



Mutuku v Mkono Poa Housing Co-operative Society Ltd (Environment and Land Case E003 of 2023) [2025] KEELC 6236 (KLR) (24 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6236 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE E003 OF 2023
NA MATHEKA, J
SEPTEMBER 24, 2025

BETWEEN

SAMMY KAVUU MUTUKU PLAINTIFF

AND

MKONO POA HOUSING CO-OPERATIVE SOCIETY LTD DEFENDANT

JUDGMENT

1. The Plaintiff states that he was the registered owner of all that land known as Parcel No. Mavoko Town Block 3/2791 measuring approximately 8.820 Hectares having been registered as such and issued with a Title Deed to that effect on 17th September, 2012 by the County Land Registrar, Machakos County. The Plaintiff states that on 2nd July, 2021, he entered into a written Sale Agreement for sale of the parcel No. Mavoko Town Block 3/2791 with the Defendant for a purchase price of Kshs. 26,000,000 (Twenty six million). The Plaintiff states that the Sale Agreement was duly signed by the Plaintiff and the Defendant together with their respective witnesses in the presence of an Advocate of the High Court and the Sale Agreement is valid under the provisions of the Law of Contract. The Plaintiff stated that he honoured the terms of the Sale Agreement entered into between himself and the Defendant on 2nd July, 2021 by availing the Land Control Board consent, executing the Transfer forms and surrendering the original title deed of the parcel No. Mavoko Town Block 3/2791. The Plaintiff states that the Defendant breached the terms of the Sale Agreement dated 2nd July, 2021 when the Defendant paid only part of purchase price totaling to Kshs. 8,000,000/= and unjustifiably refused to pay the balance of the purchase price of Kshs. 18,000,000/= and general damages for the inconvenience occasioned to the Plaintiff by the Defendant's breach of contract.
2. The Plaintiff states that he has been inconvenienced by the Defendant's failure to pay the balance of the purchase price and claims general damages. The Plaintiff states that his claim against the Defendant is for an order of specific performance compelling the Defendant to pay to the Plaintiff the balance of the purchase price of Kshs. 18,000,000/= (Eighteen million).



3. The Plaintiff states that he also claims the general damages for the inconveniences caused to the Plaintiff by breach of the Sale Agreement dated 2nd July, 2021 by the Defendant.
4. The Plaintiff prays for the Judgment against the Defendant for:
 - a. An Order of specific performance compelling the Defendant to pay the Plaintiff balance of purchase price of Kshs. 18,000,000/=.
 - b. General damages for breach of contract.
 - c. Interest on (a) and (b) above from the date of filing the suit.
 - d. Costs of the suit.
5. The Defendant stated that it is the Plaintiff who without any justification whatsoever maliciously, wrongfully and with intent to injure the Defendant procured and or induced the breach of the sale agreement. That the Plaintiff has occasionally backtracked on the terms of the agreement more particularly seeking to have the property revert back to him which has in turn caused the Defendant not to be able to sell the subdivided portions as provided for in clause 10.1.6. The Plaintiff has on occasions refused to accept the proceeds from the sale of the subdivided parcels on account of claiming the entire balance of purchase price contrary to the express provisions of clause 10.1.6 which mandated the Defendant to subdivided the property and sell the subdivisions in order to remit the proceeds to offset the balance of purchase price as is and when sold. The Plaintiff has without reasonable cause frustrated the agreement thereby making it impossible for the Defendant to complete. That the Defendant has always been ready to complete save for the breach by the Plaintiff.
6. The Defendant denies that this court has jurisdiction and avers that the Plaintiff being its member, more particularly Membership No. M00246; was mandated to address any dispute between himself and the Defendant before the Co-operative Tribunal in accordance with the provisions of the *Co-operative Societies Act*. Accordingly, the present suit brought by the Plaintiff is fatally defective and ought to be dismissed forthwith with costs. That this Honourable Court lacks jurisdiction to hear and determine this matter under Section 76(2) of the *Co-operative Societies Act*, Cap 490 of the Laws of Kenya. The Plaintiff's suit is frivolous, vexatious and an abuse of the court's due process and ought to be struck out forthwith.
7. This court has considered the evidence and the submissions therein. On the issue of jurisdiction, that this Court lacks jurisdiction to hear and determine this matter under Section 76(2) of the *Co-operative Societies Act*, Cap 490 of the Laws of Kenya, I have perused the court record. I note that a preliminary objection dated 13th March 2023 was filed and the submissions were made by both parties. By the ruling dated 7th November 2023, Justice Christine Ochieng dismissed the preliminary objection and found it to be premature as it required membership of the Plaintiff and amount outstanding to be ascertained.
8. By his own admission in the plaint, the Plaintiff stated that he honoured the terms of the Sale Agreement entered into between himself and the Defendant on 2nd July, 2021 by availing the Land Control Board consent, executing the Transfer forms and surrendering the original title deed of the parcel No. Mavoko Town Block 3/2791. The Plaintiff states that the Defendant breached the terms of the Sale Agreement dated 2nd July, 2021 when the Defendant paid only part of purchase price totaling to Kshs. 8,000,000/= and unjustifiably refused to pay the balance of the purchase price of Kshs. 18,000,000/= and general damages for the inconvenience occasioned to the Plaintiff by the Defendant's breach of contract.



9. The Defendant submitted that the Plaintiff being its member, more particularly Membership No. M00246, was mandated to address any dispute between himself and the Defendant before the Co-operative Tribunal in accordance with the provisions of the *Co-operative Societies Act*. Accordingly, the present suit brought by the Plaintiff is fatally defective and ought to be dismissed forthwith with costs. That this Honourable Court lacks jurisdiction to hear and determine this matter under Section 76(2) of the *Co-operative Societies Act*, Cap 490 of the Laws of Kenya.
10. The Defendant raised the issue of jurisdiction again in their final submissions. According to the Black Law Dictionary a Preliminary Objection is defined as being;

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
11. The above legal preposition has been made in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696 where the court held that;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”
12. In the case of Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR the court outlined the scope and nature of preliminarily objection as;
 - (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
13. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the preliminary objection by the Defendant herein ought to be determined by the court first to establish the issue of jurisdiction.
14. I have considered the submission on the preliminary objection, section 76 the Cooperatives *Societies Act* and the Plaint. In determining whether the court has jurisdiction to adjudicate the suit I must consider whether the dispute raised concerns the business of the Co-operative Society as provided under section 76 of the *Co-operative Societies Act*. Section 76 of the Act provides for the disputes which fall within the jurisdiction of the Co-operative Tribunal. It provides that;
 - (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 demands 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.
15. The term “business of the Society” used in Section 76 of the *Co-operative Societies Act* in defining a dispute that should be referred to a Tribunal was considered in the case of *Gatanga Coffee Growers Co-operative Society Ltd vs. Gitau (1970) 1 EA 361* as follows;
- “‘business of the Society’ is not confined to the internal management of the Society but covers every activity of the Society within the ambit of its by-law and rules.”
16. At the heart of the preliminary objection is whether a dispute relating to the sale agreement is one that falls within the realm of section 76(1) of the Act and more specifically whether it is a dispute that concerns the business of the society. Parties have referred this Court to various authorities in support of their cases. I am therefore alive to the divergent schools of thought that have been expressed over this question.
17. I am particularly persuaded by the view that where there are clear procedures for the redress of any particular grievances under *the Constitution* or Acts of Parliament, the processes ought to be strictly followed. I say this on the strength of Article 159 of *the Constitution* that recognizes judicial authority exercised by Courts and Tribunals as a vehicle of ensuring that justice is delivered expeditiously. This view was espoused in *Speaker of the National assembly vs James Njenga Karume, (1992) eKLR* by the Court of Appeal.
18. In *Ernest Muiruri Njoroge & 28 Others v Kabira Karanja & 4 Others, C/A 114 of 1997* the Court again held that a dispute brought by members against the office bearers of a Co-operative Society relating to allotment of plots should be heard by the Tribunal. The rationale was that the members could not shed their status as members in connection with the plots. Section 81 of the Act further provides that a party who is dissatisfied by the award of the Tribunal may appeal to the High Court and such an appeal is final. Being the final court in cooperative matters, my view is that it would not be ideal for the Court to assume both appellate and original jurisdictions. This is a view that has been expressed



in decisions including *Charles Keragita Arwenya vs Nyakoe Farmers Co-operative Society Ltd*, (2016) eKLR where the Court recognized that:

“...under S.81 (1) of the Act, any party aggrieved by the order of the tribunal may appeal to the High Court. It would therefore appear that S.76 of the Act ousts the jurisdiction of the High Court in exercising original jurisdiction in disputes involving Co-operative Societies and its members. The only jurisdiction open to the High Court in such matter would be the appellate jurisdiction only.”

19. In my opinion, the business of the Society is to be discerned from Constitution or the by-laws of the Society which indicates the objects for which the Society is established. The words ‘the business of the society’ appearing in section 76 is therefore wide enough to include even the business of sale of land.
20. By the Plaintiff’s own admission as contained in the plaint, the Defendant is a deposit cooperative society duly registered as such under the *Co-operative Societies Act* Cap 490 of the Laws of Kenya. This submission is uncontroverted. He admits being a member of the Society and was allotted eight plots from the suit land. The Plaintiff states that on 2nd July, 2021, he entered into a written Sale Agreement for sale of the parcel No. Mavoko Town Block 3/2791 with the Defendant for a purchase price of Kshs. 26,000,000/= (Twenty six million). That the Defendant has now breached the agreement by not paying the balance of the purchase price and hence seeks inter alia specific performance.
21. For all the foregoing reasons I find that this suit should not have been filed in the Environment and Land Court by dint of the provision of section 76 of the Cooperative *Societies Act*, 1997. The forum with jurisdiction is the Co-operative Tribunal. In the circumstances, my finding is that the preliminary objection has merits. I, therefore, uphold it and proceed to strike out the Plaintiff’s suit with costs to the Defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF SEPTEMBER 2025.

N.A. MATHEKA

JUDGE

