



REPUBLIC OF KENYA



KENYA LAW
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**Magondu v Fortune Sacco Ltd (Civil Appeal E017 of 2023)
[2025] KEHC 7747 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7747 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E017 OF 2023
JK NG'ARNG'AR, J
JUNE 5, 2025**

BETWEEN

STEPHEN GITHINJI MAGONDU APPELLANT

AND

FORTUNE SACCO LTD RESPONDENT

JUDGMENT

1. The appellant being dissatisfied with the whole decision of the lower Court at Baricho by Hon. D.M. Ileri Senior Resident Magistrate on 13th January, 2023 filed a memorandum of appeal dated 15th February 2023 the crux of the case is based on the reliefs / the orders sought as follows: -
 - a. That the trial magistrate's ruling of 13th January, 2023 be set aside and the Judgement delivered on 29th July, 2022 upheld without further delay
 - b. The appellant prays for orders that this appeal be allowed with costs
2. The respondent filed a notice of preliminary objection to be determined dated 14th December, 2022. They raise the following issues:
 - i. That the present suit and motion as taken out, drawn and filed is incompetent, fatally defective and unsustainable in law.
 - ii. That the Honorable court lacks jurisdiction to hear the matter as the same ought to be filed at the Co-operatives Tribunal which jurisdiction is indicated under section 76 of the Co-operatives and *Societies act*, cap 490 Laws of Kenya.
 - iii. That in whole, the Plaintiff herein is a frivolous litigant and proceedings herein amount to an abuse of court process. The issue for determination is whether the preliminary objection has merit.



3. The case of Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696 is renowned on the issue of what constitutes a preliminary objection. The court observed thus: -

.....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.

4. Sir Charles Newbold P. stated: -

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 issue, and this improper practice should stop.

5. Similarly the Supreme Court in the case of Hassan Ali Joho & another v Suleiman Said Shabal & 2 others SCK Petition No 10 of 2013 [2014] eKLR held that: -

“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.”

6. Further in the case of Hassan Nyanje Charo v Khatib Mwashetani & 3 others, [2014] eKLR the court held that:-

“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. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

7. Plainly, a preliminary objection must be founded upon a settled and brisk point of law, to the intent that its application to undisputed facts, leads to but one conclusion that the facts are incompatible with the point of law.

8. This court lays reference to section 76 of the Co-operatives and *Societies act*, cap 490 Laws of Kenya which gives power to the to the parties to a dispute to file a derivative suit where they feel aggrieved by act of omission involving negligence, default, breach of duty or trust by a director of the company. The power so given by law should and must be exhausted in compliance with the law.

9. Particularly, this court is guided by the provisions of section Section 76 provides thus

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; or
 - 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 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; a claim by a Sacco society against a refusal to grant or a revocation of license or any other due, from the Authority.
10. Further this court finds that Section 279 of the *Companies Act* give directions on the Power of members to convene general meeting at the expense of the company provides as follows:
 1. If, after having been required to convene a general meeting under section 277, the directors fail to do as required by section 278, the members who requested the meeting, or any of them representing more than one half of the total voting rights of all them, may convene a general meeting.
 2. If the requests received by the company included the text of a resolution intended to be moved at the meeting, the members concerned shall include in the notice convening the meeting the text of the intended resolution.
 3. The members concerned shall ensure that the meeting is convened for a date not more than three months after the date on which the directors were requested to convene a meeting.
 4. The members concerned shall convene the meeting, as nearly as practicable, in the manner in which meetings are required to be convened by directors of the company.
 5. The business that may be dealt with at the meeting includes a resolution of which notice is given in accordance with this section.
 6. The company shall reimburse the members concerned for all reasonable expenses incurred by them because the directors failed to convene a meeting as required by section 278.
 7. The company shall deduct from the remuneration payable to the directors who were in default the amount of expenses reimbursed to members under subsection (6).
11. This court notes that the above provisions give guidance on the modes and mechanisms of dispute resolution before lodging the current case in court. All exhaustible mechanisms provided in law have not been exhausted. The Appellant had a right to address his issues to the Tribunal for ease of settlement of the dispute in question to far as it is their best interest and in a quest of saving judicial time.
12. The obtaining position in law is that the exhaustion doctrine or avoidance doctrine require that a party exhausts the statutory procedures before proceeding to such application.
13. It has been held severally that a party is required to exhaust any alternative dispute resolution mechanism before filing a matter in Court as a matter of law. To this end the Court of Appeal in the



case of Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] CA 304 (KLR) the court of Appeal observed as follows:

“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 within churches, 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. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.” See also Peter Muiruri Kabiru & 2 Others –Vs- Paul Wandati Kabue HCCC NO. 319 of 2009 (Milimani).

14. I am persuaded that the Appellant failed to abide by the provisions I have quoted above and that the matter was prematurely brought before the lower court
15. For the reasons I have set out, I find that the ruling issued by the lower court on 13th January, 2023 is judicious and is hereby upheld. The appellant’s appeal is hereby dismissed with costs to the Respondent.

Orders accordingly.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 5TH DAY OF JUNE, 2025 IN THE PRESENCE OF:

N/A for the Appellant

N/A for the Respondent

Siele/Mark (Court Assistants)

.....

J.K. NG’ARNG’AR

JUDGE

