



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO. E041 OF 2022

IG (INVEST & GROW) SACCO SOCIETY LIMITED

APPELLANT

VERSUS

GABRIEL OCHIENG LINCOLN 1ST

RESPONDENT

ZACHARIA MUKHWANA 2ND

RESPONDENT

ENOCK SHITIKHA 3RD

RESPONDENT

BENARD MUDOGO 4TH

RESPONDENT

SIMIYU JAMES 5TH

RESPONDENT

MAKUNDA ANDANJE 6TH

RESPONDENT

KEFA TISA INDENJE	7TH
RESPONDENT	
FELISTA WAITI	8TH
RESPONDENT	
MMBAKA JACKLINE WAYELA	9TH
RESPONDENT	
CONSOLATA ASUMPHER OKELLO	10TH
RESPONDENT	
JOYCE SHIMULI TORONI	11TH
RESPONDENT	
MWAELEMA K. BEATRICE	12TH
RESPONDENT	

(Being an appeal from the judgment of the Honourable Co-operative Tribunal by B. Kimemia, Chairperson, J. Mwatsama- Deputy Chairperson, G. Kamiti, member, Akusala- member, P. Gichuki- member in Kakamega CTC No. 368 of 2020, delivered on 7th July 2022)

JUDGEMENT

Introduction

1. The Respondents instituted a civil claim against the Appellant at the cooperative tribunal at Kakamega in Cause No. 368 of 2020. They contended that the Appellant had advanced a loan to one of its members, Mwongo Masungu, in the sum of Kshs. 1,831,000/= while they acted as his guarantors. They were later informed, by a letter dated and stamped on 21st July

2020, that the loan advanced to Mr. Mwombe stood at Kshs. 1,609,293/= as it accrued interest of Kshs. 25,748 totalling to Kshs. 1,635,041/=:, and that the board of directors resolved to share the guarantors' names with the Credit Reference Bureau and the balance of Kshs. 1,635,041 would be paid by the guarantors. Each guarantor was to pay Ksh. 125,772/= to be deducted from their salaries, and the Appellant had immediately started attaching their salaries on 28th May 2020.

2. In their claim, the Respondents sought a declaration that the Appellant's action to share their information with the Credit Reference Board and attachment of their salaries for each of them to pay Kshs. 125,772/= to settle the principal debt of Kshs. 1635,041/= was null and void, and the board of directors acted ultra vires of the SACCO's by law.
3. They further sought orders for the taking of accounts and that the Appellant refund them with interest the amounts that they had attached at commercial rates and further an order restraining the SACCO from attaching their salaries, savings and property in the enforcement of the guarantee loan that was advanced

to Mwombe Masungu. They also sought punitive and exemplary damages.

4. In their judgment delivered on 7th July 2022, the tribunal, upon analysing the case before it, the Claimants/Respondents and the Respondent/Appellant's statements and evidence, found that the Board of Directors acted ultra vires the by-laws by resolving to attach the Respondents' salaries without having an annual general meeting, holding that the guarantors ought to have been the last resort in case of the debtor's default.
5. The Tribunal further found in favour of the Respondents by holding that the Appellant had acted ultra vires in first sharing the guarantors' details with the Credit Reference Bureau (CRB) and further attaching their salaries to settle the debtor's indebtedness.
6. They further issued an injunction restraining the Appellant from attaching the Respondents' savings, salaries and or property in the enforcement of the guarantee on the loan that had been advanced to Mwombe Masungu and then give an account of the monies that had been attached from the guarantees and refund the same with interest.

7. The Appellant, being dissatisfied with the decision of the tribunal, lodged a Memorandum of Appeal dated 14th July 2022, raising the following grounds;

a) *That the learned member of the tribunal erred both in law and fact in finding that the attachment of the respondent's salaries to the tune of Kshs. 125,772 /= towards settling the principal debtor's outstanding loan of Kshs. 1,635,041/= was null and void and ultra vires the bylaws of the appellant when evidence tendered showed that the appellant acted intra vires of its bylaws and policies.*

b) *THAT the learned members of the tribunal erred both in law and fact in finding that the action of the appellants' board in passing a resolution to share the respondent's information with the Credit Bureau was null and void and ultra vires the by-laws of the appellant when the appellant is obligated to refer defaulters to the Credit Reference Bureau.*

