



**Kithitu & 2 others v Mhasibu NWD T Sacco Society Ltd & another (Petition 002 of 2022)  
[2023] KEHC 21563 (KLR) (Commercial and Tax) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21563 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
PETITION 002 OF 2022  
DO CHEPKWONY, J  
JULY 21, 2023**

**BETWEEN**

**JOSEPH WAMBUA KITHITU ..... 1<sup>ST</sup> PETITIONER  
ANGELINE KALEEH MUSAVA ..... 2<sup>ND</sup> PETITIONER  
RUTH NJOKI NGÁNGÁ ..... 3<sup>RD</sup> PETITIONER**

**AND**

**MHASIBU NWD T SACCO SOCIETY LTD ..... 1<sup>ST</sup> RESPONDENT  
MICHAEL PASCAL OSODO OHULO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Before me is a Petition dated 25<sup>th</sup> April, 2022 seeking the following orders:
  - a. An Order do issue compelling the 1<sup>st</sup> Respondent and/or 2<sup>nd</sup> Respondent to forthwith avail and deliver up to the Petitioners the following documents: -
    - i. The executed loan agreement for Loan No 12446 between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
    - ii. The guarantees executed by the Petitioners for the loan agreement i.e Loan No 12446.
    - iii. Statement of the 2<sup>nd</sup> Respondent's loan account clearly reflecting the loan amount disbursed by the 1<sup>st</sup> Respondent, amount paid by the 2<sup>nd</sup> Respondent inclusive of the applicable interest, the arrears and the penalties applied.
    - iv. Notice to the 2<sup>nd</sup> Respondent informing him of his default in servicing the loan and the 1<sup>st</sup> Respondent demand that he remedies the same.



- v. Formal notice to the Petitioners informing them that the 2<sup>nd</sup> Respondent had defaulted in servicing the loan and the 1<sup>st</sup> Respondent's demand that they remedy the 2<sup>nd</sup> Respondent's default.
  - vi. The 1<sup>st</sup> Respondent formal notice to the Petitioners and its intention to exercise the right to recover the 2<sup>nd</sup> Respondent's loan arrears from the Petitioners' savings.
- b. A Declaration that the 1<sup>st</sup> Respondent has denied, violated and/or infringed upon the Petitioners' fundamental rights as enshrined in Article 35(1)(b) and Article 50 of the Constitution of the Republic of Kenya
  - c. A Declaration that the 1<sup>st</sup> Respondent denied, violated and/or infringed upon the Petitioners' fundamental rights as enshrined in Article 35(1)(b) and Article 50 of the Constitution of the Republic of Kenya will greatly prejudice the Petitioners' impending claim against the 2<sup>nd</sup> Respondent and/or the 1<sup>st</sup> Respondent at the Cooperative Tribunal.
  - d. Damages be awarded to the Petitioners against the 1<sup>st</sup> Respondent and/or the 2<sup>nd</sup> Respondent.
  - e. Such further orders as this Honourable Court deems fit and just in the circumstances.
  - f. The costs of this Petition be awarded to the Petitioner against the 1<sup>st</sup> Respondent.
2. The Petitioners hold that they are members of the 1<sup>st</sup> Respondent together with the 2<sup>nd</sup> Respondent. The Petitioners avers that as a member of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent borrowed a loan of Kshs 6,736,505.00 repayable with 1% monthly interest within a period of forty-eight (48) months from 15<sup>th</sup> November, 2013 under a Loan Agreement No 12446 and whereby they executed guarantees for the 2<sup>nd</sup> Respondent as security for her.
  3. According to the Petitioners, the 2<sup>nd</sup> Respondent defaulted in servicing the loan and as a result, it attracted a penalty charge of 3% of the monthly repayment plus a 1% monthly interest charge on the outstanding loan balance totaling to Kshs 3,509,280.74 as at 9<sup>th</sup> June, 2021 and the 1<sup>st</sup> Respondent recovered the loan arrears by deducting the same from the Petitioners as follows:
    - i. Joseph Wambua Kithitu – 1<sup>st</sup> Petitioner Kshs 1,049,667.09
    - ii. Angeline Kaleeh Musava- 2<sup>nd</sup> Petitioner Kshs 824,738.43
    - iii. Ruth Njoki Ngángá – 3<sup>rd</sup> Petitioner Kshs 996,826.10
  4. The Petitioners contends that despite copying them with the correspondences issued to the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent did not issue them with any statements for the loan account or a breakdown of the loan to justify the loan arrears or even issue them with a formal demand notice for the Petitioners to settle the arrears as guarantors which is a mandatory legal requirement.
  5. The Petitioners aver that they issued the 2<sup>nd</sup> Respondent with a demand notice for a refund of the sums of monies deducted from their savings accounts which the 2<sup>nd</sup> Respondent has refused to pay.
  6. The Petitioners hold that they intend to file a suit at the Cooperative Tribunal for recovery of their monies and to do so, they will require all the documents they are praying for in this Petition. It is also the Petitioner's claim that they need these documents to prove their case against the Respondents. They argue that the 1<sup>st</sup> Respondent refused to provide the documents for the reasons that they are personal in nature but they state that by virtue of being guarantors they are privy to the contract.



