiction to hear disputes like the one before this court is vested in the Registrar of Societies. I have read the Act, Cap 108 Laws of Kenya, Section 18 of the Act refers to “Disputes as to officers”. It does not refer to elections of the office bearers. It provides that:

- (1) If the Registrar is of the opinion that a dispute has occurred among the members or officers of a registered society as a result of which the Registrar is not satisfied as to the identity of the persons who have been properly constituted as officers of the society, the Registrar may, by order in writing, require the society to produce to him, within one month of the service of the order, evidence of the settlement of the dispute and of the proper appointment of the lawful officers of the society or of the institution of proceedings for the settlement of such dispute.
- (2) If an order under subsection (1) of this section is not complied with to the satisfaction of the Registrar within the period of one month or any longer period which the Registrar may allow, the Registrar may cancel the registration of the society.
- (3) A society aggrieved by the cancellation of its registration under subsection (2) may appeal to the High Court within thirty days of such cancellation.

22. This provision requires the Registrar to write to the officials of a society requiring them to settle the dispute within one month and report to the Registrar office. To my understanding, it is not for the Registrar’s office to settle the dispute. I have not come across any other provision under the Act regarding the settlement of disputes touching on elections of office bears of a society by the Registrar.



23. It is upon the Defendants to demonstrate, through evidence, that the jurisdiction to hear and determine this matter lies with the Registrar of Societies. Have they done so? I do not think so for the record does not contain such evidence to persuade this court that Cap 108 Laws of Kenya vests jurisdiction to hear and determine the issues raised in the pending application and the suit on the Registrar of Societies.
24. The jurisdiction of this Court is created under Article 165 of *the Constitution*. Sub-article (3)(a) equips the High Court with unlimited original jurisdiction in criminal and civil matters. The High Court cannot be divested of this jurisdiction by a statute.
25. I have considered the invitation by the Defendants to strike out the Application and the suit for being filed in a forum that lacks jurisdiction. Having found that this court is vested with the jurisdiction to hear and determine this matter, it remains an academic exercise to proceed to determine this matter. I think the parties should have their day in court to ventilate the issues they are raising by presenting their evidence. This will facilitate this court in determining the issues in a ruling.
26. Consequently, I find the PO not merited. It is hereby dismissed with costs. Parties are at liberty to take directions on the pending Notice of Motion dated 31.1.2025. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 7<sup>TH</sup> APRIL 2025**

**S. N. MUTUKU**

**JUDGE**

In the Presence of:

Mr. Arika for the Plaintiffs

Mr. Maosa for the 1, 2, 4, 5, 6, 7, & 8 Defendants

Mr. David Kose Oyombe, the 3<sup>rd</sup> Defendant

