



**Biashara Sacco Society Ltd v Mwangi (Civil Appeal 66 of 2019)
[2023] KEHC 24095 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL 66 OF 2019
M MUYA, J
OCTOBER 19, 2023**

BETWEEN

BIASHARA SACCO SOCIETY LTD APPELLANT

AND

ANN WAIRIMU MWANGI RESPONDENT

(Being An Appeal From The Judgment Of Hon P. Mutua Spm In Nyeri Cmcc No. 149 Of 2016)

JUDGMENT

Background

1. The appellant Biashara Sacco being dissatisfied with the Judgment in the Lower court dated 5th November 2019 has filed this appeal which is premised on the following grounds:-
 1. That the learned magistrate erred in law in failing to find that the court had no jurisdiction to deal with the matter by dint of Section 76 (1) of the Co-operative Societies Act Cap 490 Laws of Kenya.
 2. That the learned magistrate erred in Law failing to find that the court suit before him offended the provisions of Section 6 of the Civil Procedure Act and rules 2010 as the issues before it were directly and substantially before the co-operative tribunal in Tribunal case No.2 of 2012 Michael Mwangi Kinyua v Biashara Sacco Society Ltd and Nyeri Hcc A No.1 OF 2012 Michael Mwangi Kinyua v Biashara Sacco Society Limited which matters are still pending.
 3. That the learned magistrate erred in Law and fact in proceeding to find that the title be discharged as security whereas there was no conclusive evidence before him that the subject loan had fully been paid.



4. That the learned Magistrate erred in Law and fact in totally mis- constraining the evidence before him and proceeding to write Judgment based on more assumption devoid of any conclusive evidence or at all.
5. That the learned Magistrate Misdirected himself in law and fact thus causing gross injustice to the appellant.

Appellant's Submissions

- 2 The appellant contends that the learned Magistrate did not have Jurisdiction to hear and determine the case at hand as it was contrary to the provisions of section 76 of the *co-operative societies Act*. Further that the Respondent and her husband (who was PW2) had clearly indicated that the subject matter in issue before the court was the same in the tribunal and the High Court and that the appellant was suing as the registered owner in the lower court and the Respondents husband was suing as a holder of power of Attorney in the tribunal and the High Court. The learned Magistrate had found that the parties were not the same which was an erroneous conclusion; the further found that the previous suits were not pending before any court which was not correct as PW3 had admitted a cross-examination that the tribunal matter was still pending.
3. It is submitted that the finding by the learned magistrate that the security had been fully discharged was erroneous for lack of evidence and the fact that there was no evidence on the value of the shares belonging to PW2 ; More so when PW2 had admitted, that the appellant had declined to set off his shares as against the amount due and owing.
4. Further that PW2 had admitted that the appellant had ruled that he had no shares and that appellant still contends that the issue of shares is still alive and pending before the Tribunal. That there was no strict proof by the Respondent as to full payment as required by Law and the learned Magistrate finding and order were not based on evidence adduced before him. Reliance is placed in the case of *Jadua Karsan-v- Anam Singh Bhogal* (1953) 20 e KLR 74

Respondents Submissions

5. It is submitted that the Respondent is the registered proprietor of all that piece of land known as LR Nyeri/Mweiga/659.
- 6 The Respondent was a member of the appellant who took a loan with the said appellant and also guaranteed her husband one Micheal Mwangi Kinyua who was an executive member of the appellant by reason of being the vice chairman. She used her title as security for her loan and also as a guarantor for a loan advanced to her husband Michael Mwangi Kinyua and one Charles Mathiganu.
7. That the appellant vide a letter dated 6th January, 2012 consolidated all the loans which amounted to Ksh3856,371/= and wrote to Michael Mwangi (PW 2) requiring him to offset the said loan arrears by 12 -1-2012 failure to which the said property would be sold by way of a public auction. "the said Michael Mwangi wrote to the appellant suggesting that his shares amounting to Kshs 3,960,851 be utilized instead. The appellant refused to offset the loan with the shares as requested and proceeded to instruct an auctioneer to sell the Respondents parcel of land which had been issued as security.
8. The appellant failed to give the Respondent the mandatory statutory notices and the High court in its Judgement in HCCA no 130 of 2012 delivered on 8/5/2015 found March in the appeal and granted an injunction staying sale of the Respondents property until the Statutory notices were properly served.



9. It is further submitted that the Judge had instructed Respondents husband to deposit the decretal amount of Kshs 3,856,371/=. After the Judgment was delivered, the appellant through their advocate wrote to Michael Mwangi Kinyua giving him the Mandatory 90 days statutory notice from 19th May 2015 demanding payment of Ksh 3,856,371/=
10. Through correspondence by counsel for the appellant and Michael Mwangi an agreement was reached whereby counsel for the appellant would release the title to LR Nyeri/Mweiga/659 after Michael Mwangi Advocate instruct Co-operative Bank to release the money held in the fixed deposit account.
11. It is further submitted that the appellants advocate received the money in instalments including the interest accrued overtime. However it failed to discharge the title deed for LR Nyeri/Mweiga/659 to the Respondent.
12. After several requests for the release of the title were made albeit unsuccessfully, the Respondent decided to file a case in Nyeri CMCC No.149 of 2016. It is the contention by the Respondent that the appellant is holding her title illegally as there is no evidence that she owes the appellant any money. It is Respondents submission that the appellant has no claim against the Respondents submission that the appellant has no claim against the Respondent whatsoever as her loan of Ksh 327 978/= was consolidated with one advanced to Michael Mwangi Kinyua and Charles Muthingani making a total of Kshs 3,856,371/= and which amount was paid in full on 10th November, 2015 when the money held at a fixed deposit account was released to the appellants advocate.