7. The Petitioners hold that by the actions of the Respondents, their constitutional rights have been infringed hence they seek a declaration that their fundamental rights have been infringed.

### **The Responses**

8. In response, the 1<sup>st</sup> Respondent filed its Replying Affidavit through its Loans Recovery Manager, Josephine Mumbe Maingi sworn on 12<sup>th</sup> July, 2022. The 1<sup>st</sup> Respondent confirms granting the 2<sup>nd</sup> Respondent a loan for Kshs 6,736,505.00 which was guaranteed by the Petitioners in the sum of Kshs 1,400,000.00 for the 1<sup>st</sup> Petitioner, Kshs 1,100,000.00 for the 2<sup>nd</sup> Petitioner and Kshs 1,329,523.00 for the 3<sup>rd</sup> Petitioner.
9. The 1<sup>st</sup> Respondent argues that the Petitioners were notified that the 2<sup>nd</sup> Respondent had defaulted in the loan repayment and that they had a chance to notify the 2<sup>nd</sup> Respondent to repay the loan before their deposits were deducted. It further holds that the loan application form had clear terms on loan guarantee that in the event of default in the loan repayment the deposits of the guarantors would be utilized as security for the same and the 1<sup>st</sup> Respondent was authorized to deduct any balance, interest and costs pertaining to the loan from the securities pledged and on that basis the 1<sup>st</sup> Respondent holds that it proceeded and recovered their loan from the Petitioner's deposits.
10. The 1<sup>st</sup> Respondent argues that the Petitioners ought to have obtained a copy of the loan application form from the 2<sup>nd</sup> Respondent at the point of execution of the guarantee forms. It holds that it is not obligated to furnish the documents to the Petitioners without the authority of the 2<sup>nd</sup> Respondent since it is private information under the [Data Protection Act](#) and against the right to privacy under the [Constitution](#) of Kenya.
11. The 1<sup>st</sup> Respondent also contends that this Court lacks jurisdiction to entertain the Petition as the court of the first instance is the Cooperatives Tribunal and therefore this Court should dismiss the Petition.
12. The 2<sup>nd</sup> Respondent filed Replying Affidavit sworn on 17<sup>th</sup> July, 2022 opposing the Petition on the basis that the Petition does not disclose any violation of the Petitioner's rights under Article 35 of the [Constitution](#) of Kenya and that, if there is any such violation, the Petitioners have not exhausted the existing dispute resolution mechanisms to warrant the intervention of this court as it lacks the original jurisdiction to hear and determine the Petition.
13. The 2<sup>nd</sup> Respondent argues that under Section 14 of the [Access to Information Act](#) provides for a remedy of filing a review application to the Commission on Administrative Justice where a party believes that his right to information has been infringed. The 2<sup>nd</sup> Respondent argues that under Section 23 of the [Access to Information Act](#), the High Court is only clothed with the appellate jurisdiction.
14. The 2<sup>nd</sup> Respondent contends that since the Petitioners have not proven an infringement of their constitutional rights and have filed the Petition prematurely, the same ought to be dismissed with costs.
15. The Petitioners filed Supplementary Affidavit sworn by the 1<sup>st</sup> Petitioner on his own behalf and on behalf of the other Petitioners on 3<sup>rd</sup> August, 2022. They dispute the allegation by the 1<sup>st</sup> Respondent that the loan contract was separate from the contract of guarantee. On the issue of this Court's jurisdiction, they hold that the Cooperative Tribunal lacks jurisdiction to handle a dispute on infringement of rights of access of information under Article 35 (1)(b) of the [Constitution](#) of Kenya since such jurisdiction is only conferred upon the High Court under Article 165 of the [Constitution](#) of Kenya.



