



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mutungi v FEP Sacco Society Limited & 2 others (Civil Appeal  
E109 of 2021) [2024] KECA 494 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 494 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E109 OF 2021  
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA  
APRIL 26, 2024**

**BETWEEN**

**CLAUDIA MUENI MUTUNGI ..... APPELLANT**

**AND**

**FEP SACCO SOCIETY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**SUSAN KIAMBATI ..... 2<sup>ND</sup> RESPONDENT**

**SACCO SOCIETY REGULATORY AUTHORITY ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal from a Ruling and Orders of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) delivered on 19th March, 2021 in Mombasa HCCC No. 52 of 2020)*

**JUDGMENT**

1. The appellant, Claudia Mueni Mutungi, filed a suit against the 1<sup>st</sup> respondent, FEP Sacco Society Limited, and the 2<sup>nd</sup> respondent, Susan Kiambati, by way of an amended plaint dated 11<sup>th</sup> September 2020, seeking judgment for:
  - a. “Kshs 29,000,000;
  - b. A declaration that she was not a member of the 1<sup>st</sup> respondent;
  - c. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents breached her fundamental rights and freedoms under Article 36(2) of the Constitution;
  - d. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents breached Rule 15(e) of Sacco Societies (Deposit-taking Sacco Business) Regulations, 2010 and engaged in prohibited business by recruiting her and running a fixed deposit in her favour when she was not a member of the 1<sup>st</sup> respondent;
  - e. Special damages



- f. An order compelling the 1<sup>st</sup> respondent, its agents, servants, or anyone authorized by them to pay the accrued interest on the principal sum from 5<sup>th</sup> July 2020, to the date of payment of the principal amount;
  - g. The 3<sup>rd</sup> respondent be advised to consider administrative actions against the management of the 1<sup>st</sup> respondent to protect the larger public; and
  - h. Costs of the suit and interest”.
2. The appellant was a long term member of the Kenya Women Micro- Finance Bank, now known as Kenya Women Finance Trust (KWFT), where she held a fixed deposit account, and where the 2<sup>nd</sup> respondent managed her account as a Customer Care Manager. In November 2019, the 2<sup>nd</sup> respondent advised her to move to FEP Sacco Society Limited, which was offering a higher interest rate for fixed deposits as compared to KWFT. In persuading her to move her deposit, the 2<sup>nd</sup> respondent informed her that a smooth transition would be possible as she would handle her account.
  3. On the strength of the 2<sup>nd</sup> respondent’s advice, she transferred Kshs 29,000,000 from her account at KWFT to the 1<sup>st</sup> respondent’s account at KCB, Koinange street, Nairobi, on 2<sup>nd</sup> December 2019. Upon receipt of the deposits, on 3<sup>rd</sup> December 2020, the 1<sup>st</sup> respondent paid her anticipated interest in advance amounting to Kshs 1,136,438.
  4. She stated that, at the time of transferring the money, she did not apply for membership, and was not required to be a member of the 1<sup>st</sup> respondent. On 28<sup>th</sup> February 2020, she notified the 1<sup>st</sup> and 2<sup>nd</sup> respondents that she required her money to be placed in a call account for a period of 1 month on maturity on 3<sup>rd</sup> March 2020. The 1<sup>st</sup> respondent responded to her letter on 31<sup>st</sup> March 2020 by introducing a mischievous subject known as “...intention to withdraw membership of Claudia Mueni Mutungi”. On 6<sup>th</sup> April 2020, the 1<sup>st</sup> respondent gave her a form of application for alleged withdrawal from membership and requesting for the withdrawal of Kshs 20,000,000, which she completed.
  5. The appellant claimed that the issue of withdrawal was revisited on 4<sup>th</sup> June 2020 by the 1<sup>st</sup> respondent when she was informed that the notice to withdraw could only take effect from 5<sup>th</sup> July 2020 and lapse on 5<sup>th</sup> September 2020 in reliance on the 1<sup>st</sup> respondent’s by-laws number 17(a) of the 1<sup>st</sup> respondent’s rules; and that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were in breach of their agreement, hence the suit filed against them.
  6. In response to the claim, the respondents filed a Notice of Preliminary objection dated 21<sup>st</sup> August 2020 premised on the grounds that the court lacked jurisdiction to hear the matter under section 76 of the *Co-operative Societies Act*; and that the Court could only exercise appellate jurisdiction in terms of section 81(3) of the *Co-operative Societies Act*.
  7. In response to the Preliminary objection, the appellant filed grounds of opposition dated 11<sup>th</sup> September 2020 where she stated that the High Court has jurisdiction to deal with the matter as provided under Article 165(3) (a) of the *Constitution*. She also stated that sections 76 and 81(3) of the *Co-operative Societies Act* do not apply to the dispute since she is not and has never been a member of the 1<sup>st</sup> respondent.
  8. Together with the grounds of opposition, the appellant also filed a Notice of motion dated 11<sup>th</sup> September 2020 seeking summary judgment against the 1<sup>st</sup> respondent for Kshs 29,000,000 together with interest. The application was anchored on the grounds that her claim was for payment of Kshs 29,000,000 held by the 1<sup>st</sup> respondent in a fixed deposit and that, there are no triable issues on account of the amount and interest which should go to trial. She deposed that the 1<sup>st</sup> respondent’s by-laws



