



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nyambu v Jitegemee Sacco Society Limited (Petition  
E049 of 2023) [2024] KEHC 5283 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5283 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**PETITION E049 OF 2023**

**OA SEWE, J**

**MAY 20, 2024**

**IN THE MATTER OF ARTICLE 1, 2, 3, 10, 21, 23, 73, 75, 76,  
159, 165, 226 & 227 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES  
10, 73, 75, 76, 226 AND 227 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SALE OF PROPERTY KNOWN AS MOMBASA  
XXVI/13 BELONGING TO JITEGEMEE SACCO LIMITED**

**AND**

**IN THE MATTER OF OPENNESS, ACCOUNTABILITY AND RESPONSIBLE FINANCIAL  
MANAGEMENT AND CONTRAVENTION OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**TOM MBITSI NYAMBU ..... PETITIONER**

**AND**

**JITEGEMEE SACCO SOCIETY LIMITED ..... RESPONDENT**

**RULING**

- [1] The petitioner, Tom Mbitsi Nyambu, filed this Petition pursuant to Article 35 of the [Constitution](#) of Kenya. He seeks, inter alia, that an order be made compelling the respondent to provide him with certain documents as set out in paragraph 25 of the Petition. Concomitantly, the petitioner filed an interlocutory application, under a Certificate of Urgency, seeking certain interim orders pending the hearing of the Petition.



- [2] In response to that application, the respondent filed the Notice of Preliminary Objection dated 29<sup>th</sup> September 2024 contending that this Court has no jurisdiction to hear or determine the Notice of Motion and the Petition dated 22<sup>nd</sup> September 2023 in light of the provisions of Section 76 of the Co-operative Societies Act No. 12 of 1997; and therefore the Petition offends the doctrine of exhaustion.
- [3] The Preliminary Objection was canvassed by way of written submissions. In the respondent's submissions dated 17<sup>th</sup> October 2023, a single issue was proposed, namely, whether the Notice of Preliminary Objection dated 29<sup>th</sup> September 2023 is merited. According to the respondent, the Petition seeks to ventilate a dispute between a member of a Sacco and the Sacco within the meaning of the Co-operative Societies Act. He relied on *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors* [1969] EA 696, the Speaker of the National Assembly v Karume [1992] KLR 22, *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) (2021) KEHC 6 (KLR) (25 January 2022).
- [4] The petitioner relied on his written submissions dated 9<sup>th</sup> January 2024. In his view, the issue for determination should be whether the term "dispute" as envisaged by Section 76 of the Cooperative Societies Act includes an allegation of violation or threatened violation of a right or fundamental freedom. The petitioner therefore made reference to Article 165(3)(b) of the Constitution that reposes in the High Court the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.
- [5] Thus, it was the submission of the petitioner that the Petition is properly before this Court. He relied on *Samuel Kamau Macharia & Another v Kenya Commercial Bank and another* [2012] eKLR and *In the Matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011*, to support the submission that a court's jurisdiction flows from either the Constitution or legislation; and that a court of law can only exercise jurisdiction as conferred on it by law.
- [6] The law in respect of preliminary objections is well established, namely, that a preliminary objection ought to be demurrer, and should only be raised on a pure point of law. Hence, in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [1969] EA 696, it was held:
- ...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...".
- [7] Similarly, in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR the Court of Appeal held:
- ...A Preliminary Objection 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..."



[8] I am therefore satisfied that the respondent’s Preliminary Objection raises a pure point of law for consideration as a preliminary objection. As was pointed out by Hon. Nyarangi, JA in the Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR:

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

[9] Moreover, where the issue of jurisdiction is raised, the Court is under obligation to consider it right away, as was aptly pointed out by Hon. Nyarangi, JA in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (supra). The learned Judge said:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.”

[10] Needless to mention that jurisdiction flows either from the Constitution or Statute. This point was restated in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, thus:

...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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law...”

[11] Accordingly, Article 165(3)(b) of the *Constitution* is explicit that:

Subject to clause (5), the High Court shall have—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;”

[12] Moreover, Sub-article (3)(d) adds that the High Court has jurisdiction:

(d) ...to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;



- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- (iv) a question relating to conflict of laws under Article 191; and *Constitution* of Kenya, 2010”

[13] It is plain therefore that, in so far as the Petition seeks declaratory orders for purposes of enforcing the constitutional right of access to information under Article 35, the Petition is properly before the Court.

[14] It is nevertheless evident from the facts pleaded in the Petition that the dispute is between a cooperative society and one of its members. It was in this regard that the respondent hinged its Preliminary Objection on Section 76 of the *Cooperative Societies Act*. The provision states as follows in Subsection (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.”

[15] Indeed, in *Geoffrey Muthinja Kabiru & Others v Samuel Muguna Henry & 1756 others* (supra)

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 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. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

[16] I have consequently gone further to consider whether the circumstances hereof constitute an exception to the exhaustion doctrine, considering that for purposes of the *Cooperative Societies Act*, a dispute is defined in Section 76(2) thus:

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.”

[17] In the premises, it is manifest that the doctrine of exhaustion is inapplicable to the facts pleaded in the Petition and the reliefs envisaged thereby. A five-judge bench of the High Court expressed this view in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 Others (Interested Parties)* [2020] eKLR, thus:

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...”

[18] In the result, I find no merit in the respondent’s Preliminary Objection dated 29<sup>th</sup> September 2023. The same is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20<sup>TH</sup> DAY OF MAY 2024**

**OLGA SEWE**

**JUDGE**