## The Submissions

16. In their Submissions dated 26<sup>th</sup> August, 2022, the Petitioners have raised two issues for determination being:-
  - a. Whether this Honourable Court lacks jurisdiction to entertain the matter;
  - b. Whether the Petitioners are entitled to the documents sought in prayer No (1) and if the denial of such documents constitute to denial and violation of Petitioners Constitutional rights.
17. The 1<sup>st</sup> Respondent submissions are dated 23<sup>rd</sup> September, 2022 and it has raised five issues for determination:-
  - a. Whether this Honourable Court has jurisdiction to entertain the suit filed by the Petitioners?
  - b. Whether the Petitioners are entitled to the documents indicated under Clause 2.4 of the Petition.
  - c. Whether the existence of a contract of guarantee between the Petitioners and the 2<sup>nd</sup> Respondent estoppes the Petitioners from claiming as against the 1<sup>st</sup> Respondent?
  - d. Whether there has been a violation of the Petitioner's rights?
  - e. Whether the court should grant the orders sought at pages 7-8 of the Petition from Clause 1-6 both inclusive.
18. The 2<sup>nd</sup> Respondent's main issue for determination is whether there has been violation of the Petitioners rights.

## Analysis and Determination

19. Having read through the affidavits in support of and rebuttal of the Petition alongside the submissions filed by the parties herein, this Court finds the common issues that arise for determination are:-
  - a. Whether the court has jurisdiction to handle the Petition.
  - b. Whether the Petitioners are entitled to the orders sought.

## Whether the court has jurisdiction to handle the Petition

20. For any court, the starting point is to establish whether or not it has jurisdiction because without it, a court has to down its tools. This was stated in the locus classicus case of *The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1, where Nyarangi J.A. held as follows:-

"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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'



21. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia v KCB & 2 others*, Civil Application No 2 of 2011 has gone on to hold that:-

“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”

22. In this instant case, the 1<sup>st</sup> Respondent is a Sacco regulated by the Cooperatives *Societies Act* and the Petitioners and the 2<sup>nd</sup> Respondent are its members, either past or present, so that any dispute arising between them is required to be referred to the Cooperatives Tribunal at the first instance. And in the event an award is issued and either party is aggrieved by the said award, the party can then move to the High Court on appeal.

23. This procedure is provided for under Section 76 of the *Co-operative Societies Act*, Cap 490 of the Laws of Kenya which provides as follows:

“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.
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.”



24. In the case of *Republic v Cooperative Tribunal & 2 others Ex Parte Jackson Wekesa Abala* [2019]eKLR, faced with similar issues as this case, the court held that the Cooperative Tribunal has jurisdiction to deal with disputes between the members of the Tribunal as guarantors and the Society. It held:-

“ A literal and ordinary interpretation of the section is that where the parties to a dispute are current or past members of a co-operative society, or members of a cooperative society and the society, or between two co-operative societies; and the subject matter of the dispute is the business of a co-operative society, then the dispute shall be referred to the Tribunal. Section 76(2) proceeds to give examples of such disputes and is not exhaustive in this respect. In the present application it is not in dispute that the Applicant and Interested Parties are members of the Law Society of Kenya SACCO, which is a co-operative society. It is also not in dispute that the Interested Parties guaranteed a loan which was advanced to the Applicant by the Law Society of Kenya Sacco.

