



REPUBLIC OF KENYA



**Ekumam & 23 others v Kiama (Sued as Liquidator of Mwasiliano Sacco Society Limited) & 2 others
(Civil Case 201 of 2016) [2025] KEHC 13379 (KLR) (Civ) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 201 OF 2016

JN MULWA, J

SEPTEMBER 25, 2025

BETWEEN

MARK EKAAL EKUAM	1ST PLAINTIFF
JACKSON MUTHUSI	2ND PLAINTIFF
LAWRENCE MUGAMBI	3RD PLAINTIFF
DAVID RONO	4TH PLAINTIFF
PACIFIC KEMUNTO OMAMBIA	5TH PLAINTIFF
LILY CHEPNGENO	6TH PLAINTIFF
ELIZABETH ODHIAMBO	7TH PLAINTIFF
DAVID THIONGO	8TH PLAINTIFF
ONESMUS MAINGA	9TH PLAINTIFF
CHARLES GAKUO	10TH PLAINTIFF
KENNETH NABOLA MURUNDU	11TH PLAINTIFF
THOMAS NYANGITO BURUNO	12TH PLAINTIFF
JAMES KIPLANGAT KIBET	13TH PLAINTIFF
SIMUYU MAKOBOLA	14TH PLAINTIFF
JOHONA KOSKEI	15TH PLAINTIFF
SARAH ERENG	16TH PLAINTIFF
PHILIP MWANTHI	17TH PLAINTIFF
PETER MUTUKU KANZI	18TH PLAINTIFF



DAVID SURI NDOIGA 19TH PLAINTIFF
KENNEDY SURA PAMBA 20TH PLAINTIFF
WILSON K ROB 21ST PLAINTIFF
NICHOLUS K TUM 22ND PLAINTIFF
JOSHUA K YEGO 23RD PLAINTIFF
AGNES NYAMBURA NGURE 24TH PLAINTIFF

AND

PETER WANJOHI KIAMA (SUED AS LIQUIDATOR OF MAWASILIANO SACCO SOCIETY LIMITED) 1ST DEFENDANT
METHUSELA ONCHIRI (SUED AS LIQUIDATOR OF MAWASILIANO SACCO SOCIETY LIMITED) 2ND DEFENDANT
CO-OPERATIVE BANK OF KENYA LTD 3RD DEFENDANT

JUDGMENT

1. By way of a plaint dated 27/07/2016 and amended on 30/05/2017, Mark Ekaale Ekuam, Jackson Muthusi, Lawrence Mugambi, David Rono, Pacific Kemunto Omambia, Lily Chepngeno, Elizabeth Odhiambo, David Thiongo, Onesmus Mainga, Charles Gakuo, Kenneth Nabola Murundu, Thomas Nyangito Buruno, James Kiplangat Kibet, Simiyu Makobola, Johona Koskei, Sarah Ereng, Philip Mwanthi, Peter Mutuku Kanzi, David Suri Ndoiga, Kennedy Sura Pamba, Wilson K. Rob, Nicholas K. Tum, Joshua K. Yego and Agnes Nyambura Ngure (hereafter the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd & 24th Plaintiff/Plaintiffs) filed suit against Peter Wanjohi Kiama & Methusela Onchiri (sued as joint liquidators of Mawasiliano Sacco Society Ltd) (hereafter the 1st & 2nd Defendants) and Co-operative Bank of Kenya Ltd (hereafter the 3rd Defendant) seeking judgment against the 3rd Defendant for -;
 - a. Release of Kshs. 23,387,321.25/- to the 1st and 2nd Defendants to account to the members of the former society;
 - b. A declaration that the 3rd Defendant is illegally withholding 23,387,321.25/-.
 - c. Costs of the suit.
 - d. Interest on (a) from 22/02/2013 at commercial rates until payment in full
2. It was averred that at all material times to the suit the Plaintiffs were former members of Mawasiliano Sacco Society Ltd (hereafter the Sacco) who contributed to the purchase of LR. No. 209/13958 (hereafter the Suit Property) located at Nairobi South B within Nairobi County. That through an Annual General Meeting (AGM) convened on 19/12/2009, the Plaintiffs resolved to dispose of the suit property, to wit, the proceeds thereof were to apply towards paying dividends to members, refund as shares to members who have withdrawn from membership and advance as loans to remaining members.



