Utabibu Cooperative Sacco v Wanjohi & 4 others (Civil Appeal E1493 of 2024) [2025] KEHC 13411 (KLR) (Civ) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13411 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1493 OF 2024

AC MRIMA, J

SEPTEMBER 30, 2025

BETWEEN

UTABIBU COOPERATIVE SACCO ..... APPELLANT

AND

BANICE WAIRIMU WANJOHI ..... 1ST RESPONDENT

FAITH KATHURE GAICU ..... 2ND RESPONDENT

LINET NYAGAKA MBECHE ..... 3RD RESPONDENT

ROSELINE NJERU ..... 4TH RESPONDENT

DORCAS JEBET KIPSANG ..... 5TH RESPONDENT

(Being an appeal from the judgment and decree of the Cooperative Tribunal in Co-operative Tribunal Case No. 235/E362 delivered on 28th November 2024)

JUDGMENT

Background:

1. The uncontested facts of this case are that, Utabibu Cooperative Sacco, the Appellant herein, advanced Dorcas Jebet Kipsang, the 5th Respondent herein, a loan facility pursuant to a loan agreement. Banice Wanjohi, Faith Kathure Gaicu, Linet Nyagaka and Roseline Njeru, the 1st to 4th Respondents, guaranteed the 5th Respondent the loan facility.

2. As fate would have it, the 5th Respondent defaulted in her repayments. Unable to trace the 5th Respondent, the Appellant pursued the guarantors. To that end, it made monthly deductions on their respective monthly salaries. Aggrieved, the 1st – 4th Respondent lodged a complaint before The Cooperative Tribunal (hereinafter referred to as 'the Tribunal').

3. Upon considering rival arguments the Tribunal took the position that in a loan agreement, a Creditor must first pursue the primary debtor and it is only after it exhausts all the debt recovery avenues in vain that it can seek to recover the loan amount from the secondary debtors. It ordered the Appellant to stop deducting the guarantors' salaries and to refund them what had been deducted.

4. The Appellant was disgruntled with the foregoing findings and lodged the instant appeal.

The Appeal:

5. Through the Memorandum of Appeal dated 17th December 2024, the Appellant sought to set aside the entire judgment on the following grounds: -

    1. The learned members of the Tribunal erred and misdirected themselves when they failed to consider the appellants submissions on both points of law and facts in the appellant procedure for recovery of a debt as per the Credit Policy and Procedures.

    2. The learned members of Tribunal failed to consider the evidence contained in the Credit Policy Procedures Manual under Clause 3.17(d) 3.19(e), 4.2 and 4.3 and the contract of guarantee as to the right of the Appellant to realize all securities including guarantees once it was established that there was a default on a loan.

    3. The learned members of Tribunal erred in law and were biased by prioritizing clause 3.19(d) of the Credit Policy and Procedures Manual over Clause 3.19(c) which allowed the appellant to exhaust normal debt collection procedures before the appellant elects at its discretion to utilize a SACCO lawyer or debt collector.

    4. The learned members of Tribunal erred and misdirected themselves by failing to appreciate their own findings that revealed that the default on the loan was undisputed and that all notices were issued to the guarantors to not only take liability for the loan but also pursue the 5th Respondent to make good her default.

    5. The learned members of Tribunal erred in law by failing to appreciate the well-established principles on the law of guarantees and departed from the case law cited thus arriving at the impugned ruling.

    6. The learned members of Tribunal grossly misinterpreted the Credit Policy and Procedures Manual which is the guiding contract between the Appellant and its members and by insisting on a procedure for recovery that was not applicable to the circumstances of the case delved into the arena of re-writing the contract of the parties.

    7. The learned members of the Tribunal erred and misdirected themselves by failing to appreciate that the appellant is regulated non-withdrawable deposit taking Sacco which is prohibited by section 22(2) of the Sacco Societies Non-Deposit taking business regulation (2020) from releasing shares to members and execution of its Judgments as is would result to an illegality.

    8. That the decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

The Appellant's submissions:

6. In its submissions dated 1st April 2025, the Appellant argued that the Tribunal failed to consider Clause 3.19(c) and instead prioritized the election of a lawyer or debt collector to recover the loan.

The Appellant made reference to the book The Law of Guarantees (2nd Ed) by Geraldine Andrews & Richard Millet where it was observed that: -

> .... a contract to indemnify the creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point.