Jurisdiction

13. It is submitted that the learned Magistrate had Jurisdiction and that the issue had been heard by the court and the appellant never appealed against the said decision.

Subjudice

14. That the parties in the Co-operative Tribunal case no. 2 of 2012 are *Michael Mwangi -v- Biashara Sacco Society Limited*. Parties before PMCC No.149 of 2010 were Ann Wairimu Mwangi v Biashara Sacco Society Limited.
15. That the appeal lacks merit and it ought to be dismissed and the decision of the learned Magistrate ought to be upheld.

Analysis and Conclusion

Issues for determination.

- a. Whether the learned Magistrate had Jurisdiction to try and determine the matter?
- b. Whether the suit was subjudice?
- c. Whether the appeal has merit?

Whether the court had Jurisdiction to try the matter?

16. In the court of appeal case of *owners of the motor vessel Lillian S versus Caltex Oil (Kenya) Ltd* (1989) KLR Nyarangi JA observed thus: -

“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 the opinion that it is without Jurisdiction”

17. In the supreme court of Kenya case of *Samuel Kamau Macharia v KCB & others*, civil application no.2 of 2011.It was held:

“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”

18. In the present matter the appellant contends that the lower court did not have Jurisdiction by dint of Section 76 (1) of the *Co-operative Societies Act* which provides:- “if any dispute concerning the business of a co-operative society arises;

- a. Among members, past members and persons claiming through members, past members or deceased members
- or
- b. Between members past members or deceased members and the society, its committee or any officer of the society and any other co-operative society; or
- c. Between the Society and any other Co-operative Society.

19. It shall be referred to the tribunal.

20. It is instructive to note that the appellant had raised a preliminary objection in the lower court on Jurisdiction and subjudice. The learned Magistrate determined that there was no evidence that the tribunal Claim no 2 of 2012 was still pending and he proceeded to have the preliminary Objection struck out.

21. A proper reading of that ruling shows that there was indeed a claim before the Tribunal, only that it was not sufficiently clear whether it was still pending or not. The lower court was informed that the Respondents husband had filed a claim in the Tribunal praying for orders that the title subject matter of this appeal be released to him. This application was dismissed by the tribunal.

22. In this appeal it is not denied that the Respondent was a member of the appellant who took out a loan with the co-operative and also guaranteed her husband one Michael Mwangi Kinyua who was vice-chairman. She used her title deed for LR Nyeri/Mweiga/659 as security for her loan and was guarantor to that of her husband and one Charles Muthigani.

23. The Respondent clearly admits that she was a member of the appellant a fact which the lower court to seems to have ignored. Her dispute with the appellant fell under section 76 of the *Co-operative Societies Act* Squarely which stipulates that such disputes must be referred to the Tribunal. The lower court did not have Jurisdiction to try and determine the matter.

Whether the Suit was Subjudice?

24. 8.6 of the *Civil Procedure Act* provides:-

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between the same parties or between parties under whom they claim or



any of them Claim, litigating under the same title, where such suit or proceedings is pending in the same or any other court having Jurisdiction in Kenya to grant the relief claimed”

25. The matter in the Tribunal was between Michael Mwangi Kinyua (Respondents husband) and Biashara Sacco Society. The High Court Appeal Case No.130 of 2022 was between Michael Mwangi Kinyua and Biashara Sacco Society Ltd. The suit in the lower court was between the Respondent Anne Wairimu Mwangi and Biashara Sacco Society. The parties are different, however the subject matter is substantially the same. In the lower court the Respondent was seeking the release of title LR Nyeri/Mweiga/659 whereas at the tribunal Michael Mwangi Kinyua had used the same title to borrow money and was demanding its release and had claimed that he had power of attorney from the Respondent. This power of attorney creates a legal Nexus between the Respondent and the said Michael Mwangi Kinyua her husband.
26. The same dispute was before the High court which made orders for the transfer of the matter to the Tribunal for hearing and determination in the Joint account, the interest accrued the moneys paid out to the Respondent in satisfaction of the claim, the disputed notification for sale, auctioneers fees the taking of accounts and the surplus or deficit.
27. It is abundantly clear that the subject matter was the same in the lower court, the tribunal and the High court. The parties were essentially the same.
28. The Respondent was suing in the lower court as the owner of the title in question. Michael was suing as the holder of power of attorney of the same title. Thus this suit fell squarely under section 6 of the *civil procedure Act*. The learned Magistrate had no Jurisdiction to entertain and determine the matter by dint of section 76 of the *Co-operative Societies Act* as the Respondent and her husband were members of the appellant a Co-operative Society. The order for the discharge of the title was premature as can be alleged by the orders and determination of the High court which ordered for the transfer of the matter back to the tribunal for taking of accounts and determination of the moneys deposited in the account and interest accrued.
29. I am satisfied that the appeal has merit and it’s allowed as prayed. Costs to the Appellant.

JUDGEMENT READ, DELIVERED IN OPEN COURT THIS 19TH DAY OF OCTOBER, 2023.

HON. JUSTICE M. MUYA

JUDGE

In the presence of

Nganga for the Appellant

Miss Maina for Respondent

Court Assistant: Kinyua

30 days R/A.