3. The plaintiffs claim that later they learned from a former official of the Sacco that the suit property was sold to PJ Petroleum Equipment Ltd on 22/08/2012 for a sum of 24,000,000/- and after deduction of legal fees the sum of Kshs. 23,387,321.25/- was deposited in the Sacco's account number 012XXXXXXXXX80 held and maintained with the 3rd Defendant.
4. It was further averred that on 27/12/2013, the then acting Commissioner for Co-operatives placed the Sacco in liquidation and appointed the 1st and 2nd Defendants as Liquidators, to wit, the latter were bound to account for the sale proceeds of the suit property to members of the society; that upon disposal of the suit property the 3rd Defendant without a Court Order and without authority of its lawful owners attached the sale proceeds in the aforecaptioned account to cover personal loans allegedly borrowed by individual members of the Sacco.
5. Additionally the plaintiffs herein aver that they never borrowed any loan(s) from the 3rd Defendant as such the sale proceeds from the suit property would not be applied to recover personal loans of other members to their detriment and without their consent, hence the attachment of the sale proceeds by the 3rd Defendant was illegal and fraudulently made without their consent; consequently it was averred that the Plaintiffs claim against the 3rd Defendant is for an order directing the 3rd Defendant to release the sale proceeds in respect of the suit property to the 1st and 2nd Defendants as authorized liquidators of the society.
6. The 1st and 2nd Defendant filed a statement of defence dated 16/09/2016 in which they averred that the former officials of the Sacco colluded with the 3rd Defendant to the detriments of the Sacco membership whereas the 3rd Defendant never created a charge with the Commissioner of Co-operatives in respect of the suit property. That the 3rd Defendant is bound in law to revert all proceeds in respect of the sale of the suit property to an escrow account for the benefit of the Sacco membership.
7. It was further averred that the 3rd Defendant unlawfully holds the proceeds of the sale whereas it is bound by law to raise any claim against the former Sacco through the liquidators as provided for under the *Co-operative Societies Act* therefore the suit against them ought to be dismissed with costs.
8. The 3rd Defendant filed a statement of defence dated 13/09/2016 denying the key averments in the plaint meanwhile averred that 1st Plaintiff did not contribute towards purchase of the suit property thus lacks locus standi to lay claim on any proceeds emanating from the realization of the same. It was further averred that the 3rd Defendant entered into various agreements with Mawasiliano Staff Co-operative Savings and Credit Society wherein the 3rd Defendant granted financial accommodation to the Sacco and its members including an M.O.U that facilitated the grant of personal loans to members of the Sacco all secured inter alia by a charge on the suit property.
9. Further it is stated that the proceeds of sale in respect of the suit property went towards partly offsetting the outstanding liabilities owed by the Sacco as had been agreed between the Bank and the Sacco whereas despite applying the proceeds of sale to the latter, the Sacco still has an outstanding balance of Kshs. 59,063,021.35, as at August 2013, which sum remains unpaid and continues to accrue interest at the agreed rate; adding that the Sacco utilized the proceeds of sale to pay the 3rd Defendant pursuant to an agreement between the parties therefore it did not require a Court order to effect such payment.
10. The Sacco stated that the plaintiffs neither challenged the sale of the suit property nor protested on use of the proceeds of sale of the suit property to offset its outstanding liabilities before any Court or tribunal thus they lack capacity to challenge the same.
11. The foregoing, thus formed the state of pleadings prior to hearing of the suit.



Plaintiff's Case and Evidence

12. During the trial, the 1st Plaintiff – Mark Ekaale Ekuam testified as PW1. He identified himself as a sales manager in Nandi County and proceeded to adopt his witness statement dated 27/07/2016 and supplementary affidavit dated 29/10/2016 as his evidence in chief. He further adduced into evidence the Plaintiffs list of documents dated 27/06/2016 as PExh.1.
13. It was his evidence that he joined Mawasiliano Sacco in 1995 and filed the instant case because in 2013 he had made several attempts to obtain his shares refunded as he could not obtain a loan facility. That despite requesting the Sacco for the release of his shares, it responded by stating that it was unable to do so, as it had sold the property; however the 3rd Defendant withheld the said proceeds. He went on to state that the proceeds of sale were over Kshs. 23 million and that at the time the Sacco was banking with the 3rd Defendant.
14. He testified that the Sacco had earlier taken a loan with the 3rd Defendant which was repaid and a discharge issued whereas he is unaware whether a subsequent loan was obtained by the Sacco. He further stated that the Sacco is under liquidation therefore the 1st and 2nd Defendants ought to pay back his share and therefore the suit prayers ought to be allowed as prayed.
15. On cross-examination, PW1 confirmed being a member of the Sacco and at the time was employed by Telkom Kenya whereas Sacco members were employees of the latter. That as at when the Sacco was placed under liquidation he was still a member meanwhile his case is predicated on the fact that the Sacco ought to account for the proceeds of sale of the suit property as held by the 3rd Defendant. He stated to have joined the Sacco in 1995 and that at the time the suit property had already been purchased by the Sacco and later charged in 2001. He further confirmed that the loan taken out by the Sacco was paid in full and a discharge was issued. While referencing the charge document, he stated that the same captured that the borrower was to be advanced finances from time to time by way of loans and overdrafts whereas various facilities were advanced to the Sacco meanwhile the charge was executed by officials of the Sacco.
16. While referencing to the 3rd Defendants list of documents, he confirmed there being a memorandum of understanding in 2004 between the Sacco and the 3rd Defendant, that the Sacco was to act as guarantor for loans issued under the scheme; That various loan facilities were issued to members of the Sacco as against the charge over the suit property and that by 2011 the Sacco was indebted to the bank and sought approval to sell the suit property. He went on to state that the 3rd Defendant response in the letter dated 29/08/2011 agreed by way of private treaty that all proceeds of the sale were to be channeled to the 3rd Defendant to reduce liabilities and the proceeds of sale were applied to offset part of the loans of the Sacco as informed by the Sacco meanwhile he was not aware whether the Sacco had settled all its liabilities to the 3rd Defendant.
17. In re-examination, PW1 maintained that the discharge of charge ought to have absolved all liabilities over the suit property whereas after the latter charge, he has not yet come across any further charge over the suit property. That the Sacco was not obtaining loans from the 3rd Defendant but individual members who had applied. He further stated that the 3rd Defendant did not inform him but rather the Sacco about the proceeds of sale of which he has yet to receive his shares. That the money held by the 3rd Defendant belongs to the Sacco meanwhile the former has not confirmed the existence of a further charge over the suit property.
18. Heward Ndambiri testified as PW2. He identified himself as a farmer in Kirinyaga County and that he was the last Sacco Manager before it was placed into liquidation. He proceeded to adopt his witness