7. It submitted that its right had crystallized upon receipt by the 1st -4th Respondents of all notices as per clause 3.19 of the Credit Policy and Procedures Manual and they had to exercise their right to call the 5th Respondent to make good her default. It was its case that the 5th Respondent wrote an email to it stating that she would repay the loan in instalments of Kshs. 17,500/-. It was its case that the Respondents were aware of their obligations when the 5th Respondent defaulted in repaying the loan for a period of two months. In buttressing its right to pursue the guarantors, it asserted that the claim that it had to call a lawyer or a debt collector could not stand. It referred to the decision of the Court of Appeal in Fidelity Commercial Bank Limited -vs- Kenya Grange Vehicles Industries Limited eKLR where it was observed thus: -

> .... It is a form of security of guaranteeing payment by a third party. In such cases, the most important factor to consider before liability can attach is whether there has been default. Once default is established and there had been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security.

8. The Appellant further relied on the High Court decision in Rose Chepkurio Mibie -vs- Jared Mokua Nyariki & 2 Others eKLR where it was observed that: -

> .... that unless the parties have agreed through contract, the Guarantor will not be called upon to make good the money owed by the principal debtor, the creditor is under no obligation to first pursue the principal debtor and leave alone the guarantor.

9. In conclusion, it was submitted that if allowed to stand, the judgment of the Tribunal will perpetrate an illegality.

The 1st to 4th Respondents' case:

10. The 1st to 4th Respondents challenged the appeal through written submissions dated 4th April 2025. At the outset, the Respondents urged the Court to reject the new ground of appeal regarding the provision of Section 22(2) of Sacco Societies Non-Deposit Taking Business Regulations from releasing shares to members, a fact which they claimed was not an issue before the Tribunal. They drew support from the case of Republic -vs- Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & Others ex-parte Tom Mbaluto [2018] eKLR.

11. On the question on whether the Tribunal erred in the circumstances of the suit, it was their submission that the principal debtor participated in the matter and has been willing to repay the loan as restructured but that has been frustrated by the Sacco. It was their case further that the Appellant was obligated by its operation manual and procedures and by-laws to take appropriate measures to recover the outstanding loan from a borrower, a fact that goes beyond issuance of notices. It was its case that the Appellant went no further than simply issue letters and text messages. They argued that nothing was adduced to show that the Appellant followed up with the borrower after default to warrant the deduction and withholding of their deposits and shares. They submitted that the procedure laid out in the operation manual and procedures was not followed. They also claimed that the Appellant had

the obligation to exhaust remedies against the 5th Respondent before targeting their deposits and the failure to do so violated both procedure and equity.

12. In conclusion, the 1st - 4th Respondents submitted that there was no good reason the Appellant had not pursued the 5th Respondent despite her commitment and capability to make payment.

The 5th Respondent:

13. Dorcas Jebet Kipsang, the 5th Respondent herein, who is the loanee to the Appellant appeared in this appeal, but did not file any written submissions. She, however, opposed the appeal.

Analysis:

14. On the basis of the foregoing and having carefully considered the record, rival submissions and the decisions referred to, the only issue that emerges for determination is whether the Appellant was scrupulously non-compliant with the recovery mechanisms under the law and its Credit and Policy Procedure Manual.

15. The jurisdiction of this Court is created by Section 81 of the Co-operatives *Societies Act* in the following terms: -

> 81. Appeal to High Court
>
> (1) Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court.
>
> Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.
>
> (2) Upon the hearing of an appeal under this section, the High Court may -
>
> (a) confirm, set aside or vary the order in question;
>
> (b) remit the proceedings to the Tribunal with such instructions for further consideration, report, proceedings or evidence as the court may deem fit to give;
>
> (c) exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought; or
>
> (d) make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.
>
> (3) The decision of the High Court on any appeal shall be final.

16. From the above provision, it can be gleaned that the appeal from the Tribunal to the High Court is both on facts and the law and the decision of the High Court is final. In the case of Susan Munyi -vs- Keshar Shiani [2013] eKLR the Court of Appeal discussed the role of a first appellate Court dealing with issues of facts and the law as hereunder: -

> ... As a first appellate Court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess,

> weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

17. Similarly, in Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates [2013] eKLR the Court set out the role of the first appellate Court in the following terms: -

> ... This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.