The specific relief sought by the Interested Parties in their claim before the Respondent in Co-operative Tribunal Case No 149 of 2018 was a refund by the Applicant of Kshs 400,000/= and Kshs 150,000/= to be paid to their respective Law Society of Kenya SACCO Accounts. Their dispute thus concerned the refund by the Applicant of monies they paid to settle his loan obligations with the Law Society of Kenya SACCO. It is thus my finding that the Respondent was properly seized of the claim filed before it by the Interested Parties in in Co-operative Tribunal Case No 149 of 2018, as it involved the business of refund of a loan payment to the Law Society of Kenya SACCO by the Interested Parties on behalf of the Applicant, who are both members of the said SACCO.”

25. It therefore follows that the appropriate forum to handle the dispute herein is the Cooperatives Tribunal as it concerns the 1<sup>st</sup> Respondent and its members being the Petitioners as guarantors and the 2<sup>nd</sup> Respondent as the borrower.
26. Looking at the prayers sought in this Petition, they relates to access to information which the Petitioners claim they were denied information and documents relating to the loan account. As a starting point, Article 35 of the *Constitution* of Kenya gives the right of access to information to every citizen with respect to information held by the state and any person required for the exercise or protection of any right or fundamental freedom.
27. The legal instrument that deals with the issue of information is the *Access to Information Act*. Section 4 of the said Act provide as follows: -

“Right to information (1) Subject to this Act and any other written law, every citizen has the right of access to information held by— (a) the State; and (b) another person and where that information is required for the exercise or protection of any right or fundamental freedom. (2) Subject to this Act, every citizen's right to access information is not affected by— (a) any reason the person gives for seeking access; or (b) the public entity's belief as to what are the person's reasons for seeking access.”

28. The Act provides for the process of accessing these information under Section 8 thereof which is made through an application which is processed as per the provisions of Section 9 of the Act. And depending on the response issued, Section 14 of the Act provides that an Applicant may apply in writing to the Commission requesting for a review of the decision of the public or private entity. It is therefore given that there is a right to access information unless there is a limitation of such rights under Section 6 of the Act.



29. The procedure for applying for review is set out under Section 14 of the Act as follows:-
1. “Subject to Sub-section (2), an Applicant may apply in writing to the Commission requesting a review of any of the following decisions of a public entity or private body in relation to a request for access to information—
    - a. a decision refusing to grant access to the information applied for;
    - b. a decision granting access to information in edited form;
    - c. ...
  2. An application under Sub-section (1) shall be made within thirty days, or such further period as the Commission may allow, from the day on which the decision is notified to the Applicant.
  3. The Commission may, on its own initiative or upon request by any person, review a decision by a public entity refusing to publish information that it is required to publish under this Act.
  4. The procedure for submitting a request for a review by the Commission shall be the same as the procedure for lodging complaints with the Commission stipulated under section 22 of this Act or as prescribed by the Commission.”

30. It therefore follows that there is an express procedure of obtaining information under the Act which ought to be followed and therefore there is no justification in the Petitioners opting to approach this Court before exhausting all other provided avenues. In the case of *Commission for Human Rights & Justice (CHRJ) & Another v Chief Officer, Medical Services County Government of Mombasa & 3 Others* (Constitutional Petition E003 of 2022) [2022] KEHC 12994 (KLR) (21 September 2022) (Judgment) the High Court stated as follows:-

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks judicial review of that action without pursuing available remedies before the agency itself or as stipulated by the governing statute...

The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & another v Samuel Munga Henry & 1756 others* [2015] eKLR, where it 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 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...This accords with article 159 of the *Constitution* which commands courts to encourage alternative means of dispute resolution.”

The Petitioners ought to have exhausted the mechanism provided under the *Access to Information Act* before approaching this court. This petition offends the doctrine of exhaustion of remedies. On this ground alone, the Petitioners' Petition fails.”



31. The upshot is that there is nothing to show that there was infringement of rights to information as there is a clear procedure for in the law for a party to access information under the [Access to Information Act](#).
32. The Petition dated 12<sup>th</sup> April, 2022 therefore lacks merits and is hereby dismissed with costs to the Respondent.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21<sup>ST</sup> DAY OF JULY , 2023.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Nyoike counsel for Petitioners

No appearance by and for the Respondents

Court Assistant - Martin