statement dated 16/03/2022 as his evidence in chief. It was his evidence that he joined the Sacco in 1982 when the suit property was owned by members on accord of their contribution of shares from their salaries. He confirmed that the Sacco obtained a loan in 2001 whereafter a charge was registered over the suit property. He went on to state that the PW1 was employed by Telkom Kenya in 1993 and thereafter joined the Sacco with his membership card being issued in 2005 meanwhile all other Plaintiffs were employed in 1992. That PW1's pay slip shows that he was contributing to the Sacco and that all loans were paid off within a year.

19. Under cross-examination, he stated that the Sacco had a membership of about 4300 as at the date of liquidation. He confirmed there being a charge over the suit property that was paid in full and that there was no further charge over the same. He went on to state that there were often unsecured loans and personal loans were secured by the members salaries and not attached to the suit property. The sale of the suit property was authorized by members in a General Meeting held in 2009 and as per the resolution the proceeds were to be utilized to pay members dividends, share and deposit refunds.
20. PW2 maintained that there was no agreement with the 3rd Defendant to utilize the proceeds of sale of the property given that there were no outstanding loans as at 2008; as such the said proceeds remained as property of the Sacco. That the 3rd Defendant did not communicate until the Plaintiff filed suit whereas the liquidators have yet to receive the proceeds of sale from the bank. It was his evidence that there were often borrowings by the Sacco from the 3rd Defendant however the only secured facility was the one issued in 2001. He confirmed there being several loans advanced by the 3rd Defendant to the Sacco and its members. While referencing the letter dated 29/08/2011, he stated that the same captured therein that the 3rd Defendant approved the sale of the suit property on condition that the proceeds thereof be channeled to the bank to reduce the Sacco's liabilities. He stated that he was not a member of the management committee of the Sacco so he was not aware meanwhile the Sacco was liquidated, as members had been retrenched.
21. In re-examination, he reiterated that the suit property that was sold belonged to members of the Sacco and that the 3rd Defendant had no stake in it. That the proceeds of sale were received neither by the Sacco nor the liquidators whereas the reason the same was withheld by the 3rd Defendant was on account of personal loans to members. He stated that the Sacco did not guarantee the loans to confirm that members were employees of Telkom Sacco. That there was a written guarantee by the Sacco for its members' loan meanwhile the initial loan was fully settled and Sacco discharged. He concluded by reiterating that there was no further charge on the suit property therefore the proceeds withheld by the 3rd Defendant ought to be released to the liquidators towards payment of members deposits and shares.

1st & 2nd Defendant's Case and Evidence

22. On behalf of the 1st & 2nd Defendants, Peter Wanjohi Kiama testified as DW1. He identifying himself as the Assistant Commissioner of Co-operatives and that he knew the 2nd Defendant who was his co-liquidator of the Mawasiliano Sacco. He adopted as his evidence in chief his affidavit sworn on 21/10/2016 and proceeded to adduce in evidence the 1st & 2nd Defendant's DExh.1. Being the list of documents dated 16/09/2016.
23. The gist of his evidence was that, as liquidator, his duties concerned taking over assets, realize them and thereafter pay shareholders. That the suit property was part of the assets under management and that as at appointment as liquidator they had established that the suit property had been sold with proceeds thereof held by the 3rd Defendant. He went on to state that before they could access the proceeds as liquidators they were sued vide the instant suit whereas the property was not charged to



- the 3rd Defendant as at their appointment as liquidators. That they did not receive any claim from the 3rd Defendant, as at liquidation, and that the suit property was acquired by the Sacco on behalf of its members therefore the proceeds of sale belonged to the said members. He stated that the personal loans were disbursed through the 3rd Defendant meanwhile the Sacco was only a facilitator vide applications.
24. On cross-examination, DW1 stated that the custodian of the proceeds of the sale of the suit property ought to have been the liquidators of the Sacco and not the 3rd Defendant per in terms of Section 66 of the *Co-operative Societies Act*. He affirmed having been appointed as liquidator in December 2013 and the suit property was sold on 22/08/2012 prior to his appointment. That the personal loans were in respect of members and not the Sacco, to wit, the security deposited with the 3rd Defendant cannot be used to settle loans taken by individual members. He too confirmed that after the discharge in respect of the suit property the Sacco did not execute any further charge therefore the 3rd Defendant is irregularly withholding the said proceeds of sale.
 25. It was his further evidence that he had not filed a list of assets and liabilities in respect of the Sacco and denied that the Sacco had a huge loan with the 3rd Defendant. He conceded to the fact that there were many further borrowings by the Sacco. He maintained that the additional borrowings were not charged as against the suit property and that he was not aware of a memorandum of fulfilment of a first loan meanwhile the same was fully paid in 12 months however the Sacco did not collect the title to the suit property.
 26. DW1 emphasized that by dint of Section 51 of the *Co-operative Societies Act* it was mandatory that a charge must be registered with the Commissioner of Co-operatives. He concluded by stating that officials of the Sacco may have fraudulently dealt with the 3rd Defendant's officials with respect to other loans.
 27. In re-examination, he iterated that there was only one charge in respect of the suit property for Kshs. 5 Million which was repaid in full, stating that any other loans taken out by the Sacco were not secured by the suit property as a new charge must be registered with the Commissioner of Co-operatives and authorized by the Saccos AGM.
 28. With respect to restructuring of outstanding Sacco loans and personal loans, he stated that the same was irregular because a Sacco loan cannot be consolidated with a personal loan. He reiterated that the proceeds of sale ought to have been deposited with the liquidators to settle all creditors including the Plaintiffs who had a stake on the sale proceeds.