18. With the foregoing guidance, a consideration of the issue at hand now follows.

19. The Tribunal adopted the witness statements of the disputants as their evidence-in-chief. Willis Julah, the Appellant's Chief Executive Officer's testimony was that on 10th August 2021, the 5th Respondent applied for a Development loan of Kshs. 2,474,000/- repayable in 72 months and that the 1st to 4th Respondents were the guarantors. On 28th February 2022, the 5th Respondent applied for refinancing of Kshs. 500,000/- which the 1st and 3rd Respondents and another one person jointly and severally accepted liability for repayment in the event of default. It was his evidence that subsequently, the 5th Respondent left the employment at Aga Khan University Hospital leaving the Appellant without an avenue of recovering the loan. He stated that the Appellant sent notices to the 5th Respondent and the 1st- 4th Respondents requiring them to make good the default to no avail leaving the only option being to pursue the guarantors.

20. On their part, the 1st – 4th Respondents evidence was that upon the 5th Respondent defaulting in repayment, the Appellant started deducting and withholding their shares before pursuing the 5th Respondent or asking them to implore the 5th Respondent to make good here repayments. It was their evidence that when they learned of the deductions, they reached out to the 5th Respondent who informed them that she had gone to the Appellant and asked it not to deduct their monies or withhold their shares.

21. Having gone through the documentary evidence, there is no doubt that when the 5th Respondent fell into arrears, the Appellant, in its message dated 21st October 2022, informed the 5th Respondent of the default. Subsequently, it sent a reminder message dated 4th November 2022 whereupon all the guarantors were copied. The message copied to the guarantors indicated that the 5th Appellant was in default and a letter of demand was to be dispatched for purposes of recovery of the loan. A final notice was sent through the message dated 14th December 2022.

22. In the said final notice the Appellant notified the 1st – 4th Respondents that the 5th Respondents was yet to make good the default to the tune of Kshs. 467,751/- and that by virtue of their guarantee, they were under the immediate liability to pay the sum of Kshs. 155,917/= each. The said letter further indicated that unless the monies were paid, the Appellant would institute proceedings for recovery and in such circumstances it would, in its absolute discretion, recover the defaulted sum from either their salary or deposits.

23. Further to the foregoing, there is an email correspondence between the Appellant and the 5th Respondent where the 5th Respondent requested the Appellant not to surcharge the guarantors. A response from the Appellant stated in part as follows: -

> ... in response to your request please note that you are advised by the credit committee to continue making payments.
>
> The loan shall be monitored for some time before any guarantor deduction is stopped...

24. In a subsequent email, the 5th Respondent requested the Appellant to be allowed to liquate the loan at the monthly rate of Kshs. 17,500/=. It turned out that the 5th Respondent did not honour the repayment proposal and the Appellant continued with the deductions against the guarantors, the 1st to 4th Respondents herein.

25. This Court is alive to the fact that the matter at hand is based on a contract of guarantee. As such, the settled legal position is that unless a contract so provides, a Court should exercise restraint from any invitation to rewrite the contract. The Court in Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR, after reviewing case law on the subject reiterated as follows: -

> ... We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.

26. Further, in National Bank of Kenya Ltd versus Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR, the Court was categorical that: -

> ... it is clear beyond peradventure, that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.

27. The above legal rendition aims at ring-fencing the sanctity of contracts between willing parties. However, it should always be remembered that regardless of what parties have agreed and eventually reduced into contractual terms, such must align with *the Constitution* and the law. That will be the only way in upholding constitutionalism and the rule of law in Kenya.

28. In this case, there is no doubt that the 5th Respondent is a defaulter having failed to repay the loan advanced to her by the Appellant. Whereas the principal arrangement between the Appellant and the 5th Respondent was reduced into writing, there was a further and secondary arrangement between the Appellant and the 1st to 4th Respondents in the form of contracts of guarantees. These Respondents were the guarantors to the loan advancement between the principal parties and severally bound themselves in the following inter alia terms: -

> I/We, the undersigned hereby jointly and severally accept liability for the repayment of the borrower's loan in the event of default. I/We understand that the amount in default may be recovered by an offset against our deposits in the society or attachment of our salary two months after the date of such default with or without written notice. I/We hereby authorize the society to recover the amount from our deposit in the society or salary and other benefits [as the society may in its absolute discretion elect].

