



**Muthoni v Capital Sacco Limited; Viewline Auctioneers (Interested Party); Mukira (Proposed Interested Party) (Commercial Case E001 of 2024) [2024] KEHC 5863 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5863 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
COMMERCIAL CASE E001 OF 2024  
EM MURIITHI, J  
MAY 23, 2024**

**BETWEEN**

**MARY MUTHONI ..... PLAINTIFF**

**AND**

**CAPITAL SACCO LIMITED ..... DEFENDANT**

**AND**

**VIEWLINE AUCTIONEERS ..... INTERESTED PARTY**

**AND**

**ERIC GITONGA MUKIRA ..... PROPOSED INTERESTED PARTY**

**RULING**

1. By an application under certificate of urgency dated 26/2/2024, pursuant to sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 51 of the [Civil Procedure Code](#), Sections 76(1) and 76(2) of the [Co-operative Societies Act](#) and all other enabling provisions of the law, the proposed interested party seeks that:
  1. Spent.
  2. The applicant herein Eric Gitonga Mukiira be joined in these proceedings as an Interested Party.
  3. Upon grant of prayer (2) above this Honourable court be pleased to issue an order dismissing the suit herein on the ground that the Court lacks jurisdiction to hear and determine the suit in view of Sections 76(1) and 76(2) of the [Co-operative Societies Act](#).



4. In the alternative to prayer 3 above the applicant's Preliminary Objection attached to herein be considered as duly filed and served and the Court does give directions on the same.
  5. Costs of this application be provided for.
2. The application is premised on the grounds on the face of it and supporting affidavit of the proposed interested party sworn on even date. He avers that he is a son to the late Alex Mukira M'buru and therefore a beneficiary of his estate which comprised of Nyaki/Kithoka/3392. His father died on 12/1/2021 and was buried on 19/1/2024 in a funeral ceremony where the defendant's officials participated and actually contributed. It is therefore in bad faith that in the process of exercising their statutory power of sale, they adopted clandestine methods of service and never served the crucial 45 day redemption notice. The defendant purportedly served the 90 days statutory notice and thereafter instructed the interested party to begin the process of auction. The 45 days' notice under section 96 (2) of the Land Act is not optional but mandatory. The defendants never served the notices as by law required, as the alleged 90 days' notice was served through postage to his late father's postal address which they have no access to. The 90 day notice was addressed to his late father with the clear knowledge that his father had already died and no succession cause had been undertaken. The defendant ought to have taken out citation proceedings for the court to appoint an administrator of the estate. He is advised by his advocates on record that the foregoing notwithstanding, this court was made to entertain a matter which it lacked jurisdiction to deal with, as section 76 of the Co-operative Societies Act provides in the mandatory terms that a dispute of this nature shall in the first instance be dealt with by the Co-operative Tribunal. He urges the court to dismiss the matter for want of jurisdiction. He assumes that even where the High Court had original jurisdiction to handle the matter, such jurisdiction would only vest in the Environment and Land Court vide section 13 of the Environment and Land Court Act. He prays for the application to be allowed to avert tremendous injustice and gross miscarriage of justice being meted against the beneficiaries of the estate.
3. The application was not responded to.

### **The 2<sup>nd</sup> Application**

4. By an application under certificate of urgency dated 1/3/2024 pursuant to Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, sections 1A, 1B, 3A, 6 and 18 of the Civil Procedure Act and Article 159 of the Constitution, the defendant seeks that:
1. Spent
  2. The court do issue orders of stay of proceeding in Co-operative Tribunal of Kenya CTC NO E001/2024, Mary Muthoni –vs- Capital Sacco & Viewline Auctioneers Ltd.
  3. The court do issue any other orders it deems just and equitable in the circumstance.
  4. Costs be in the cause.
5. The application is premised on the grounds on the face of it and supporting affidavit of Nathaniel Kithinji Ikuigu, the defendant's debt recovery manager sworn on even date. He is indeed consternated by the plaintiff's dishonest conduct which involves filing of several suits in different courts with the hope of obtaining favourable orders. Following the ruling of this court of 6/2/2024 on the plaintiff's application dated 22/2/2024, the plaintiff served them with a hearing notice from the cooperative tribunal in CTC No. E001/2024. The application dated 5/2/2024 was served upon them contemporaneously with the statement of claim which verily reveal that the orders and reliefs sought therein are similar to the ones sought herein. He accuses the plaintiff of failing to disclose to the tribunal



the existence of this suit and particularly the ruling of 6/2/2024, and the plaintiff's only option is to lodge an appeal to the court of appeal. It would be a travesty of justice and an absurdity of the highest order for the tribunal to issue parallel orders to the ones issued by a higher court of competent jurisdiction. The plaintiff's main aim of filing the matter before the tribunal is to frustrate the auction and sale of the charged property in the event that she does not satisfy the outstanding loan amount within 30 days as ordered by this court in its ruling. The plaintiff is a mischievous litigant with the knack for forum shopping and fishing expeditions. It is in the interest of justice that the proceedings before the tribunal be stayed to avoid a possible embarrassment in the matter of issuance of parallel conflicting orders by the two courts. Moreover, a similar set of facts and issues cannot be ventilated by two parallel courts.