3rd Defendant's Case and Evidence

29. On behalf of the 3rd Defendant, John Githinji testified as DW2. He identified himself as a Remedial Officer with the 3rd Defendant and proceeded to adopt his witness statement dated 13/04/2023 as his evidence in chief. He adduced into evidence the 3rd Defendants list of documents filed on 13/09/2016 and supplementary list of documents dated 22/06/2022 as 3rd Defendants DExh.1.
30. It was his evidence that the sum in issue amounting to Kshs. 23 Million was not due to the Plaintiffs because the Sacco's account was overdrawn and in arrears by members. That the 3rd Defendant charged the suit property for the members loan, to wit, the aforesaid amount was the proceeds of the sale in respect of the said property.
31. Under cross examination, DW2 stated that the property was initially charged to secure a loan of Kshs. 5 million in 2001 whereas in the charge there was a condition of repayment that if any loan was advanced to the Sacco it was to be secured by the suit property. He confirmed the advanced amount of Kshs. 5



million was fully repaid together with interest and that upon repayment the title was not discharged until on 25/02/2013, and was not charged again by the 3rd Defendant.

32. The witness stated that the discharge was approved by the 3rd Defendant to facilitate the sale of the property as requested by the Sacco however at the said time, the Sacco was still indebted to the 3rd Defendant. He went on to state that vide a letter dated 05/08/2008 the Sacco requested for a restructure of the loan and consolidation of the same to enable it clear its arrears. That as at discharge, the 3rd Defendant was aware of the restructure and loan arrears amounting to Kshs. 107 million that had been disbursed to the Sacco. He went on to state that from the sale the 3rd Defendant recovered Kshs. 23,398,321.25/- which sum was utilized or credited towards the discharge of charge.
33. While referencing the letters dated 03/04/2001, 04/06/2002 and 07/09/2002, he confirmed that there was no charge created over the loans advanced therein. He however maintained that the Kshs. 23 million was credited to the Sacco account as agreed in a letter dated 22/07/2011. He nevertheless qualified that the latter was merely a letter and not an agreement, meanwhile stated that neither of the Plaintiffs owed the 3rd Defendant any money by way of loans nor was he aware of any personal loans advanced to members of the Sacco.
34. Additionally, the witness stated that pursuant to the memorandum of understanding, the 3rd Defendant was to collect loan forms from the Sacco members for their pays lips to act as security for the loans, to wit, the other facilities advanced were not registered and were unsecured. He confirmed that members of the Sacco personal loans ought not to have been attached to the Sacco, however he emphasized that the money taken by the 3rd Defendant from Sacco members was not irregular. He concluded by stating that he is unaware whether the 3rd Defendant lodged any claim with the liquidators, nor whether proceeds of sale in respect of the suit property was owed to the Plaintiffs.
35. In re-examination, he stated that subsequent loans were premised on the charge as the 3rd Defendant carried out a restructure of the same. The existing security had secured additional and further facilities whereas there were various loans granted to the Plaintiffs that included overdrafts loans, working capital loans, Sacco personal loans and ESS loans. The board members of the Sacco accepted the restructuring and executed the same. He reiterated that proceeds of the sale in respect of the suit property were utilized to reduce the Sacco loan as the suit property was the security.
36. At the close of the trial, parties filed submissions, of which they had an opportunity to highlight.

Plaintiffs Submissions

37. Counsel for the Plaintiffs began his submissions by restating the history of the matter, pleadings and evidence by the respective then proceeded to condense his submissions on six (6) cogent issues for Court's consideration. However, as a preliminary issue, while calling to aid the decisions in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007, Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993, Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749 and Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR as cited in Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] KEHC 7276 (KLR) counsel submitted that the question of the Plaintiffs locus standi was neither pleaded nor raised at the hearing of the suit it is trite that parties are bound by their pleadings. That in any event, there is no dispute that the Plaintiffs were members of the Sacco under liquidation, that they owned the suit property therefore their capacity as members accorded them locus standi pursuant to Article 22 and 258 of *the Constitution*. They called to aid the decision in John Mining Temoi & Anor vs. Governor of County of Bungoma & 17 others [2014] eKLR was cited in the latter regard.