c) *THAT the learned members of the tribunal erred both in law and fact in making an order for the refund of the money recovered from the respondents when the appellant was realising the security given by the respondents*

d) *THAT the learned members of the tribunal erred in both law and fact in making an order for the giving of the amounts recovered from the respondents when the same had been given to the respondents before the filing of their claim.*

e) *That the learned members of the tribunal erred in both law and fact in failing to find that the respondent had no claim against the appellant, having executed a guarantee in favour of the appellant and having admitted to their claim to be guarantors in favour of MWOMBE MASUNGO, and therefore having an obligation to offset the loan upon the loanee's failure to do so.*

f) *THAT the learned members of the Tribunal erred both in law and fact in restraining the appellant from continuing to attach the respondent's salaries, savings and or property in enforcement of the guarantee by the respondent when the respondent executed the said guarantee in favour of the appellant.*

g) *THAT the learned members of the tribunal erred both in law and fact in rewriting the contract between the parties instead of interpreting it.*

h) THAT the learned members of the tribunal erred in both law and in fact in failing to find that the respondent's entire claim was fatally defective for failure to enjoin the loanee.

i) THAT the learned members of the tribunal erred in law and in fact in failing to consider evidence on record and analyse the same in line with the appellant's defence, thus leading to a misdirection in law and fact.

j) That the learned members of the tribunal erred both in law and in fact in failing to consider the appellant's submissions on factual issues raised from evidence tendered at the trial, the principles canvassed and authorities attached, thus leading to a misdirection in law and fact.

k) THAT the learned members of the tribunal's finding was against the weight of evidence produced by the appellant and has led to a miscarriage of justice.

8. They thus pray that the appeal be allowed and the judgment of the Co-operative tribunal made on 7th July 2022 be set aside and or varied and that the Respondents' claim to the Co-operative tribunal be dismissed with costs.

9. The appeal was canvassed by way of written submissions.

Appellant's Submissions

10. In their submissions dated 18th December 2024, the Appellant raised three issues for determination. On their first issue of whether they, as the Appellants, were right in attaching the Respondents' salaries, they aver that the Respondents had admitted that they were the guarantors to the loan that had been issued to one Mwombe Masungu, who was never joined in the proceedings.
11. They relied on their Credit Policy and Procedure Manual, provision 5.2.3 and provision 92(a) of their SACCO laws. They faulted the Tribunal for finding that it was necessary to convene an Annual General Meeting when the Board of Directors was the governing body that could issue directives in view of a defaulted loan by one Mwombe Masungu. They referred to regulation 58, which allows the Board, by a general power to develop credit regulations, and when there is a default of a loan, the steps from the Credit Policy and Procedure Manual are to be effected.

12. They averred that since the loanee had provided the guarantors as his security, they were then obliged to attach their salaries, and since the Respondents were members of the Sacco, they subscribed to its terms and regulations, including credit recovery requirements.
13. They claimed that the Respondents never denied guaranting the loanee or alleged that their signatures forged; they are bound by their terms, and it is only fair that they SACCO recovers what is owed to them.
14. On the second issue of whether they were right in referring the Respondents' names to the Credit Reference Bureau, they averred that it is mandatory for all the lending institution. Referring to Section 26 (1) of the Banking Act (Credit Reference Bureau), they stated that they had already sent a letter to the Respondents informing them of the action they would take as they had informed the Bureau of the default by Mr. Mwombe Masungu and they were mandated to forward the Respondents' information as guarantors to a defaulter.
15. On the final issue of whether the Tribunal erred in ordering them to refund the Respondents monies recovered from realizing the security against the loan and to stop attaching their salaries, they contended

that they were in order in attaching the Respondents' salaries since they admitted guaranteeing the loan and with the order by the Tribunal, it would be impossible for them to recover the defaulted amount hence the decision of the Tribunal was a bad precedent.

16. They faulted the Tribunal, terming it as severely adverse and against the rule of natural justice. Further, they posited that the Respondents had exhibited bad faith by not enjoining the loanee in the proceedings, as they would have recovered the monies deducted from their salaries in settlement of the loan from the loanee and not the Appellant.

