



**Wahiu & 7 others v Magereza Savings and Credit Cooperative Society Limited  
(Civil Appeal 98 of 2019) [2025] KECA 621 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KECA 621 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 98 OF 2019  
SG KAIRU, LA ACHODE & P NYAMWEYA, JJA  
APRIL 4, 2025**

**BETWEEN**

**SAMUEL GACHINI WAHIU ..... 1<sup>ST</sup> APPELLANT  
JOSEPHAT NGAITA THEURI ..... 2<sup>ND</sup> APPELLANT  
JAMES WERU MAINA ..... 3<sup>RD</sup> APPELLANT  
RAHAB W MWANGI ..... 4<sup>TH</sup> APPELLANT  
GRACE W WANJAU ..... 5<sup>TH</sup> APPELLANT  
MARY CHEPKURUI ..... 6<sup>TH</sup> APPELLANT  
FRANCIS KIPSAN CHEBOSWONY ..... 7<sup>TH</sup> APPELLANT  
FRANCIS MUNYUA KAARIA ..... 8<sup>TH</sup> APPELLANT**

**AND**

**MAGEREZA SAVINGS AND CREDIT COOPERATIVE SOCIETY  
LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi Msagha, Serгон & B. Thurania Jaden, JJ.) dated 14th June 2018 in HCCA No. 76 of 2014)*

**JUDGMENT**

1. This appeal arises from the judgment delivered on 14<sup>th</sup> June 2018 by which the High Court at Nairobi (A. Msagha Mbogholi, J. K. Serгон & B. Thurania Jaden, JJ.) set aside the Award of the Co-operatives Tribunal given on 28<sup>th</sup> February 2014 in Nairobi Co-operative Tribunal Case No. 525 of 2011.
2. The background in brief is that the appellants, on their own behalf and on behalf of 873 members of Magereza Savings and Credit Cooperative Society, the respondent, filed a claim against the respondent



before the Cooperative Tribunal. The essence of their claim was that they contributed to the purchase of two properties, namely Mageso Court on LR No. 1870/V/68 and Mageso Chambers LR No. 209/579 situated in Nairobi, which were then registered in the name of the respondent. They asserted that the respondent held the properties in trust for them. The respondent contested the claim maintaining that it purchased Mageso Court using its savings while Mageso Chambers was acquired partly from savings and partly from a loan facility from the Co-operative Bank of Kenya.

3. After conducting a hearing and receiving submissions, the Co-operatives Tribunal (the Tribunal) found in favour of the appellants. It declared that the said properties are registered in the name of the respondent in trust for its members who were on its register as at 31<sup>st</sup> December 1984. The Tribunal ordered that the properties be transferred to the said members in whatever manner they wish to form themselves. In the alternative, the Tribunal ordered that the properties be sold, and the proceeds be shared on a pro-rata basis by those members who were on the register as at the said date. It was also ordered that accounts of income and expenditure of the properties be taken from the year 1990 and the profits be shared on the same basis.
4. Aggrieved, the respondent successfully appealed to the High Court which in its judgment, the subject of this appeal, set aside the Award of the Tribunal in its entirety. The High Court found that the appellants' claims to the properties were not supported by the evidence and that the holding by the Tribunal that the respondent held the properties in trust for the appellants was baseless. Dissatisfied, the appellants lodged this appeal.
5. We heard the appeal on 7<sup>th</sup> October 2024. Learned counsel Mr. Stephen Gitonga appeared for the appellants. Miss. Anne Kadima, learned counsel, appeared for the respondent. Counsel orally highlighted their respective written submissions.
6. For the appellants, Mr. Gitonga faulted the High Court for delving into factual matters and overturning the decision of the Tribunal. Counsel submitted that under Section 74(2) of the Cooperative *Societies Act*, an appeal to the High Court from a decision of the Tribunal must be confined to matters of law; that by undertaking a re-appraisal of the evidence to draw its own conclusions on matters of fact, the High Court exceeded its jurisdiction. It was urged, that as an appellate court, the High Court should not have interfered with the factual findings of the Tribunal. In support of the proposition that an appellate court should not interfere with factual findings made by lower courts unless there is a demonstrable error of law, the decision of this Court in Stanley N.Mureithi & Joseph M. Stanley vs. Bernard Munene Ithiga, Civil Appeal No. 12 of 2014 was cited.
7. To the extent that it is contended that the High Court erred in law in interfering with factual findings of the Tribunal, counsel submitted that High Court exceeded its mandate and therefore this Court has jurisdiction to entertain and determine this appeal.
8. It was submitted that the Tribunal correctly found that the appellants and approximately 873 members of the respondent made financial contributions toward acquisition of the Mageso Court; that the income derived therefrom was used to acquire Mageso Chambers and the Tribunal correctly found that the respondent held the same in trust for the benefit of the contributing members. It was urged that High Court failed to appreciate the trust relationship between the respondent and its members regarding the ownership of the two properties; and that the High Court disregarded resolutions passed at various AGM's of the respondent separating its operations from its investment ventures.
9. Counsel stressed that the findings of the Tribunal were well supported by the evidence including financial records, share certificates and witness testimonies and the High Court was wrong to overturn the decision of the tribunal.