38. Addressing the Court on whether the Sacco had charged the suit property to the 3rd Defendant, counsel began by anchoring his submissions on Section 27(1) of the *Co-operative Societies Act* to assert that the General Meeting is the supreme authority in a Co-operative Society. Further, while placing reliance on Section 49, 50, 51(1) & (2) of the *Co-operative Societies Act* it was submitted that from the evidence before the Court, only one charge was registered in respect of the property, and whereas the purported subsequent charges by the 3rd Defendant were not registered as required by law therefore the latter's application of the proceeds of sale in respect of the suit property was illegal.
39. On whether the Sacco repaid the secured loan in full, it was summarily submitted that the 3rd Defendant failed to tender any evidence that the loan of Kshs. 5 Million was in arrears and or not settled in full whereas a discharge was executed in respect of the same.
40. Concerning whether the 3rd Defendant lawfully applied the proceeds of sale in respect of the suit property towards liquidation of other unsecured loans not related to the loan taken out in 2001, counsel relied on Section 65(1) & (2) of the *Co-operative Societies Act* to posit that DW1 was statutorily mandated to take custody of the all assets concerning the Sacco and argued that from the MOU and Personal Loan Application forms exhibited before Court, it was evident that the Sacco was not a beneficiary of the personal loans and did not commit to take over members obligation or repay the said loans in case of default.
41. Counsel went on to submit that the manner in which the 3rd Defendant expropriated the proceeds of sale was illegal with no material demonstrative of its cause whereas if the suit property was security for the purported loans then the 3rd Defendant was at liberty to exercise its statutory power of sale.
42. While calling to aid Section 27(1) of the *Co-operative Societies Act*, and the decision in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, it was posited that the MOU did not provide for personal loan take over by the Sacco as the 3rd Defendant could not purport to create a charge on the suit property without a resolution of Sacco members. Further, the officials of the Sacco had no powers of their own to commit the assets of the Sacco for loans without the approval of the General Meeting.
43. Submitting on whether the Plaintiffs are entitled to a share of the sale proceeds of the suit property, it was contended that it is not in dispute that the Plaintiffs are former members of the Mwasiliano Sacco, that is under liquidation meanwhile participated in the purchase of the suit property. It was further argued that the Plaintiffs never borrowed any loans from the 3rd Defendant, and therefore it was illegal for the latter to attach their shares in the subject property allegedly to recover loans.
44. It was submitted further that by dint of the letter dated 29/08/2011, the Plaintiffs sufficiently demonstrated that the 3rd Defendant fraudulently colluded with former officials of the Sacco to sell the suit property which was purchased by members of the Sacco; and that the 3rd Defendant equally failed to disclose the loan accounts in question and or how the same were advanced thus to continue holding the suit property as security after discharge in anticipation of further loans was illegal just as realizing the security without having the same registered citing the decision in *Angwenyi & another v National Industrial Credit Bank Ltd* [2004] KEHC 1164 (KLR) in the forestated regard.
45. Counsel further compounded his argument by positing that by dint of Section 66(1) of the *Co-operative Societies Act*, the 3rd Defendant had no authority to direct the Sacco to sell the suit property to settle any debts which were unsecured or not charged; That any claim as against the Sacco ought to have been channeled to the 1st and 2nd Defendants upon liquidations whereas in any event the power to authorize sale of the suit property lay squarely with the Sacco AGM. In conclusion, counsel urged the Court to allow the suit as lodged.



1st and 2nd Defendants Submissions

46. On the part of the 1st & 2nd Defendants, counsel condensed his submissions into five (5) cogent issues. Equally, addressing the preliminary issue of locus standi, counsel shared the position as the Plaintiffs that the issue was not pleaded whereas by dint of Section 21(d) & 42 of the *Co-operative Societies Act*, the Plaintiffs were well within their rights to seek redress to ensure that the proceeds emanating from the sale of the suit property, to wit they contributed, are well utilized for the benefit of members of the Sacco.
47. On whether the suit property was charged counsel summarily submitted that it has since not been disputed by the parties hereto that the suit property was charged in 2001 which loan was fully repaid thereafter a discharge was prepared in respect of the said property. Concerning whether the loan issued to the Sacco was fully repaid, it was submitted that the loan issued in 2001 was fully repaid whereas no further charge was registered either at the land office or with the Commissioner of Co-operatives in respect of the suit property.
48. Submitting on whether the Plaintiffs are entitled to a refund of their shares in the suit property from the proceeds of sale, while equally calling to aid the provisions of Section 66(1) of the *Co-operative Societies Act* counsel argued that liquidators once appointed were vested with the duty to settle the debts of the Sacco. That despite a resolution of the Sacco members to sell the suit property and utilize the proceeds, the 3rd Defendant on its own volition withdrew the said funds from the escrow account and applied the same to offset other loans not secured using the title to the suit property.
49. It was further contended that, if the 3rd Defendant claimed an interest in the suit property the burden of proof was on it to demonstrate the nature of interest claimed. Therefore, having sufficiently established that the proceeds belong to the Sacco, this Court ought to revert the said proceedings to Sacco for onward distribution by the liquidators as mandated by law.
50. Penultimately, while calling to aid the decision in *Nahashon Njenga Nyagah v Savings & Loan Kenya Ltd & Another* [2017] eKLR counsel posited that the 3rd Defendant by issuing conflicting information on various loans without sufficient loan details showing loan accounts for each loan, such ambiguity and doubt ought to be resolved in favour of the Sacco members and or Plaintiffs.
51. In conclusion, counsel relied on Section 79 of the *Land Act* and Section 51 of the *Co-operative Societies Act*, to contend that firstly if there was default by the Sacco, the 3rd Defendant was at liberty of exercise its statutory remedies but not to sell the suit property by private treaty; and secondly having failed to mandatorily register the subsequent charges over the suit property with the Commissioner of Co-operative, the purported charges cannot sustain as such the suit ought to be allowed as prayed.