Respondents' Submissions

17. The Respondents in their submissions dated 3rd February 2025, contend that the conduct of the Appellant was unlawful and a breach of the by-laws as the Board of Directors exceeded and/or acted without authority by proceeding to enforce guarantees without seeking the authority of the Annual General Meeting to issue instructions for liquidation of the debt according to the Sacco by-law provision 92 (a). They hold that the authority was vested on the general meeting and not the Board of Directors. They further submit that the

Board of Directors failed to seek instructions to refer the issue of the recovery of the loan and or enforcement of the guarantees to the Tribunal, as required by the provision in the by-law in section 92 and section 13 of the Co-operative Societies Act.

18. They averred that the board of directors were bound by the Appellant's by-laws to seek authority from the General meeting to enforce guarantees and instructions to refer the issue of the loan recovery or enforcement of guarantees to the Tribunal as required by the by-laws.
19. They averred that the Appellant failed to issue a notice of breach of the principal debtor's obligations under the loan agreement before effecting the attachment of the guarantor's salaries, and hence, an act of bad faith by the Appellant. They quoted the case of **Martin Kirima Baithambu vs. Jeremiah Miriti (2017) eKLR.**
20. They submitted that the Appellant acted in bad faith, and although they admitted having guaranteed Mwombe Masungu, they were only guarantors, and would be liable after the Appellant had exhausted all their remedies against the borrower, which they failed to prove they had done. They urged that the Appellant was under duty to ensure that the borrower Mwombe

Masungu complied with his obligations in so far as satisfying the loan amount and not the obligations of the Respondents, and quoted the case of **Ebony Development Company Ltd vs. Standard Chartered Bank Ltd (2008) eKLR.**

21. They submitted that the Appellant did not issue a notice of the principal debtor's breach and thus their intention of sending the Respondents' information to the Credit Reference Bureau was biased and hold that they were entitled to the notice of breach of the principal debtor's obligation before the Appellant could proceed to attach their salaries and thus the Tribunal was right in ordering the Appellant to refund their monies.
22. In conclusion, they submitted that the Appellant's appeal lacked merit and ought to be dismissed.

Analysis and determination

23. I have carefully considered the Memorandum of Appeal, the record, the submissions filed by both parties, and the applicable laws. As the first appellate court, this Court is mandated to reconsider and re-evaluate the evidence on record and draw its own conclusions, bearing in mind that it did not have the opportunity to

observe the demeanour of the witnesses. This duty was stated in **Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123.**

24. Based on the Memorandum of Appeal and the parties' written submissions, the issues for determination are as follows;

a) whether the Board of Directors acted ultra vires in allowing the appellant to attach the guarantors' salaries and recover from guarantors before an AGM authorisation;

b) whether the appellant acted lawfully in referring the guarantors' names to a Credit Reference Bureau;

c) whether the Tribunal erred in ordering refunds and restraining further recovery;

25. 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.”

26. In the case before this court for determination, the Respondents admitted they were guarantors to Mr. Mwombe Masungu, who was never joined as a party at the lower court proceedings. On the other hand, the

Appellant avers that they followed its credit policy and internal procedures and avers that the by-laws and Regulation 58 empower the Board of Directors to adopt and implement credit recovery procedures, such as attaching the guarantor's salaries so as to recover the debt owed to them.

27. The Tribunal, in its judgment, found the Board acted ultra vires by effecting salary attachments and by informing the CRB without first obtaining authority of a General Meeting as prescribed by the SACCO's by-laws. The Tribunal found further that guarantors ought to be a last resort and that the Appellant did not show it had exhausted remedies against the principal debtor or complied with the by-laws' procedural safeguards. The Tribunal ordered refunds and granted injunctive relief.

