



Kiarie v Tai Saving and Credit Cooperative Society Limited & another (Civil Appeal 151 of 2018) [2023] KEHC 2115 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 151 OF 2018
JM CHIGITI, J
MARCH 3, 2023**

BETWEEN

GEORGE KIARIE APPELLANT

AND

**TAI SAVING AND CREDIT COOPERATIVE SOCIETY
LIMITED 1ST RESPONDENT**

TRANSPORT AND LIFTING SERVICES LIMITED 2ND RESPONDENT

(Being an appeal from the Ruling of the Principal Magistrate at Githunguri, Githunguri Law Courts, (Honourable C. Kutwa) delivered on 11th November, 2018 in P.M.C.C NO. 47 OF 2018)

JUDGMENT

Brief background

1. The appellant filed this suit on May 28, 2018. The appellant confirmed and generously described himself at Paragraph 4 of the Complaint, as a member of the 1st respondent. He maintained a seed account with the 1st respondent for purposes of bonding connection with its trade and business, giving rise to the relationship of bank and customer.
2. At paragraph 4 the appellant averred that he was the account holder of an account number 001xxxxxxx within the 1st respondent which enabled him to connect with its trade and business, giving rise to a banker customer relationship.
3. At paragraph 3 to 5 of the 1st respondent's Defence it avers that the appellant applied for a loan of Kshs.8,300,000/= which was rejected because he did not meet the appraisal criteria.



4. In his submissions the appellant confirms that indeed, he approached the 1st respondent for a loan facility. The appellant submits at paragraph 11 of his submissions that, he executed a loan facility on February 27, 2018 with the 2nd respondent.
5. He further submits that the 1st respondent made a professional undertaking to the 2nd respondent, regarding a transfer of the motor vehicle and registration upon release of the original logbook, and duly executed transfer form C.
6. At paragraph 5 the 1st respondent avers that it never charged parcel number Nairobi/Block 119/2868.
7. The 1st respondent at paragraph 6 of the defense contends that it communicated that it was unable to honour the professional undertaking given that the loan had been rejected.
8. The 1st respondent continues at paragraph 7 of the Defence, to aver that it further advised the appellant that it returned the logbook of the car to the 2nd respondent when it had identified that the loan proceeds were not going to come through.

Analysis and determination;

9. The foregoing set of transactions, speak in detail about the relationship that exist between the appellant and the respondents, as buttressed by the parties in their respective pleadings, in their submissions, and the grounds of objection. I have no doubt in my mind whatsoever that it fits into the ambit of a commercial relationship.
10. I am even more persuaded in my thinking by all the documents that the Appellant relied on as exhibits for his case, and as set out in the list of documents. These are the kind of documents that are used in commercial transactions between cooperative societies, and its members when borrowing and lending is taking place. The documents that parties interact with in the borrowing and lending transactions include log books, searches, valuations, charge, discharge, acknowledgment letters, undertakings amongst others. From the aforementioned documents, it is clear that there was a deliberate commercial transaction that was taking place between appellant and the respondents.
11. I have no doubt in my mind, that the relationship between the appellant and the respondent was in the nature of a commercial transaction that was intended to generate profit to the 1st respondent as the appellant enjoyed the comfort of the car purchased from the loan.
12. The fact that the appellant had to apply for the facility through set forms as read alongside the fact that the transactions that involved setting up of a standing order is a demonstration of the existence of a contractual relationship which the appellant believes was breached. It is no wonder the appellant chose to move the court for the order of specific performance which is a relief that is available to a purchaser in case of a breach of contract.
13. Having satisfied myself that there was a business or a commercial transaction, the next question that I must ask myself is whether the business transaction was between the appellant in his capacity as a member of the Respondent.
14. At Paragraph 4 of the Plaint, the appellant described himself with so much clarity and precision, as a member of the respondent Sacco who maintained account number 001xxxxxxxxx, within the Sacco for purposes of and in connection with its trade or business, giving rise to the relationship of banker and customer.
15. It is unfortunate that the intended business relationship did not come through. Instead a dispute was conceived leading the appellant as a member of the 1st respondent to take the dispute to court.



16. The next question that the court must address is whether the court has jurisdiction to determine disputes between members and their Corporative Societies.
17. According to the respondent, the suit offended section 72 of the *Co-operative Societies of Kenya Act*, cap 490 of the laws of Kenya. The said Section provides as follows:

“Section 72

Power to restrain convicted persons from being officers of society Any person who is convicted of an offence under sections of the *Companies Act* (cap. 486) specified in section 71 shall cease to be, or remain, an officer of a co-operative society, and shall cease to be concerned in or take part in, whether directly or indirectly, the management of a co-operative society, for a period of five years from the date of his conviction, and any person acting as, or purporting to be acting as such an officer, or being so concerned in, or taking part in the management of a co-operative society during that period, shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding two years.”

18. In *Khalifa Mohamed vs PS Transport* the court had the following to say on the ‘Principle of Constitutional avoidance’

“Section 9 (1) *Fair Administrative Action Act*, 2015 provides an avenue for a party aggrieved by an administrative action to without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to article 22(3) of the *Constitution*. This, is subject to exhausting all other available remedies. Thus, Section (9) (2) provides in mandatory terms that;

“The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”

“Under section 9 (3) “The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).”

19. In *Bethwell Allan Omondi Okal v Telkom (K) Ltd (Founder) & 9 others* [2017] eKLR the court held thus;

“The appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law”

20. In *Council of County Governors v Attorney General & 12 others* [2018] eKLR the court held as follows;

“Applying and exhausting alternative dispute resolution mechanisms, is a condition precedent to filing of court action by either of the units of government. Only after applying and exhausting the available dispute resolution mechanisms should parties resort to judicial intervention.



“The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved.”

21. In the case of *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR the Court of Appeal stated that:-

“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 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... This accord with article 159 of the *Constitution* which commands courts to encourage alternative means of dispute resolution.”

22. In *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR the Court stated as follows:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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. This encourages alternative dispute resolution mechanisms in line with article 159 of the *Constitution*.”

23. In *Wangari v Kenya Revenue Authority & another* (Constitutional Petition 8 of 2020) [2022] KEHC 411 (KLR) the court held as follows;

“The courts have developed the exhaustion doctrine, as a prudential doctrine, in consonance with the *Constitution* pursuant to article 159 thereof as a judicial policy aimed at ensuring access to justice and the efficient administration of justice.”

24. Similarly, the court in the case of Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR elaborately dealt with the doctrine of exhaustion. The court stated as follows: -

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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. This encourages alternative dispute resolution mechanisms in line with article 159 of the *Constitution*”.



25. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* Pet 14A, 14B & 14C of 2014 of [2014] eKLR held that:

“The principle of avoidance entails that a court will not determine a constitutional issue, when a matter may properly be decided on another basis.”

26. On the applicability of the doctrine of exhaustion in Kenya, the doctrine traces its origin from article 159(2)(c) of the *Constitution* which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(c) Alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)”.

Disposition;

26 Upon analyzing the above evidence as guided by authorities, I come to the conclusion that the trial court made a correct finding that it lacked jurisdiction to hear, and determine the suit.

Order

27 The appeal is here by dismissed with costs to the Respondent.

DELIVERED AT KIAMBU THIS 3RD DAY OF MARCH, 2023.

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J. CHIGITI (SC)

JUDGE

In the Presence of;

For Appellant:

For 1st Respondent:

For 2nd Respondent:

C/A:

