



REPUBLIC OF KENYA



KENYA LAW
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Kathanzu v Amica Savings and Credit Limited & another (Commercial Suit E012 of 2024) [2026] KEHC 2909 (KLR) (11 February 2026) (Ruling)

Neutral citation: [2026] KEHC 2909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
COMMERCIAL SUIT E012 OF 2024
NIO ADAGI, J
FEBRUARY 11, 2026**

BETWEEN

PAUL MUTUKU KATHANZU PLAINTIFF

AND

AMICA SAVINGS AND CREDIT LIMITED 1ST DEFENDANT

GEOFFREY ZAMBEZI MUTUMA 2ND DEFENDANT

RULING

1. Before court for determination is a Notice of Preliminary Objection dated 3rd August 2024 raised by the 1st Defendant based on one major ground that:
 - a. That the nature of the Plaintiffs' cause of action and the reliefs sought therein arises from a dispute between the 1st 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 Honourable 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; View line Auctioneers (Interested Party); Mukira (Proposed Interested Party)* (Meru High Court Commercial Case E00I of 2024) [20241 KEHC 5863 (KLR) (23 May 2024)
 - c. That the matter is therefore a nullity, an abuse of the process of this Honourable.
 - d. Court and should be dismissed in limine
2. The Preliminary Objection is in opposition to the Plaintiff's suit via a Complaint dated 6th May 2024 seeking for prayers against the Defendants that:-



- a. A declaration that the contractual obligation owed by the Plaintiff to the Defendants herein is void to the extent of his intension to withdraw from his guarantee of the facility;
 - b. A permanent order of injunction restraining the Defendant/Respondent by itself, its servant and or agent or nominees from selling by public auction or any other manner, disposing, advertising, interfering or attempting to evict the Plaintiff from land parcel Muputi/Kimutwa/1014, Muputi/Kimutwa/1015 And Muputi/Kimutwa/1607 situated in Machakos County; and
 - c. Costs of the suit
3. Together with the Plaint, the Plaintiff filed a Notice of Motion application dated 6th May 2024 which application is now spent having been allowed as there was no response to it by the Defendants.
 4. The court gave directions for the Preliminary Objection to be canvassed by way of written submissions. The 1st Defendants' submissions are dated 3rd July 2024 while the Plaintiff's submissions are dated 2nd July 2025. The 2nd Defendant has not entered appearance or filed submissions.
 5. The 1st Defendant submitted that the dispute herein is between the Plaintiff, as a guarantor of the 2nd Defendant (who is a member of the 1st Defendant), arising from a facility granted to the 2nd Defendant by the 1st Defendant. Accordingly, the dispute falls within the scope of Section 76 (1)(b) as read with Section 76(2)(b) of the Co-operative Societies Act. The 1st Defendant submitted that the fact the 2nd Defendant is a member of the 1st Defendant is uncontroverted. Furthermore, the issue in question arises from the 2nd Defendant's default on the facility that was granted to him by the 1st Defendant and guaranteed by the Plaintiff.
 6. That the Plaintiff guaranteed the 2nd Defendant and agreed to repay the loan in the event of borrower's default. This formed the basis of a contract between the Plaintiff and the 1st Defendant.
 7. That the Plaintiff had an obligation to approach the co-operative tribunal in the first instance.
 8. The 1st Defendant submitted that the point of law raised vide the preliminary objection is not new as it has severally been raised and duly adjudicated before competent courts of law.
 9. The 1st Defendant cited the cases including Republic v Matheka Kithome & 4 others Mombasa Misc. Civil Appl. No. 664 of 2010, Muthoni v Capital Sacco Limited; Viewline Auctioneers (Interested Party); Mukira (proposed Interested Party) (Commercial Case E001 of 2024) [2024] KEHC 5863 (KLR)(23 May 2024):
 10. The 1st Defendant also cited the famous case of Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696 on the locus classicus of what merits as a preliminary objection, where the court observed thus;

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”
 11. The 1st Defendant submits that the Preliminary Objection herein falls within the contemplation of this precedence, as it serves to challenge the very jurisdiction of this court to hear and determine this matter.