29. The recovery process was further provided for in the Appellant's Credit Policy and Procedure Manual [hereinafter referred to as 'the Manual']. Clause 3:19 of the Manual is on Collection Procedure and provides as follows: -

a. A notice is to be sent to the loanee within 30 days of default.

b. A reminder notice is to be sent within 60 days to the loanee and copied to the guarantor(s).

c. A final mail notice is sent to the guarantor(s) after which realization of security i.e. deposits and other security pledged may be used to offset the loan balance.

d. The loan balance can be transferred to the debt collector or Sacco lawyer at the expense of the borrowing member (meets all the legal and collection costs associated with collection.

e. The SACCO society may appoint a debt collector after exhausting the normal debt collection procedures.....

30. Therefore, for the undertaking given by the Guarantors to be realized in the event of loanee's default, the Manual stipulated a three-step process being a notice to the loanee, a subsequent notice to the loanee and copied to the guarantors and finally a notice to the guarantors. According to the record, the loanee was notified of the default by the Appellant and the guarantors were equally informed. The guarantors then pursued the 5th Respondent who in turn proposed a restructured repayment plan, but still did not honour her own proposal. The Appellant then proceeded to recover the default loan amount from the guarantors.

31. According to the Merriam Webster Dictionary, the term 'guarantor' means 'a person who undertakes to answer for the payment of a debt or the performance of a duty of another in case of the other's default or miscarriage'. A guarantor is, therefore, an individual or entity that agrees to take on the responsibility of fulfilling a financial obligation if the primary borrower defaults or is unable to meet their contractual obligations. As such, a guarantor's primary role is to offer assurance to a lender or creditor that a financial obligation will be met, even if the primary borrower is unable to fulfil it. They serve as a form of financial security for the lender.

32. The Halsbury's Laws of England 4th Edition Vol. 20 puts the guarantor's obligation as follows: -

> .... On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of the default or previous recourse against the principal....

33. According to The Law of Guarantees (2nd Ed.) by Geraldine Andrews & Richard Millet at pg.156, "a contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point."

34. When a Court is called upon to interpret a contract, the general canons of interpretation usually apply. The Court in Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR discussed the issue as follows: -

... In considering both the validity and tenure of the contract of guarantee, we find no better place to start than the Encyclopedia of Forms and Precedents, 4th Edn, Vol 9-page 761 para 25 where the principles of construction of guarantees were set out as follows;

> The ordinary rules of construction applicable to all contracts also govern the contracts of guarantee. The whole agreement must, in the usual way, be considered, and the natural meaning given to the words used unless such meaning involves obvious absurdity. ...
>
> So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

35. In Mwaniki wa Ndegwa v National Bank of Kenya Ltd & Another (2016) eKLR, the Court of Appeal observed that a guarantor became liable upon default by principal debtor. The Court further remarked that it is not up to the guarantor to see to it that the borrower complies with his contractual obligation but to pay on demand the guaranteed sum.

36. Returning to the case at hand, the Respondents' contention is that the procedure stipulated in the Clause 3:19 of the Manual was not followed. This Court has already reproduced the said provision above. By placing the evidence on record and law side by side, there is no doubt that the Respondents were sufficiently informed of the default and called upon to make good that default. Therefore, the argument that the Appellant was to pursue the 5th Respondent even through its lawyers and to only resort to the guarantors as a last resort cannot be correct. The Manual provided for notice to the guarantors which the Appellant religiously gave out. Further, and more importantly, the 1st to 4th Respondents executed contracts of guarantee which were explicit and placed the recovery of any defaulted loan at the discretion of the Appellant. In any event, the Manual cannot override the express provisions of a contract of guarantee. The Appellant cannot, therefore, be faulted for doing what the parties expressly agreed under contract. It is upon the 1st to 4th Respondents to pursue the 5th Respondent for refund and the Appellant reserves the right to fully recover the amount in default from the Respondents. As such, the Appellant's contention against the judgment of the Tribunal is upheld.

Disposition:

37. Drawing from the foregoing, the appeal is successful and the following final orders do hereby issue: -

    (a) The appeal is merited and the judgment of the Hon. Co-operative Tribunal dated 28th November 2024 is hereby set aside.

    (b) The 1st to 4th Respondents' Statement of Claim dated 6th April 2023 is hereby dismissed.

    (c) The Respondents shall jointly and severally bear the costs of the appeal as well as the costs of the Statement of Claim.

    It so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF SEPTEMBER, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of:

Miss. Wairimu, Learned Counsel for the Appellant.

Mr. Lokitano, Learned Counsel for the 1st to 4th Respondents.

Michael/Amina – Court Assistants.