



**Finmat Sacco Ltd v Nyagowa (Civil Appeal E094 of 2022)  
[2023] KEHC 20999 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20999 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E094 OF 2022  
RPV WENDOH, J  
JULY 20, 2023**

**BETWEEN**

**FINMAT SACCO LTD ..... APPELLANT**

**AND**

**JAMES NYAGOWA ..... RESPONDENT**

**JUDGMENT**

- 1 This appeal emanates from the Ruling of Hon. S. N Mutava (RM) in Civil Suit No. 75 of 2022 at the Resident Magistrate’s Court at Rongo dated August 3, 2022, in which the appellant’s preliminary objection was dismissed. Being dissatisfied with the ruling, the appellant commenced this appeal vide a memorandum of appeal dated August 3, 2022 on the following grounds: -
- i. The trial Magistrate erred in law and fact in failing to appreciate that the respondent was a member of the appellant Sacco and that any dispute/claim arising from such is a preserve of the Co-operatives Tribunal.
  - ii. The trial Magistrate erred in law and fact by stating that the appellant admitted that the respondent had paid its debt in the statement of defence, which allegations were not admitted in any paragraph of the appellant’s statement of defence.
  - iii. The trial Magistrate erred in law and in fact by failing to appreciate the provisions of law governing the operations of Co-operative Society particularly Section 76 of the Co-operatives Society Act.
  - iv. The trial Magistrate erred in failing to appreciate that the establishment of the Co-operative Tribunal under the Co-operatives Act is sanctioned by the Constitution of Kenya 2010 and that its functions cannot be taken by another court.



- v. The trial Magistrate erred in law and fact by addressing matters not raised in the Preliminary Objection and proceeded to rule on such.
  - vi. The trial Magistrate erred in law and in fact by failing to appreciate the provisions of Section 76 of the Co-operative Society Act that provides for dispute resolution mechanisms between a Co-operative Society and a member.
  - vii. The trial Magistrate erred in law by entirely failing to determine issues of jurisdiction raised and enabling provisions and arrogating herself a jurisdiction she does not have in law.
2. Consequently, the appellant sought the following orders from this Court:-
- i. The appeal be allowed and the ruling delivered on August 3, 2022 be set aside.
  - ii. Costs of the appeal be awarded.
3. The facts which gave rise to the preliminary objection are that the respondent instituted a suit dated April 27, 2022 asking for orders to release his 8 heads of cattle or in the alternative payment for their price at Kshs. 245,000/= together with costs of the suit and any relief the Court may deem fit and just to grant.
4. It was his contention that the appellant is a financial institution in the business of loaning money to its members; that as a member, he had obtained a loan which he was duly servicing. However, on or about April 25, 2022 without notice, the appellant attached 8 heads of cattle from the respondent's home when he had only a balance due to the appellants amounting to Kshs. 28,720/=. He further averred that he visited the appellant's offices in Rongo and cleared his debt of Kshs. 28,720/= yet till the time of instituting the suit, the 8 heads of cattle had not been returned to him.
5. The appellant entered appearance and filed a statement of defence dated May 23, 2022. The appellant partly admitted to advancing the loan facility to the appellant and the stated outstanding amount of Kshs. 28,720/=. The appellant denied taking the heads of cattle worth Kshs. 245,000/= as alleged by the respondent.
6. Contemporaneously, the appellant filed a notice of preliminary objection which challenged the jurisdiction of the trial court; that the matter in dispute was best to be litigated before the Co-operatives Tribunal as the respondent is a member of the Co-operative and is bound by the provisions of Section 76 of the Cooperatives Act, Cap 490 Laws of Kenya.
7. Directions were taken that the appeal be canvassed by way of written submissions. It is only the appellant who complied. I have considered the grounds of appeal, record and supplementary record of appeal and the submissions by the appellant.
8. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion and the same does not entail taking on other matters which were never brought to the trial court's attention or were not subject of the said court's consideration. In *Selle v Associated Motorboat Co. (1968) EA 123* the Court of Appeal held as follows:

“ this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or



of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

9. The preliminary objection raised relates to the issue of jurisdiction without which the court cannot take another step. In the case of the Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) 14 Nyarangi JA stated: -

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. 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 (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

- 10 The Supreme Court in Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others (2012) eKLR expressed itself 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...”

- 11 The main contention in this appeal is whether the trial court was right to hold that it had jurisdiction to hear and determine the dispute before it. Admittedly, the appellant is a Co-operative Society and therefore governed by the Cooperative *Societies Act*. The respondent does not deny being a member. It is not in contention that the dispute involves a loan advanced to the respondent by the appellant.

- 12 The appellant argued that this being a dispute concerning a Co-operative Society, by dint of Section 76 (1) of the *Co-operative Societies Act*, the trial court had no jurisdiction to hear and determine it. The said section states: -

76 Disputes

(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.”

- 13 The term dispute is defined in subsection (2) as—

“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 of personal representative of a deceased member whether such debt or demand is admitted or not.....”

- 14 Therefore, the Cooperatives Tribunal is seized of jurisdiction where the dispute concerns members whether present, past, deceased or any other persons claiming through members, between a member (s-) and the society. Under Section 76 (2) a claim is a debt due to the Co-operative from a member or past member.



- 15 At paragraph 4 of the plaint, the respondent pleaded that as of April 25, 2022 there was an outstanding loan of Kshs. 28, 720/= which the appellant partly admitted. The respondent went on further to plead at paragraphs 7 and 8 of the plaint that he paid the alleged outstanding debt to which the appellant admitted in paragraph 7 of their statement of defence but at the same time, the respondent denied paragraph 7 of the plaint in paragraph 6 of its statement of defence. From the contradictory responses of the appellant in its statement of defence it is not clear whether there is an outstanding debt or not.
- 16 However, in the strict sense, the gist of the dispute which has to be determined first is whether there is an outstanding debt to justify the seizure of the alleged heads of cattle worth Kshs. 245,000/=. In this court's opinion, that is a matter which only the Cooperatives Tribunal can determine in the first instance since it is acknowledged that the appellant did advance a loan facility to the respondent.
- 17 In my opinion, this is one of the issues which concerns the "business of the co-operative society" as stated in Section 76 of the Cooperative *Societies Act*.
- 18 In the end, I find that the appeal succeeds. The trial court is not seized with jurisdiction to hear and determine this dispute. The matter in dispute falls within the purview of the Cooperative Tribunal as per the provisions of Section 76 of the *Co-operative Societies Act*.
- 19 The ruling delivered by the trial court on August 3, 2022 arrogating jurisdiction to itself was made in error and it is hereby set aside. The suit filed before the Principal Magistrate's Court in Rongo being PM Rongo Civil Suit No. 75 of 2022 is hereby struck out.

Costs of the appeal to the appellant.

**Dated, Delivered and Signed at Migori this 20<sup>th</sup> day of July 2023**

**R. WENDOH**

**JUDGE**

**Judgment delivered in the presence of;**

N/A for the Appellant.

Ms. Shakola for the Respondent.

**Emma and Phelix** Court Assistants.