3rd Defendant's Submissions

52. On its part, the 3rd Defendant by its counsel began by setting out the history and agreed issues in the instant matter, meanwhile proceeded to consolidate three (3) issues for the Court's consideration. Concerning the question of the Plaintiffs locus standi to institute the instant proceedings, while calling to aid the provisions of Section 64 & 66(1) of the *Co-operative Societies Act*, the decisions in *Joseph Muthuri Ikunya & 32 others v Co-operative Bank of Kenya Ltd & 14 Others* [2018] eKLR, *Charles Mbatha Suing as the liquidator of Steel Sacco Society Ltd (in liquidation) v Kenya United Steel Company (2006) Ltd* [2017] KEHC 1678 (KLR) and *Geoffrey Kipkoech v UAP Provincial Insurance Company Ltd & Wilfred Riitho Njeru as Interim Liquidator of Lakestar Insurance Company Ltd (in Liquidation)* [2020] KEHC 4280 (KLR) counsel argued that it is not in dispute that the suit property



- belonged to Mawasiliano Sacco; that the Plaintiffs were former members of the Sacco and that the Sacco is now in liquidation.
53. Additionally, it was submitted that the Sacco was a registered entity capable of suing in its own name in respect of the suit property that was registered in its name whereas by dint of the fact that the Sacco is under liquidation leave ought to have been sought before filing suit or file suit as against the liquidators (herein the 1st and 2nd Defendant). Therefore, in totality of the above, it was submitted that the Plaintiffs suit is fatally defective and ought to be struck out.
 54. On whether the subsequent facilities advanced by the 3rd Defendant were secured by the existing charge over the suit property, while placing reliance on the decisions in *John Karanja Kihagi & Leah Njeri Karanja v Jamii Bora Bank, Ridhika Capital Limited & Jolans Transporters Limited* [2020] KEHC 1797 (KLR) and *Equip Agencies Limited -vs- I & M Bank Limited* [2017] eKLR it was argued that by dint of specific provisions in the charge document, the suit property was a continuing security as such was charged to secure not only the loan advanced in 2001 but all future loans that were advanced. That the Plaintiffs contention that the first loan was discharged and no further charge registered for additional loans is without merit as there was no need to register a further charge on the suit property.
 55. In the alternative, it was submitted that the Plaintiffs failed to evince redemption of the suit property, by way of a certificate of satisfaction of charge, pursuant to Section 53 of the *Co-operative Societies Act*, if indeed a discharge was issued upon payment of the Kshs. 5 Million.
 56. It was further posited that the subsequent offer letter expressly provided that additional loans would be secured by the existing charge of the suit property. That the Sacco was fully aware of the terms of the further advance meanwhile accepted the terms and as a consequence the said advances were secured. The decision in *John Karanja Kihagi* (supra) was cited in the foretated regard. Counsel went on to argue that there was an admission of the charge as at the sale of the suit property. While placing reliance on the decision in *Kibiri & 5 Others v Harambee Savings and Credit Co-operative Society Ltd* [2024] KEELC 1149 (KLR), it was contended that, in any event, the “indoor management rule” was applicable to the Sacco just as companies therefore the Sacco was bound by the actions of its officials and therefore the Plaintiffs cannot now purport that the officials were acting on their own accord.
 57. Counsel went on to argue that the further loans advanced were to the Sacco and not personal loans to the Sacco members as argued by the Plaintiffs. Therefore, the contention that the 3rd Defendant sought to recover personal loans from the Sacco is a red-herring by the Plaintiffs.
 58. As concerns whether non-registration of the further charge with the Commissioner of Co-operatives was fatal, it was submitted that by dint of Section 50 of the *Co-operative Societies Act*, a premium is placed on the law governing the charge (here Section 46 of the Registered Title Act (repealed) as the test for validity while Section 51 of the Act is a secondary requirement for registration with the Commissioner. Therefore, where a charge is properly registered under the applicable land law, it is valid even if it is not registered with the Commissioner of Co-operatives. The sanction for non-registration does not invalidate a charge but amounts to an offence by the officers of the Sacco.
 59. Lastly, it was submitted that notwithstanding the discharge of charge, it is important to contextualize the issuance of the said discharge on the backdrop of sale agreement dated 22/08/2012. That as at the sale of the suit property, it was known to the parties that the same was still charged to the 3rd Defendants, to wit, in order to facilitate a successful sale of the property a discharge was issued by the 3rd Defendant. Thus, by dint of the letter dated 29/08/2011, the proceeds of sale were rightfully applied to reduce the Sacco’s debt. In conclusion, the Court was urged to dismiss the Plaintiffs claim with costs.



Analysis and Determination

60. The Court has considered the pleadings by the respective parties, the evidence and the submissions filed in respect of the matter.

