

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**HIGH COURT CIVIL CASE NO. E012 OF 2024**

CAROLINE WANJIKU MACHARIA-----

PLAINTIFF

VERSUS

SAMSON MUGWE MWANGI-----1<sup>ST</sup>

DEFENDANT

TOWER SCAACO SOCIETY LIMITED-----2<sup>ND</sup>

DEFENDANT

NEW NGOLIKA MILK PRODUCERS LTD-----3<sup>RD</sup>

DEFENDANT

THE LAND REGISTRAR NAIVASHA-----4<sup>TH</sup>

DEFENDANT

THE ATTORNEY GENERAL OF KENYA-----5<sup>TH</sup>

DEFENDANT

## RULING

1. By a preliminary objection dated 4<sup>th</sup> July 2025, the 2<sup>nd</sup> defendant is seeking for an order that, this Honourable court do find that it lacks jurisdiction to hear this suit pursuant to section 67(3) of the Sacco Societies Act (herein “the Act”).
2. Upon considering the preliminary objection the court ordered that it be served for a response and/or be canvassed vide filing of submissions. Subsequently the parties filed their respective submissions which were highlighted on 25<sup>th</sup> February 2024.
3. In a nutshell, the 2<sup>nd</sup> defendant avers that, the suit herein offends section 67 of the Co-operative Sacco Act, as Act provides that, before a matter is filed in court, the plaintiff needs to exhaust the avenue of litigating the matter before the Co-operative Tribunal. That, the issue of loans herein goes to the

business of the Tribunal. The 2<sup>nd</sup> defendant relied on the case of; Kiptoo vs Kenya Union of Savings & Credit Co-operative Union Limited (KUSCCO) 2024 KEPT 153 (KLR).

4. However, the plaintiff opposed the preliminary objection terming it is an abuse of the court process as it has not met the threshold of a preliminary objection as stated in the case of: Mukisa Biscuit Manufacturing Ltd vs West End Distributors Ltd (1969) EA 696 and section 76 of the Sacco Societies Act.
5. That, under section 76, the dispute in issue should be between members of the society. Yet in this matter, the plaintiff, 3<sup>rd</sup> and 4<sup>th</sup> defendants are not members of the 2<sup>nd</sup> defendant's Society, and neither has evidence been tendered to prove that the plaintiff is a member of the 2<sup>nd</sup> defendant. Further 2<sup>nd</sup> defendant's submissions that the plaintiff is

claiming through the mother is not supported by any evidence.

6. That the 2<sup>nd</sup> defendant is exercising statutory power of sale under the Land Act. Further, this matter relates to charges and therefore fall under the jurisdiction of the High Court.
7. The preliminary objection was also opposed by the 1<sup>st</sup> defendant who submitted that, there is no assumption that the plaintiff is a member of the 2<sup>nd</sup> defendant. Further the 1<sup>st</sup> defendant is a chargor and not a member of the 2<sup>nd</sup> defendant and neither was the facility advanced to him. Furthermore, as submitted by the plaintiff matters of charges are within the jurisdiction of the High Court.
8. At the conclusion of the arguments by the parties, the preliminary objection is considered in light of the materials before the court. In that regard, first and foremost, the nature of a preliminary objection was well established in the case of; Mukisa Biscuit

Manufacturing Co. Ltd vs West End Distributors Ltd

[1969) EA 696 where D-F Law JA stated as follows: -

*“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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”*

9. In addition, jurisdiction of the court is everything and once raised it has to be dealt with at the earliest as stated in the case of; Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) where Nyarangi, JA stated as follows:

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is*

*then obliged to decide the issue right away on the material before it. 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 that it is without jurisdiction.”*

10. To revert back to the matter herein, notably the preliminary objection is premised on section 67(3) of the Sacco Societies Act, which states that all disputes arising out of Sacco business under the Act shall be referred to the Co-operative Societies Tribunal. This ensures that legal disputes within deposit-taking SACCOs are handled by a specialized tribunal rather than general courts.