12. The 1st Defendant submitted that the totality of their submissions is that the absent of jurisdiction. This suit is a nullity at law and therefore the utmost, and indeed proper candidate for dismissal with costs.
13. On the other hand, the Plaintiff in his submissions vehemently opposes the said Preliminary Objection. It is submitted that the objection does not raise a pure point of law as required in law but is instead predicated upon contested and unproven factual assertions, namely, that the 1st Defendant is a registered cooperative society and that the Plaintiff is subject to its internal dispute resolution mechanism.
14. It is submitted that the 1st Defendant has not placed before this Honourable Court any documentary evidence to demonstrate that it is a duly registered Sacco or co-operative society within the meaning of the *Co-operative Societies Act*, nor has it produced any evidence of the Plaintiff's alleged membership or of any contractual or statutory nexus bringing the dispute within the jurisdiction of the Co-operative Tribunal.
15. That in the absence of such proof, the Preliminary Objection invites this Honourable Court to decline jurisdiction on the basis of bare allegations and conjecture, contrary to settled principles of law that jurisdiction cannot be inferred or presumed but must be clearly established on a firm legal and factual foundation.
16. The Plaintiff therefore submits that the Preliminary Objection is incompetent, premature and an abuse of the court process, as it requires the Court to ascertain disputed facts through argument rather than evidence, and is consequently incapable of disposing of the suit at this preliminary stage.
17. The Plaintiff submitted that the law on Preliminary Objections is now settled and admits of no controversy. A Preliminary Objection is a drastic procedural device whose effect, if upheld, is to terminate a suit without the benefit of a hearing. For this reason, courts have consistently held that the threshold for a competent Preliminary Objection is deliberately high and must be strictly satisfied.
18. The locus classicus remains Mukisa Biscuit Case (supra). The principle emerging from Mukisa Biscuit is that a Preliminary Objection must:-
 - a. Raise a pure point of law;
 - b. Be argued on the assumption that all pleaded facts are correct; and
 - c. Be capable of disposing of the suit without recourse to evidence or factual inquiry.
19. That in the present matter, the 1st Defendant seeks to invoke Section 76 of the *Co-operative Societies Act* to oust the jurisdiction of this Honourable Court and transfer the dispute to the Co-operative Tribunal. However, for Section 76 to apply, two foundational jurisdictional facts must first be established: -
 - i. That the 1st Defendant is a duly registered Co-operative Society or Sacco Society within the meaning of the *Co-operative Societies Act* and the *Sacco Societies Act*; and
 - ii. That the Plaintiff is a member, past member, or person claiming through a member of that society.
20. These are not questions of law. They are questions of fact which can only be established through the production of documentary evidence, namely:-



- a. A valid Certificate of Registration under the *Co-operative Societies Act* and/or *Sacco Societies Act*; and
 - b. A Membership Register, membership application form, or other documentary proof of the Plaintiff's alleged membership.
21. That neither of these jurisdiction-triggering facts has been proved, and neither is admitted by the Plaintiff. The Court is therefore being invited to assume facts which are disputed and unproven.
22. The Plaintiff submitted that this is precisely the mischief that the Mukisa Biscuit doctrine was designed to prevent. An objection which requires the Court to ascertain contested facts ceases to be a Preliminary Objection in law and is incompetent ab initio. It follows that the 1st Defendant's objection fails the Mukisa Biscuit test and must collapse at the threshold.
23. In addition, the Plaintiff submitted that the 1st Defendant has argued at length in its submissions that it is a Sacco and that the dispute is subject to the jurisdiction of the Co-operative Tribunal. However, it has not annexed or produced any of the primary documents required to establish that status. In particular, the 1st Defendant has failed to provide:-
- a. A Certificate of Registration as a co-operative society;
 - b. A license issued by the Sacco Societies Regulatory Authority (SASRA);
 - c. Any by-laws governing its operations; or
 - d. Any membership record linking the Plaintiff to it.
24. That it is trite law that submissions, however persuasive, do not constitute evidence. Reliance was the Court of Appeal decision in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR, where the Court held:-
- “Submissions are generally written and/or oral arguments by a party... they cannot take the place of evidence. A court cannot rely on submissions to find a fact that was not proved by evidence.”
25. That in the absence of documentary proof of its legal status, the 1st Defendant appears before this Court as nothing more than an ordinary corporate entity. It cannot clothe itself with the special statutory character of a Sacco merely by description or nomenclature.
26. Consequently, the specialized jurisdiction of the Co-operative Tribunal cannot be invoked on the basis of unsupported assertions. Jurisdiction must be grounded on proven facts, not on argument.
27. It is the 1st Defendant who asserts that this Court lacks jurisdiction. It therefore bears the burden of proving the facts upon which that assertion rests.
28. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR, the Supreme Court stated that while jurisdiction flows from statute or *the Constitution*, the factual basis for invoking a particular jurisdiction must be clearly established.