6. The applications were urged by oral submissions in court and ruling was reserved.

### **Determination**

7. The issues for determination are whether joinder of the proposed interested party is necessary and whether the dispute herein is one that falls within the ambit of Section 76 of the *Co-operatives Act* and thus ought to be heard and determined by the Co-operatives Tribunal or it is one outside the said provision and thus can be heard and determined by this court.

### **Joinder**

8. The proposed interested party is a son to Alex Mukira M'buri and the plaintiff.
9. The pre-requisites to be fulfilled before a party can be joined to proceedings were set out in *Muruatetu & another v Republic; Kenya National Commission on Human Rights & 2 others (Interested Parties); Death Penalty Project (Intended Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2016] KESC 12 (KLR) (Civ) (28 January 2016) (Ruling), where the Supreme Court rendered thus:

“Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements: The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.”

10. The proposed interested party's alleged interest in the matter is protected by his mother, the Plaintiff and widow of the deceased.
11. This court finds that the proposed interested party has not demonstrated how his presence in these proceedings will assist the court in the settlement of the questions in controversy.

### **Jurisdiction**

12. The jurisdiction of the Co-operative Tribunal is provided under Section 76 *Co-operative Societies Act* as follows:

“(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 Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.”

13. In *Oucho v Joseph Otieno Bee, Chief Executive Officer Bandari Sacco Ltd & 12 others; Sacco Society Regulatory Authority (SASRA) (Interested Party)* (Constitutional Petition 57 of 2021) [2022] KEHC 6 (KLR) (25 January 2022) (Ruling), the court (JM Mativo J as he then was) held that:-

“The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, 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. The rationale behind this reasoning is that statutory provisions ousting court’s jurisdiction must be construed restrictively. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this Petition. The jurisdiction of the Tribunal is expressly provided under section 76 of the act. No serious argument was advanced to challenge the jurisdiction of the Tribunal to entertain the dispute.”

14. Similarly, in *Katelemba Athiani Muputi Farming and Ranching Co-Operative Society & 6 others v Joseph Muinde & 7 others* [2017] eKLR, the court (P. Nyamweya J. as she then was) rendered thus:

“The matters in the suit herein as shown by the prayers sought by the Plaintiffs in the Plaint are the records and documents currently held by the Plaintiffs, and the continued possession and use of the 1<sup>st</sup> Plaintiff’s premises. This is a dispute touching on the internal management of the 1<sup>st</sup> Plaintiff which in my view is a matter touching on the business of the 1<sup>st</sup> Plaintiff and ought to be heard by the Co-operatives Tribunal pursuant to section 76 (1) and (2) of the *Co-operative Societies Act*.”



15. In *Republic v Matbeka Kithome & 4 Others* Mombasa Misc. Civil Appl. No 664 of 2010, this court held that:

“In my view, a dispute concerning the business of a cooperative society must be construed to mean a dispute or claim arising from, related or connected to the performance of the profession, trade or operations of the cooperative society towards the achievement of the subject of cooperatives as given under section 4(a) of the Act being “the promotion of the welfare and economic interests of its members.” It includes in terms of section 76(2) of the Act a debt or demand by a member against a cooperative society and vice versa. The dispute must be so closely related to the business (profession, trade, service or operations) for which the cooperative society is established as to be part of its activities or operations as guided by cooperatives law, by-laws and rules.”

16. Guided by the aforementioned cases, this court finds that the dispute herein falls within the ambit of Section 76 of the *Co-operatives Act* and therefore, it ought to be heard and determined by the Co-operatives Tribunal. It may only come to the Court upon appeal as prescribed under section 81 of the *Cooperatives Act*, which provides as follows:

“

“81. 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.”

17. In the locus classicus case of *Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd* [1989] eKLR the Court of Appeal stated that:

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. The Court of Appeal in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR 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.”

19. Section 76 of the *Co-operatives Societies Act* is couched in the mandatory terms that jurisdiction lies in the first instance in the Cooperatives Tribunal. This court hereby declines jurisdiction on the basis of the doctrine of exhaustion.

20. Section 27 of the *Civil Procedure Act* provides as follows as regards costs on a suit in which the court finds no jurisdiction:

“27. Costs.

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order

2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

## Orders

21. Accordingly, for the reasons set out above, this court, this court makes the following orders:

1. The Plaintiff is hereby struck out for want of jurisdiction.
2. The Defendant’s application dated 1/3/2024 is dismissed.
3. The application for joinder of a party dated 26/2/2024 is also declined.



4. However, as provided by section 27 of the *Civil Procedure Act*, the order for costs of the application herein on 6/2/2024 shall remain in force and those costs together with the costs of the suit shall be payable by the Plaintiff to the Defendant.
5. There shall, however, be no order as to costs on the two applications, respectively dated 26/2/2024 and 1/3/2024, the subject of this ruling.

Order accordingly.

**DATED AND DELIVERED THIS 23RD DAY OF MAY, 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. K. Muriuki for the Defendant.

Mr. Okoth for the Applicant/ Proposed Interested Party.

N/A for the Plaintiff & Interested Party.