11. Thus section 67 deals with the application of the broader Co-operative Societies Act, 1997 ensuring

that the Co-operative Societies Act applies in matters not explicitly covered by the Sacco Societies Act.

12. Notably, the 2<sup>nd</sup> defendant also rely on section 76 of the Co-operative Societies Act, but was not cited in the body of the preliminary objection but in their submissions. The particular section 76 of the Co-operative Societies Act (Cap 490) of Kenya mandates that any dispute regarding the business of a co-operative society must be referred to the Co-operative Tribunal rather than regular courts.

13. The subject provisions states as follows: -

*“(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 demand is 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.”*

14. To revert back to the matter herein, the main issue herein is the relation between the plaintiff and the 2<sup>nd</sup> defendant in the light of the provisions of section 76 afore. The 2<sup>nd</sup> defendant alleges that, the “1<sup>st</sup> plaintiff” is claiming through his mother, who is a member of the “1<sup>st</sup> defendant”. First and foremost, there is only one plaintiff, so the issue of “1<sup>st</sup> plaintiff” referred to in the 2<sup>nd</sup> defendant’s submissions does not arise. Secondly, even if the

afore arose out of a “typo error”, the question remains remain; is the plaintiff a member of the 2<sup>nd</sup> defendant? Who has the burden to prove that the plaintiff is a member of the 2<sup>nd</sup> defendant.

15. The burden of proof rests on the party who asserts a fact, generally the plaintiff, who must prove their case on a balance of probabilities, meaning their claim is more likely than not to be true, as per Section 107 of the Evidence Act (cap 80) Laws of Kenya. While the legal burden remains on the plaintiff, the evidentiary burden can shift to the defendant to disprove specific facts.

16. To prove whether plaintiff is a member of the 2<sup>nd</sup> defendant will require evidence and that in itself disqualifies this matter being raised through a preliminary objection. In fact, the case of Kiptoo (supra) relied on by the 2<sup>nd</sup> defendant clearly involved the Co-operative society and its member.

17. The other pronounced issue herein is whether the subject matter being a charge falls in the jurisdiction of the High Court or the Cooperative Tribunal. The 2<sup>nd</sup> defendant argues that the dispute revolves around a loan advanced to the “1<sup>st</sup> defendant” by the “1<sup>st</sup> plaintiff’s mother” and further that there is need to determine any impropriety or illegality in the loan process. As such it is imperative to delve into the business of the co-operative pursuant to section 76(1) of the Act.

18. The provisions of section 76 (1) of the Corporative Societies Act, mandates that any dispute concerning the business of a co-operative society arising among members, past members, or between them and the committee/officers, or between societies, must be referred to the Co-operative Tribunal.

19. The question is what is meant by “business of a co-operative society” In the case of; *Oucho vs Joseph*

Otieno Bee, Chief Executive Officer Bandari Sacco Ltd & 12 others; Sacco Society Regulatory Authority (SASRA) (Interested Party)

[2022] KEHC 6 (KLR) Mativo J (as he then was) stated that: -

*“44. The question is whether the dispute presented in this case concerns the business of a cooperative society, which should have been referred to the Co-operative Societies Tribunal as provided for under Section 76 cited above. The expression “business of the society” has not been defined in the Act or elsewhere. The expression has fallen for interpretation by the courts in this country and elsewhere with commendable frequency. Pronouncements from different courts in this country and elsewhere have led to a cleavage in judicial opinions as to the true meaning and scope of that expression appearing in the Act.*

45. In *Gatanga Coffee Growers Co-operative Society Ltd vs Gitau (supra)* the court interpreted the meaning of the term 'business of the society' in the *Co-operative Societies Act*. It refused to adopt a restricted interpretation and cited the Ugandan case of *Wakiro and Another v Committee of Bugisu Co-operative Union*, at p 527 where Russell J, considering the expression "business of the society" under the *Ugandan Co-operative Societies Act* which provision is similar to our Section 76 cited above stated that the expression "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-laws and rules. A similar finding was arrived in *Murata Farmers Sacco Society Ltd v Co-operative Bank of Kenya Ltd*.