Issues for determination

- a. Whether the Plaintiffs had the requisite locus standi to bring this suit against the Defendants. If the answer is in the affirmative;
 - b. Whether the Plaintiffs have established their case against the Defendants on a balance of probabilities, and if so, whether the Court ought to grant the Plaintiffs the reliefs as sought.
61. This Court has on occasion addressed itself to the importance of pleadings in determining the issues before a Court as pleadings form the thrust of the respective parties' cases. See Court of Appeal decision in *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91. That said, the gist of the respective parties' pleadings had earlier been highlighted in this judgment thus negating the need for restatement. It is further well-trodden that the applicable law on burden of proof, in civil cases, can be clasped by reading of the provisions of Section 107, 108 and 109 of the *Evidence Act*.
62. The impetus of the forestated provisions and the standard of proof in civil liability claims in our jurisdiction, being on a balance of probabilities, was reasonably discussed by the Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR. Thus, ideally, the duty of proving the rival averments contained in the respective parties' pleadings lay squarely with the parties themselves. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:
- “ [The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the Court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of claim. Rebuttal evidence by the defendant...-. The plaintiff must adduce evidence, which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim (Emphasis added).
63. However, before crystalizing the issues for this Court consideration a preliminary question and or legal objection in limine has been raised by the 3rd Defendant and canvassed via the respective parties' submissions challenging the Plaintiffs locus standi to institute the instant proceedings. The gist of the said objection has been addressed earlier in this judgment as highlighted vide the 3rd Defendant's submission. Nevertheless, at the risk of repetition, the 3rd Defendant takes issue with the suit on grounds that Mawasiliano Sacco Society Ltd was a registered entity capable of suing in its own name. Meanwhile by dint of the fact that the Sacco was at the time of institution of the suit under liquidation leave ought to have been sought before filing the suit and or before filing suit as against the liquidators.
64. That said, the 3rd Defendant's preliminary question and or legal objection was vehemently opposed by the Plaintiffs whereas the 1st and 2nd Defendant equally aligned themselves with the Plaintiffs. Pursuant to the said objection, this Court has been called to determine in limine whether the Plaintiffs have the requisite locus standi to initiate and or sustain the instant proceedings.



65. Black's Law Dictionary, Tenth Edition defines locus standi as: "...the right to bring an action or to be heard in a given forum." The Court of Appeal in *James Teko Lopoyetum v Rose Kasuku Watia & 4 others* [2021] eKLR reiterated its decision in *Alfred Njau & 5 others vs. City Council of Nairobi* [1983] eKLR where it held:

"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."

66. In *Sheila Nkatha Muthee v Alphonse Mwangemi Munga & Another* [2016] eKLR where it was held that:

"Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue renders the suit incompetent."

67. Regarding jurisdiction, the famous words of Nyarangi. JA (as he then was) in the locus classicus case of *Owners of the Motor Vessel "Lillian S"* that "...jurisdiction is everything. Without it, a court has no power to make one more step...." still ring true. Here, by the Plaintiffs own pleadings at Paragraph 10 and oral evidence in Court, it is not in dispute that Mawasiliano Sacco Society Ltd was liquidated. Particularly, it was averred that:-

".....on 27th December, 2013 the then Acting Commissioner for Co-operatives placed the former Society in liquidation and by Gazette Notice No. 15698 appointed the 1st and 2nd Defendants herein as liquidators of the former Society".

It can also be garnered from the Plaintiffs own pleadings, that in 2009 the Sacco vide an AGM, resolved to dispose of the suit property, to wit, the same was sold to PJ Petroleum Equipment Ltd in 2012 and the proceeds thereof, less legal fees, remitted to the Sacco's account held and maintained by the 3rd Defendant. Later in 2013, the Acting Commissioner for Co-operatives vide a Gazette Notice ordered the liquidation of the Sacco. Thus, as is, for all intents and purposes it can reasonably be deduced that suit property and proceeds from its sale that are at the heart of the instant suit were in respect of the Sacco, to wit, the 1st and 2nd Defendant were appointed to liquidate the same.

68. Section 64 of the *Co-operative Societies Act*, concerns itself with liquidation of a Co-operative Society whose registration is cancelled under Section 61 or 62 of the Act. While taking judicial notice of the Gazette Notice No. 15698, Vol. CXV -No. 180 of 27/12/2013, the then Ag. Commissioner of Co-operative Development appointed the 1st and 2nd Defendant as liquidators of Mawasiliano Sacco Society Ltd on the premise that the said society ought to be dissolved, pursuant to Section 62(1) of the Act.

69. As rightly argued by the 3rd Defendant, by dint of Section 12 of the Act, a Sacco has the power to sue and be sued and to do all things necessary for the purpose of, or in accordance with its by-laws. Whereas Section 21 of the Act, outlines right of members of a Sacco to appertain;-

A member of a co-operative society shall have the right to:—

- a. attend and participate in decisions taken at all general meetings of the society and vote;
- b. be elected to organs of the society, subject to its by-laws;



- c. enjoy the use of all the facilities and services of the society subject to the society's by-laws;
- d. all legitimate information relating to the society, including: internal regulations, registers, Minutes of general meetings, supervisory committees, reports, annual accounts, inventories and investigation reports, at the society's head office.

