



**Nyaberi & another v Amica Savings & Credit Co-operative Society Limited (Commercial Case E030 of 2024) [2025] KEHC 17944 (KLR) (1 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 17944 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE E030 OF 2024  
J NGAAH, J  
DECEMBER 1, 2025**

**BETWEEN**

**JUSTRY P LUMUMBA NYABERI ..... 1<sup>ST</sup> PLAINTIFF**

**JUST NICE LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**AMICA SAVINGS & CREDIT CO-OPERATIVE SOCIETY  
LIMITED ..... DEFENDANT**

**RULING**

1. By a plaint dated 14 June 2024, the plaintiffs sued the defendant for a declaration that the statutory power of sale sought to be exercised by the defendant over LR MN/ 1113328 (Original No. 8494/ I) Title No. CR 38301 has not crystallised. Consequently, they want a permanent order of injunction restraining the defendant whether by itself, employees, servants or agents or otherwise assigns or any person whatsoever acting on its behalf or under its mandate or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, appointing a receiver, transferring, charging or otherwise in any manner whatsoever interfering with LR MN/ 1113328 (Original No. 849411) Title No. CR 38301.
2. In the alternative, they have sought an order extending the time for compliance or for rectifying any default or regularization of the loan accounts concerning LR MN/ 1113328 (ORIGINAL NO. 8494/ I) Title No. CR 38301 for a period of 12 months or for such other period as the court may determine. Alternative to the preceding prayer, the plaintiffs have sought an order suspending or postponing the exercise of the Defendant's statutory power of sale for a period of twenty-four (24) months or for such other period as the court may determine to enable the Plaintiff redeem LR MN/1113328 (Original No. 849411) Title No. CR 38301. They also want a declaration that all costs incurred by the Defendant or its agents in pursuing what they have described as the unlawful, irregular and/or oppressive statutory power of sale be borne by the Defendant.



3. Alongside the suit, the plaintiffs filed an application dated 14 June 2024 in which they have prayed for, inter alia, the following orders:

- “ c) That pending the hearing and determination of this suit, the Defendant/ Respondent whether by itself, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on its behalf and/or under its mandate and/or instructions be restrained from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with LR MN/1113328 (Original No. 849411) TITLE NO. CR 38301
- d) That in the alternative, the Defendant/Respondent's statutory powers of sale be suspended and/or postponed for a period of twenty-four (24) months or for such other period as the court may determine to enable the Plaintiffs redeem LR MN/ 1113328 (ORIGINAL NO. 8494/ I) TITLE NO. CR 38301
- e) That in the alternative the time for compliance and/or for rectifying any default in the 2<sup>nd</sup> Plaintiffs loan account for which LR MN/ 1113328 (ORIGINAL NO. 849411) TITLE. NO. CR 3830 I was given as a security be extended for a period of 12 months or for such other period as the court may determine pursuant to powers conferred on the court under section 104 (2) as read with section 90 of the Land Act, 2012.”

4. The application is expressed to be brought under Sections 89, 90, 96, 103, 104, 105 and 106 of the Land Act, 2012; Order 40 Rule I, 2, 3, 4, 10 and 9 of the Civil Procedure Rules; and, Sections IA, IB, 3A and 63 (e) of the Civil Procedure Act. It is supported by the affidavit of Justry P. Lumumba Nyaberi who has sworn that he is the 1<sup>st</sup> plaintiff and a director of the 2<sup>nd</sup> plaintiff.

5. Lumumba has sworn further that vide a Letter of Offer dated 30 April, 2020, the 2<sup>nd</sup> plaintiff borrowed Kshs. 30,000,000 from the defendant, whose purpose was loan buy off and working capital to finance the business of motor cycle assembly for sale by the 2<sup>nd</sup> Plaintiff.

6. The borrowed funds were secured by a third-party charge created over property known as LR MN/ 1113328 (ORIGINAL NO. 849411) TITLE. NO. CR 38301 which is registered in the name of the 1<sup>st</sup> Plaintiff. Accordingly, the 2<sup>nd</sup> plaintiff was the borrower while the 1<sup>st</sup> plaintiff was the charger.

7. The 2<sup>nd</sup> plaintiff is said to have been repaying the loan by remitting the agreed instalments as per the loan agreement but despite that, the defendant the defendant is alleged to have conducted itself unlawfully, negligently or inequitably as regards the loan account in the following manner:

- “ a) The defendant has purported to instruct an auctioneer, namely Watts Auctions, to undertake a forced sale/auction of the suit property.
- b) The said auctioneer has proceeded to advertise sale of the property by public auction on 28/06/2024.
- c) The intended sale is illegal, null and void as the defendant has not issued to the charger, the 1<sup>st</sup> Plaintiff herein, the Ninety (90) days' Statutory Notice as prescribed under Section 90 of the Land Act.