28. The Appellant herein places heavy reliance on the Credit Policy and Procedure Manual provision 5.2.3 which states that the main collateral for loans and advances shall be deposits held by the borrower and guarantors and provision 7.1 which states that all security pledged or guaranteed will be realized whenever a loan is delinquent for more than one month while the Respondents quoted By-Law 92(a) which they

interpreted to mean that the General Meeting must authorize liquidation of any defaulted loan. It states that ***“in case of debt due to the SACCO Society from a member or debts owing to a member of a past member of the SACCO society, a general meeting of the SACCO society may, at its discretion, issue such instructions to the board of directors for liquidation of the debts as may be necessary or refer the dispute to the tribunal.”***

29. The other issue before the court is whether the actions by the Appellant was *ultra vires* the Sacco By-laws. The Credit Policy and Procedure Manual which was developed as a credit management tool in pursuance of the By-laws contains guidelines for the recovery of loans from the Appellant’s members. Rule 7.2.1. provides that:-

“The Sacco shall undertake the review of its loan portfolio at least once every quarter and shall ensure that:-

a. Loans granted adhere to this policy,

b. Problem accounts are adequately identified with the classification criteria specified in this policy.

c. Appropriate and adequate levels of provisions for potential loss are made and maintained at all times.

d. Services of a debt collector shall be sort (sic) as case may be.”

30. The Interpretation and General Provisions Act does not specifically define the words “shall” and “may”. However, the meanings of this word are determined through judicial interpretation based on common law. It has been consistently determined that the word “shall” is discretionary and optional. In the circumstances, whereas the word “shall” imposes a duty that must be performed, the word, “may” confers permissive power which can be exercised or not, at the discretion of the entity so empowered.

31. It could be that the General Meeting donated its powers to the Board and it was not imperative that they meet to consider the way forward regarding the debt owed to it by the defaulting members. However, there are no Minutes from the Board of Directors to demonstrate that they met and reviewed the credit status of the principal debtor and issued instructions pursuant to Rule 58 (cc) of the By-laws.

32. This court notes that Rule 58 of the Sacco's By-law gives the Board of Directors the authority to manage the affairs of the Sacco society. Part of the rule reads as follows:-

(a) Observe in all its activities in the Cooperative Act, the Sacco Act, Rules, Regulations and these By-laws.

(b) Generally, direct and monitor the affairs of the Sacco Society Act upon

(c) The Board of Directors shall be the governing authority, and subject to any directions from the General meeting, it shall direct the affairs of the Sacco Society. Its procedures, powers, and duties shall be as prescribed in the Cooperative Act, Sacco Act and regulations.

.....

(cc) Review monthly delinquencies reports and supervise the collection of loans to members and authorize the write-offs of uncollectible accounts.

Provided, the Board's sole official connection to the operational organization, its

achievement and conduct shall be through the Chief Executive officer. The Chief Executive Office shall only be bound by officially passed decision of the Board. Individual Board member requests that are outside of the Board meeting shall not be considered as binding.

33. Rule 7.7.2 provides the classification and provisioning criteria which are in five categories. Looking at the categories, the Respondents fell under category 3 or 4 where it is tabulated as follows:-

Grade 3 (Sub-standard)	✓ Principal/and/or interest remain unpaid for 31 to 180 days ✓ Loan not fully guaranteed/secured ✓ Declining net worth of the borrower	Engage client to understand source of difficulty and issue Second demand letter again Copied to guarantors
Grade 4 (Doubtful)	✓ Principal/and/or interest remain unpaid for 181 to 360 days ✓ High risk due to inconsistency in future earnings	✓ Suspend interest from accruing further ✓ Review security position

34. There is no indication that the Appellant adhered to the above guidelines in making the decision to attach the Respondents' salaries when in their own admission, they continued to recover the loan from the principal debtor. There was no resolution from the Board of Management to show that the Appellant had been authorised by the Board of Management to realize the security at the time and in the manner it did. As the

Tribunal held, the Credit Policy and Procedure Manual is a creature of the By-laws and hence the By-laws are supreme.

35. It is a well settled principle that a co-operative society is bound by its registered by-laws under Section 13 of Cap 490 states that;

“The by-laws of a co-operative society shall, when registered, bind the co-operative society and the members thereof to the same extent as if they were signed by each member and contained covenants on the part of each member for himself and his personal representatives to observe all the provisions of the by-laws.”

36. Having gone through the documentary evidence, there is no doubt that the Respondents did guarantee one Mwambe Masungu for the loan which amounted to Ksh. 1,635,042/= as per the letter dated 28th May 2020. I have perused the said letter which is addressed to the 1st Respondent alone. The Appellant did not file copies of similar letters addressed to the other eleven Respondents. It was incumbent on the Appellant to adduce copies of the said letters as their evidence in view of the Respondent’s claims that the Appellant had

failed to give them notice of the breach of the principal debtors obligations under the loan agreement prior to effecting the attachment of the guarantor's salaries.