70. Section 28 of the [Co-operative Societies Act](#) outlines the management of Co-operative Societies and provides for the establishment of a Management Committee with the power to institute and defend suits and other legal proceedings brought in the name or against the co-operative society. Section 65(2) of the Act states that upon appointment of liquidators.....the property of the Society vests in the liquidator or liquidators from the date on which the cancellation or registration took effect whereas Section 66(1) of the Act provides that for powers of the liquidator which includes among others that power.....to institute and defend suits and other legal proceedings by, and on behalf of, the society in his own name or office, and to appear before the Tribunal as litigant in person on behalf of the society. That said, Section 58 as read with Section 76(1) of the [Co-operative Societies Act](#) provides for the first port of call concerning settling of disputes concerning the business of a Co-operative Society.
71. As rightly argued by the Plaintiffs, while it is trite that parties are bound by their pleading and as such it is incumbent of a party to holistically plead his/her case in their pleadings for the benefit of the adverse party and that submissions cannot substitute pleadings, it is correspondingly trite that a preliminary objection on jurisdiction can be raised at any time. This position was fortified by the Court of Appeal in *Kenya Port Authority v Modern Holding* [2017] eKLR wherein while citing with approval the High Court decision in *Adero Adero & another v Ulinzi Sacco Society Ltd* [2002] eKLR, it observed that:
- “We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raisedat any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”
72. To the above end, it would appear that the Plaintiffs, 1st and 2nd Defendant’s contestation concerning the 3rd Defendant’s failure to plead the question of locus standi would appear otiose, in light of the Court of Appeal’s concurrence with the dicta from this Court.
73. Thus as to whether the Plaintiffs are well clothed with the locus standi to institute the instant suit, the reason the Court has taken the liberty of capturing and reproducing various Sections of the [Co-operative Societies Act](#) is to contextualize the instant suit. The respective parties’ pleadings and requisite undisputed facts pertaining to the instant suit have been captured earlier in this judgment. And what can be particularly localized by the fore stated is that the instant suit was filed after the Sacco was liquidated thus concerning proceeds of sale in respect of the suit property registered and or belonging to the Sacco. As is, for all intents and purposes the proceeds of sale, notwithstanding the propriety of the said sale, by dint of Section 65(2) of the Act vests in the liquidator or liquidators from the date on which the cancellation or registration took effect. Whereas, noting that the sale in respect of the suit property having occurred in 2012, by dint of Section 66(1) of the Act the 1st and 2nd Defendant were endowed with the requisite powers to institute any proceedings as against 3rd Defendant as may concern the proceeds of the suit property.



74. In any event, the purported sale of the suit property arose after the Sacco held its AGM in 2009 and the management committee of the Sacco proceeded to engage the bank. At all material times it was the management committee that engaged the 3rd Defendant at the behest of the Sacco Membership whereas upon appointment of the liquidators, the latter ought to have taken up the mantle of management pursuant to Section 66(1) of the Act. Therefore, the Plaintiffs were not privy to any agreements between the Sacco and the 3rd Defendant hence cannot now purport to usurp the 1st and 2nd Defendant's powers and duties by filing the instant suit.
75. Faced with a similar question, this Court concurs with Omondi, J (as she then was) in *John Ayieko & 49 others v Hesbon M. Kiura & another Official Liquidator of Moi University Savings and Credit Co-operative Society Ltd (In Liquidation on Behalf of the Commissioner for Co-operative Society Development & another [2020] KEHC 9216 (KLR)* wherein she observed that-;
- “On the issue as to whether the applicants have locus standi to file this suit and enforce proprietary rights, the evidence clearly shows that the plaintiffs are not the registered proprietors of the suit property nor do they have any registered interest in the suit property. In the absence of any legal or registrable right by the Plaintiffs, then they cannot purport to defeat the Bank's legal and registered right as a Chargee. It is abundantly clear that there does not exist privity of contract between the applicants and the bank, as the contracts giving rise to the statutory rights of the Bank are between the Bank and the Sacco. There must be a nexus between privity of contract and locus standi in absence of which is that the Plaintiffs are strangers to the contracts between the parties, and cannot purport to enforce or claim under it [see *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR*].”
76. While, it may be true that the Plaintiffs were former members of the Sacco and contributed to the purchase of the suit property, by dint of statutory exclusions and relevant provisions of the *Co-operative Societies Act*, it must equally be remembered that what was presented before the Court was not a Constitutional question, to wit, the Plaintiffs may anchor their claim on Article 22 and 258 of *the Constitution*. The latter provision cannot be a panacea towards establishing locus standi, and as such, the Plaintiffs argument on the same must be faulted.
77. Consequently, this Court reasonably believes that it has sufficiently addressed itself to the question of the Plaintiffs locus standi to institute and or sustain the instant proceeds. By lacking the requisite locus standi, the only reasonable conclusion is that this Court equally lacks the necessary jurisdiction to entertain the instant proceedings.
78. For the aforesaid, as clearly held in the celebrated case of *Mukisa Biscuits (supra)* the court must down its tools. That having been determined, this court will be undertaking an academic exercise in interrogation of issue b) as framed. Accordingly, the Plaintiffs suit is hereby dismissed.
79. Upon consideration of the totality of the entire case, and being aware of legal provisions of Section 27 of the *Civil Procedure Act*, that provides for costs of any action or matter to follow the event, but for good cause, that due to the fact that the 3rd Defendant was under liquidation when the plaintiff instituted the case, a procedural technicality, and further that non of the parties raised the issue of locus standi until during submissions, this court is persuaded to exercise its power and discretion to order that each party does bear own costs of the suit.

It is so ordered.

Delivered Dated and Signed at Nairobi this 25th day of September, 2025



.....
JANET MULWA.
JUDGE