10. Miss. Kadima for the respondent on the other hand submitted that this Court has no jurisdiction to hear this appeal; that under Section 74(2) of the *Co-operative Societies Act*, the recourse available to a party aggrieved by a decision of the Tribunal is to the High Court; and that this appeal does not therefore lie. In support, counsel referred to the decision in *Godfrey Kinuu Maingi & 4 Others vs. Nthimbiri Farmers' Co-operative Society* [2016] eKLR.
11. It was submitted that a court can only exercise jurisdiction conferred by *the Constitution* or other written law and cannot arrogate to itself jurisdiction not so conferred. On that basis, the Court was urged to strike out the appeal. In support, counsel relied on the decision in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & 2 Others*, Application No. 2 of 2011 [2012] eKLR.
12. On the merits, and without prejudice to the submissions on jurisdiction, it was submitted that this being a second appeal, the appellant would have to demonstrate that the High Court considered matters it should not have or failed to consider matters it should have, or that the decision is perverse. That to the extent that the grounds of appeal proffered by the appellants relate primarily to questions of fact as to the rightful owner of the properties, the appeal does not lie.
13. Moreover, on the evidence, it was established that the appellants did not contribute towards the purchase price of the properties the same having been bought using savings and a loan advanced by the Co-operative Bank of Kenya; that the appellants as members of the respondent were entitled to dividends from the income received from the properties up until such time they withdrew their share contribution from the respondent; and that upon withdrawal, they were refunded the value of their shares, while others had their share contributions offset against the loans they had taken from the respondent;
14. It was urged that the High Court was right that no evidence was presented to establish that the properties were purchased using the appellant's contributions; and that the respondent is separate and distinct legal entity from its members by dint of Section 12 of the Co-operatives *Societies Act* and a member does not become an owner of the respondent's assets.
15. We have considered the appeal and the submissions. The jurisdiction of the Court to entertain this appeal is in issue. In that regard, the respondent had applied, by its application dated 31<sup>st</sup> May 2019, to strike out the appeal on grounds that no appeal lies to this Court from a decision of the Tribunal. That application was however made late and outside the time frame prescribed by the Rules and was accordingly struck out in a ruling of the Court delivered on 26<sup>th</sup> April 2024. However, in that ruling, the Court directed that "given the challenge to jurisdiction of the Court to entertain the appeal, in accordance with Rule 107(b) of the Court of Appeal Rules, the parties will be at liberty during the hearing of the appeal to address the Court on the competence of the appeal." It was on that basis that we heard arguments on jurisdiction during the hearing of the appeal.
16. As already indicated, the appellants referred the dispute to the Tribunal (established under Section 77 of the Co-operative *Societies Act*) which rendered its award on 28<sup>th</sup> February 2014. The respondent appealed that decision to the High Court in accordance with Section 81 of that Act. The
17. Section 81(3) of the *Co-operative Societies Act* is explicit that "the decision of the High Court on any appeal shall be final."
18. As the Supreme Court of Kenya pronounced in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank & 2 Others* (above), a court of law cannot assume appellate jurisdiction where



none has been specifically granted by the Constitution or statute. At paragraph 68 of that decision, the Supreme Court stated that:

“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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings”.

19. In the case of Godfrey Kinuu Maingi & 4 Others vs. Nthimbiri Farmers Co-operative Society [2016] KECA 591 (KLR) this Court in declining to entertain an application for leave to appeal and to stay execution of a decision of the High Court on appeal from a decision of the Tribunal cited Section 81 of the Co-operative Societies Act and stated as follows:

“In the instant matter, the Co-operatives Societies Act specifically limited the jurisdiction of the Court of Appeal, by providing that an appeal to the High Court shall be final. No appeal lies to this Court from the High Court and in the circumstances, we cannot therefore purport to grant leave to the applicants to file an appeal to this Court.”

20. Mr. Gitonga urged that to the extent that the decision of the High Court in the present case is challenged on the basis that the court exceeded its jurisdiction by engaging in a re- appraisal of the evidence, instead of confining itself to matters of law, that this Court is therefore clothed with jurisdiction. That is innovative. But as the Supreme Court cautioned a court “cannot expand its jurisdiction through judicial craft or innovation”.

21. The result is that there is no competent appeal before us. It is accordingly struck out. Given that the dispute involved the appellants in their capacity as former members of the respondent, we order that each party will bear its own costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL, 2025.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