37. A further scrutiny of the letter dated 28th May 2020 indicates that it was signed on behalf of the Chief Executive Officer and date stamped 21st July 2020. The Guarantor attachment report is also dated 21st July 2020. The only inference the court can draw from the date stamp on the notice of loan recovery and the Guarantor attachment report is that the same were signed for onward forwarding to the Respondents on 21st July 2020. Notably, the Appellant failed to furnish the court with evidence of having served the notice in good time. This was important in view of the fact that the Respondents contended that the Appellant commenced deductions of their salaries much earlier.

38. Section 26 of the Banking (Credit Reference Bureau) Regulations 2020 provides:-

“A credit information provider who furnishes negative information to a bureau with respect to a customer shall, in writing or through electronic means, notify the customer of the intention to submit the negative information at least thirty

days before submitting the negative information to the bureau or within such shorter period as the contract between the credit information provider and the customer may provide.”

Without evidence of the Respondents having been served with the requisite one month notice, which one month notice was supposed to be served after a consistent three months default, then the action of submitting the Respondents’ names for negative listing was unprocedural and unfair.

39. On whether the Tribunal was correct in finding that the Board of Directors erred in holding that the guarantors were the primary liability without considering the borrower, Mwombe Masungu, Section 36(1) of the SACCO Societies Act (No. 14 of 2008) states:

“A SACCO society shall have a first charge against deposits and share capital and upon any dividend or interest payable to a member for any debt due to the society from the member, either as guarantor or endorser of a loan ...”

40. While the statute acknowledges the liability of guarantors, it does not confer upon the Board the power to proceed against them before exhausting all remedies

available against the principal debtor. The Tribunal correctly highlighted that guarantors are a secondary source of repayment. This principle is reinforced in ***Utabibu Cooperative Sacco v Wanjohi & 4 Others [2025] KEHC 13411 (KLR)***, where the Court held that a creditor must first pursue the primary debtor before seeking to enforce the obligations of a guarantor. 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 the principal debtor.

41. Therefore, the argument by the Appellant that the Respondents were responsible in case of the debtor's default without exploring other avenues and as a last resort to recover the defaulted loan, cannot stand. There was no attempt made by the Appellant to recover the debt from his shares, deposits, or other assets. No evidence was placed on record, and lastly, the Board proceeded directly to salary deductions from the guarantors and reported them to the CRB.

42. The above steps are inconsistent with statutory safeguards and common law principles. The Court of Appeal in ***Ebony Development Company Ltd v***

Standard Chartered Bank Ltd [2008] eKLR held that:

“A guarantor’s liability is contingent upon the prior failure of the principal debtor to satisfy the obligation; direct enforcement against the guarantor without notice to the principal debtor constitutes a breach of natural justice.”

43. The final issue for determination is whether the Respondents are entitled to repayment of the amounts deducted from their salaries by the SACCO. The Tribunal’s directive ordering the refund and restraining any further deductions is well grounded in Section 81 of the Co-operative Societies Act (Cap 490), which empowers the Tribunal and the courts to grant appropriate remedies where actions are *ultra vires* or inconsistent with laws.

44. This principle was supported in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] KECA 362 (KLR)**, where the Court of Appeal affirmed that monies collected pursuant to a void or unlawful act are recoverable. Given the lack of notice to guarantors, the failure to exhaust remedies against the principal debtor, and the unauthorised

referral to CRB, the Tribunal was justified in ordering the refund of amounts deducted from guarantor salaries, with interest and an Injunction restraining further deductions or enforcement against the guarantors until compliance with the By-laws and statutory provisions.

45. In conclusion, this court finds that the Tribunal did not err in its findings. The appeal is therefore dismissed, and the Tribunal's judgment of 7th July 2022 is affirmed.

46. Costs of the Appeal shall be borne by the Appellant.

Dated, signed and delivered at Kakamega this 13th day of November 2025.

A. C. BETT
JUDGE

In the presence of:

Mogambi for the Appellant

Mr. Idi for the Respondents

Court Assistant: Polycap