- d) Further, the intended sale is illegal, null and void as the defendant has not issued to the charger the Forty (40) days' notice as prescribed under Section 96 of the Land Act,
  - e) Additionally, the Auctioneer, Watts Auctions, have not issued 45 days Redemption Notice contrary to mandatory requirements of the Auctioneers Act and the law.
  - f) The defendant has also not conducted mandatory valuation of the suit property as prescribed under Section 97 of the Land Act.
  - g) No demand notice or letter has been issued to the plaintiffs/applicants regarding any default in the repayment of the loan as required by the law.
8. Lumumba has sworn that this court could cancel, vary, suspend, or postpone the scheduled sale or extend the period of time for compliance by the charger or substitution of a different remedy than outright sale. According to Lumumba, in the period 2022 and 2023, there was a dramatic decline in the sales of motorcycles which was completely disproportionate to the performance of the overall Kenyan economy and totally inconsistent with the trends of previous electioneering periods. This decline, it is sworn, was outside the Plaintiffs' control.
  9. It is also sworn that at the time of accepting the loan, the number of motorcycles sold at the national level averaged 24,000 to 25,000 per month. However, this number dropped to 11,000 units per month during the election period of 2022 and instead of rising in 2023, the numbers deeply declined to 4,000 units per month in the whole country.
  10. The decline, according to the plaintiffs, was attributed to election and post-election uncertainties, high cost of living, high cost of fuel as well as high and unsustainable inflation which afflicted Kenya in that period. The said high inflation was made worse by the depreciating Kenya Shilling which at one stage was exchanging at over Kshs. 158 to the dollar as opposed to Kshs. 112 to the dollar in 2022 when the 2<sup>nd</sup> plaintiff took the loan.
  11. These factors caused the cost of borrowing to rise sharply and unexpectedly. The Central Bank of Kenya was forced to directly intervene and manage or lower the rate of inflation and stabilize the currency by utilizing several measures including raising the inter-bank lending rates.
  12. Against the forgoing background, the 2<sup>nd</sup> plaintiff previously sought restructuring of the facility to avert defaulting, but the defendant refused to entertain the plea and has advertised the suit property for sale on 28 June, 2024 without following the due process stipulated in law.
  13. It is sworn that the plaintiffs are capable of rectifying defaults in the loan accounts to ensure they revert to normalcy or to redeem the property and, therefore, seek to be given more time. Further, the 2<sup>nd</sup> plaintiff sister company, Swiss Grade Consult Limited, where the 1<sup>st</sup> plaintiff is also a director, is willing to issue an undertaking in favour of the defendant to redeem the suit property by settling or regularizing the outstanding loan amount.
  14. In response to the application, the respondent filed a preliminary objection against the entire suit on the grounds:
    - “
    - “ a. That the nature of the Plaintiffs' cause of action and the reliefs sought therein arises from a dispute between the Defendant and its member, a dispute within



the meaning of Section 76 (2) of the *Co-operative Societies Act* and therefore ought to be heard and determined in the first instance by the Co-operatives Tribunal.

- b. That this Honorable Court therefore lacks jurisdiction in law to entertain, interrogate and determine the suit as the matters in issue fall within the jurisdiction of the Co-operatives Tribunal by dint of Section 76 (1) of the *Co-operative Societies Act*, equally as per the court's decision in *Muthoni v Capital Sacco Limited; Viewline Auctioneers (Interested Party); Mukira (Proposed Interested Party)* (Meru High Court Commercial Case E001 of 2024) [2024] KEHC 5863 (KLR) (23 May 2024)
- c. That the matter is therefore a nullity, an abuse of the process of this Honorable Court and should be dismissed in limine.”

It is this preliminary objection that is the subject of this ruling.

15. Besides the preliminary objection, the defendant has not filed any other response to the suit or to the plaintiffs' application and, thus, the only other available material before court are the plaintiff's pleadings and affidavit.

16. According to the plaint filed in court, the plaintiffs have described the defendant as a limited liability company registered under the *Companies Act*, cap. 486. But what I gather from the preliminary objection is that the defendant is, in fact, a co-operative society registered under the *Co-operative Societies Act*, cap. 490. Section 4 of the *Co-operative Societies Act* under which co-operative societies are registered provides as follows:

4. Registration of co-operative societies

Subject to the provisions of this Act, a society which has as its objects—

- (a) the promotion of the welfare and economic interests of its members or adherence to the principles of Islamic law; and
- (b) has incorporated in its by-laws the following co-operative principles—
  - (i) voluntary and open membership;
  - (ii) democratic member control;
  - (iii) economic participation by members;
  - (iv) autonomy and independence;
  - (v) education, training and information;
  - (vi) co-operation among co-operatives, and
  - (vii) concern for community in general;

may be registered by the Commissioner as a co-operative society under this Act with or without limited liability.

Provided that a co-operative union or an apex society shall not be registered except with limited liability.

17. Section 5 of the same Act provides for the essentials of registration of a co-operative Society and states:



5. Essentials for registration of a Co-operative society
- For a society to be registered under this Act, it must: —
- (a) in the case of a primary society, consist of at least ten persons all of whom shall be qualified for membership of the co-operative society under section 14, or;
  - (b) in the case of a co-operative union has at least two registered societies as its members;
18. Needless to say, the legal regime under a co-operative society registered is totally different and, therefore, subject to different legal strictures and rules from a company registered under the *Companies Act*. In the face of what appears to be contradictory evidence on whether the defendant is a limited liability company registered under the *Companies Act* or is a co-operative Society registered in accordance with the relevant provisions of the *Co-operative Societies Act*, the court cannot proceed on the presumption that it is of either of the two distinct entities and determine the preliminary objection accordingly.
19. Another layer to this argument is that it is not apparent, on the face of the pleadings that, even assuming the defendant is cooperative Society registered under section 4 of the *Co-operative Societies Act*, it is not apparent on the face of the pleadings that plaintiffs or any of them is a member of the Society and, therefore, subject to dispute resolution mechanisms prescribed by the Cooperative *Societies Act*. In short, the questions whether the defendant is a cooperative society and whether the plaintiffs are members of such a society are questions that are up for determination outside the context of a preliminary objection.
20. For the foregoing reasons, I do not find any merit in the defendant’s preliminary objection. It is hereby dismissed. Costs will abide the outcome of the suit. Orders accordingly.

**SIGNED, DATED AND DELIVERED ON 1 DECEMBER 2025**

**NGAAH JAIRUS**

**JUDGE**