46. Guidance can be obtained from the *Bombay High Court* which discussing a similar provision

*observed that the phrase "any dispute touching the business of society," should be interpreted in a very wide sense. The expression "touching the business of a society" in the act and the word "business" is a very wide term and is not synonymous with the objects of a society. The expression means affecting or relating to the business of a society. Thus, the words "touching the business of a society" are very wide and include any matter, which relates to, concerns or affects the business of the society."*

20. Be that as it were, the bone of contention herein is not the business of the 2<sup>nd</sup> defendant but its relationship with the plaintiff. Furthermore, the 2<sup>nd</sup> defendant argues that, the plaintiff has flouted the doctrine of exhaustion.

21. However, it is the considered opinion of this court before the issue of the doctrine of exhaustion is

dealt with, the issue of the plaintiff membership (if any) with the 2<sup>nd</sup> defendant be resolved.

22. It is the finding of this court that the 2<sup>nd</sup> defendant has not proved that the plaintiff is its member as required under section 76 of the Cooperative Societies Act.

23. Similarly, as much as the 2<sup>nd</sup> defendant's submissions have addressed the issue of the relationship between it and the plaintiff, the 2<sup>nd</sup> defendant has said nothing regarding its relationship with 3<sup>rd</sup> and 4<sup>th</sup> defendant who are not members of the 2<sup>nd</sup> defendant.

24. Noticeably there is interlocutory judgment against the 3<sup>rd</sup> defendant yet the preliminary objection seeks for dismissal of the plaintiff's claim; "not as it relates" to the 2<sup>nd</sup> defendant, but in its entirety. Again, the 1<sup>st</sup> defendant has opposed the preliminary objection. Can the preliminary objection then be allowed as framed or prayed?

25. In that regard, the plaintiff has relied on the case of *Egerton University Sacco Society Ltd vs Egerton University & another [2020] KEHC 8786 (KLR)* where the court held: -

*“22. On jurisdiction; The Cooperative Tribunal is seized with jurisdiction over matters set out at Section 76 of the Act. It is clearly disputes amongst members, past members, persons claiming through members and deceased members, between members, past members and the society, its committee or any office of the society, between the society and any other cooperative society. The nature of disputes is also set out under Section 76(2), again these would be claims which include by a Cooperative Society for any debt/demand from a member, a claim by a member etc. for debt due from a cooperative society. The plaintiff/applicant is a cooperative society but is not claiming from its members but*

*on their behalf. The other parties are not members of a cooperative society neither are they cooperative societies. A plain reading of these provisions clearly points out to the fact that it is only where disputes are between/among members of a Sacco or against the Sacco or the Sacco against a member that the tribunal will have jurisdiction. Hence, in my view this is not a case for this court to down its tools. The plaintiff/applicant is correctly before this court.”*

26. I concur fully with the afore holding. Finally, the plaintiff invites the court to note that striking out a case is harsh and deprives the party an opportunity to be heard and relies on the case of Transcend Media Group Ltd vs IEBC [2015] eKLR.

27. Similarly based on the provisions of article 48 of the Constitution of Kenya, 2010 that provides for access to justice, I find that it is in the interest of justice to

allow parties in any case be heard on merit where such is the case.

28. Based on the afore, it is the finding of this court that the preliminary objection lacks merit and it is dismissed with orders that costs abide the outcome of the main suit.

Dated, delivered and signed this 2<sup>nd</sup> day of April 2026.

**GRACE L NZIOKA**

**JUDGE**

In the presence of:

Ms. Wambui for the 2<sup>nd</sup> defendant/applicant

Mr. Muthomi for the plaintiff/respondent

Mr. Wachira H/B for Mr. Nderitu for 1<sup>st</sup> defendant/respondent

Ms. Hannah: Court Assistant