29. Where the facts giving rise to jurisdiction are contested, the Court cannot determine the issue summarily. This position was affirmed in *Avtar Singh Bhamra & Another v Oriental Commercial Bank* [2023] KEHC, where the Court held:
- “Where the issue of jurisdiction depends on contested facts, the court must allow parties to adduce evidence rather than determine the matter summarily.”
30. In *James Mwangi Gachoka v Taifa Sacco Society Ltd* [2018] eKLR it was held:
- “The High Court declined to refer the matter to the Co-operative Tribunal because the defendant failed to provide proof of membership and registration documents. The court held that jurisdiction cannot be assumed without evidence”.
31. Similarly, in *Microhouse Technologies Ltd v Co-operative Bank of Kenya Ltd* [2019] eKLR the Court observed that where the status of a party as a Sacco or the membership of another party is in doubt, and where the transaction appears to be commercial rather than cooperative in nature, the High Court retains its jurisdiction.
32. It is the Plaintiff’s position that by failing to produce the primary documents of its existence and of the Plaintiff’s alleged membership, the 1st Defendant is effectively asking this Court to surrender its constitutional jurisdiction under Article 165 of *the Constitution* on the basis of conjecture. That this Honourable Court cannot abdicate its jurisdiction in such circumstances.
33. The 1st Defendant’s assertion that this is a co-operative dispute is not only unproven but is contradicted by the nature of the transaction—a commercial loan secured by a charge. Reliance was placed in *Microhouse Technologies Ltd v Co-operative Bank* and *John Maina Kinyua v Murang’a Teachers Sacco*, the High Court retained jurisdiction because the disputes were rooted in commercial contracts and charges, not internal Sacco affairs.
34. Also, in *James Mwangi Gachoka and Co-operative Bank v BIFU*, the courts emphasized that proof of Sacco status and membership is mandatory to oust jurisdiction. The 1st Defendant has provided none.
35. The Plaintiff maintained that until the 1st Defendant proves it is a Sacco and that the 2nd Defendant is a member, this Honourable Court retains jurisdiction under Article 165 of *the Constitution* and the *Land Act*.

Analysis and Determination

36. I have considered the Notice of Preliminary Objection; the Parties’ Advocates submissions and the authorities cited. The issue for determination is whether or not the Preliminary Objection should be upheld.
37. The bone of contention here is on the provisions of section 76 of the Cooperative *Societies Act* which provides as follows:
- 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 purposes of the above 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 demand is admitted or not; or
 - b. 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 Sacco Society against a refusal to grant or a revocation of licence or any other due, from the Authority.
38. By Section 75(5) of that Act, that Tribunal has unlimited geographical and pecuniary jurisdiction in matters of co-operative disputes. Further, recourse during proceedings or in respect of orders and awards of the Tribunal can only be appealed to the High Court.
39. Relying on the above provisions the 1st Defendant challenges this Court's jurisdiction in hearing and determining the Plaintiff's suit and contend that the dispute ought to be ventilated in the Co-operative Tribunal.
40. The Plaintiff maintained that until the 1st Defendant proves it is a Sacco and that the 2nd Defendant is its member, this Honourable Court retains jurisdiction under Article 165 of *the Constitution* and the *Land Act*.
41. The law on the question of jurisdiction was enunciated in the case of Owners of the Motor Vessel "Lilian S" vs Caltex Kenya Limited [1989] KLR 1 where the court held:-
- "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".
42. In the case of Samuel Kamau Macharia vs KCB & 2 Others, Civil Application No. 2 of 2011, it was stated:-
- "A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."
43. I have considered the cases cited by the 1st Defendant where the courts held that the disputes fell within the ambit of the Co-operative Act and *Sacco Societies Act* and there were no contestations on membership to a Sacco or Society as it is in the instant case.
44. Section 76 to apply, two foundational jurisdictional facts must first be established:
- i. The 1st Defendant is a duly registered Co-operative Society or Sacco Society within the meaning of the *Co-operative Societies Act* and the *Sacco Societies Act*; and
 - ii. That the Plaintiff is a member, past member, or person claiming through a member of that society.



45. The 1st Defendant has not persuaded this court that it is either a duly registered Sacco or Co-operative society within the meaning of the *Co-operative Societies Act*, nor has it produced any evidence of the 2nd Defendant's membership or of any contractual or statutory nexus bringing the dispute within the jurisdiction of the Co-operative Tribunal.
46. In the absence of such proof, the Preliminary Objection invites this Court to decline jurisdiction on the basis of bare allegations and conjecture, contrary to settled principles of law that jurisdiction cannot be inferred or presumed but must be clearly established on a firm legal and factual foundation.
47. On the foregoing and being guided by the authorities cited by the Plaintiff more so the case of James Mwangi Gachoka v Taifa Sacco Society Ltd [2018] eKLR where the High Court declined to refer the matter to the Co-operative Tribunal because the defendant failed to provide proof of membership and registration documents. The court held that jurisdiction cannot be assumed without evidence.
48. Accordingly, the Preliminary Objection is found to be without merit and the same is dismissed with costs assessed at Kshs.20,000/=.

It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 11TH FEBRUARY 2026.

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 11TH FEBRUARY 2026.