- only relate to the relationship between the 1<sup>st</sup> respondent and its members, and not to non-members. She further deposed that the 1<sup>st</sup> respondent issued her with a fixed deposit advice confirming that the maturity date of her deposits was 4<sup>th</sup> July 2020, which had since passed, and that as of 5<sup>th</sup> September 2020, the 1<sup>st</sup> respondent had not paid the principal amount and interest; that the 1<sup>st</sup> respondent had not denied receiving the Kshs 29,000,000 as a fixed deposit, and that she had made a demand for payment.
9. In opposition to the application, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit sworn by Dr. Jackson Wanjau, the Chief Executive Officer of the 1<sup>st</sup> respondent, on 31<sup>st</sup> October 2020 stating that the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a joint statement of defence dated 31<sup>st</sup> October 2020 stating that the appellant applied for membership from the 1<sup>st</sup> respondent under rules 9 and 10 of the 1<sup>st</sup> respondent's by-laws on 2<sup>nd</sup> December 2019 through its Mombasa branch office, and that she later withdrew from the Sacco by filling the mandatory withdrawal forms. It was contended that one cannot withdraw from that which she was never a member; they denied the allegation that the 1<sup>st</sup> respondent was a deposit taking entity and stated that information relating to their legal status is conspicuously displayed on its website; that the appellant deliberately failed to disclose all the interests she had been paid by the 1<sup>st</sup> respondent on four different occasions between 3<sup>rd</sup> December 2019 and 5<sup>th</sup> May 2020. They indicated that the appellant never denied being a member of the 1<sup>st</sup> respondent until the date she filed the instant suit demanding a refund. They further stated that, by virtue of the fact that the appellant is a member of the 1<sup>st</sup> respondent, the dispute is one that is contemplated under section 76 of the Co-operative Societies Act. They also stated that the Court cannot exercise both original and appellate jurisdiction in matters that the Co-operative Tribunal has the original jurisdiction to hear.
  10. Directions were taken in the matter and the parties agreed to have both the Preliminary objection and the application heard and determined together. Upon considering them, the trial Judge, by a ruling dated 19<sup>th</sup> March 2021, upheld the Preliminary objection that the court did not have jurisdiction to determine the suit and declined to determine the Notice of motion dated 11<sup>th</sup> September 2020.
  11. Aggrieved by the trial Judge's ruling, the appellant filed an appeal to this Court on grounds that the learned Judge was wrong in finding that the appellant was and is still a member of the 1<sup>st</sup> respondent; in finding that the 1<sup>st</sup> respondent was receiving non-withdrawable deposit from its member for the duration of the membership; in finding that the issues raised in the suits fall in the confines of section 76 of the Co-operative Societies Act; and in finding that the court lacked the jurisdiction to hear and determine the dispute thereby upholding the Notice of Preliminary objection.
  10. When the matter came up for hearing on the Court's a virtual platform, Mr. Omondi, learned counsel for the appellant, submitted that the appellant was not a member of the 1<sup>st</sup> respondent and that, therefore, the 1<sup>st</sup> respondent's rules did not apply to her; that the preliminary objection was based on the assumption that the appellant was a member of the 1<sup>st</sup> respondent and, as she was not a member, she was not bound by the provisions of Section 76 of the Co-operative Societies Act.
  11. On the application for summary judgment, learned counsel argued that, since the 1<sup>st</sup> respondent did not deny receiving the amount claimed, the application was competent; that the cause of action at the High Court was based on breach of contract and fraud. Counsel submitted that the membership form relied on was not verified; and that no ruling was issued on the application for summary judgment, and that this Court ought to review it.
  12. In support of the appeal, Mr. Were, learned counsel for the 3<sup>rd</sup> respondent, submitted that the Preliminary objection raised by the respondents did not meet the threshold of a proper Preliminary objection, and that the trial judge ought to have dismissed it so as to interrogate the issues raised in the suit.



13. Counsel submitted that the appellant had averred that she was not a member of the 1<sup>st</sup> respondent and that, contrary to the respondents' case, the Cooperative Tribunal did not have jurisdiction; that the issue of the appellant's membership is an issue that can only be determined at a full hearing; and that the dispute brought by the appellant did not constitute Sacco business as defined in the Sacco Act.
14. Mr. Malenya, learned counsel for the respondents, submitted that the appellant was and still is a member of the 1<sup>st</sup> respondent, and that the High Court had no jurisdiction to determine the matter as prescribed under section 76 of the Co-operative Societies Act. Counsel further submitted that this appeal is a violation of section 81 of the Co-operative Societies Act, and prayed that it be dismissed.
15. Having carefully considered the record, the ruling and the submissions of the parties, the main issue for consideration is whether there was a competent Preliminary objection before the court, and whether the same is sustainable.
16. Black's Law Dictionary, 11<sup>th</sup> Edition defines a "preliminary objection" as:

... an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary."
17. A Preliminary objection was also defined in the case of *Mukisa Biscuit Company v Westend Distributors Limited* (1969) EA 696 at page 701 thus:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues. This improper practice should stop".
18. Law, JA. in the Mukisa Biscuits case (supra) went on to state that:

A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point ....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence ...."
19. The Supreme Court in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party



to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

20. In the case of *Muiruri v Kimemia* (2002) 2 KLR 677 this Court held that:

A preliminary objection is in the nature of a demurrer in that it raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

21. The Tanzanian Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & others v Attorney General* (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJ.A.), succinctly discussed preliminary objections thus:

At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

22. In the instant case, the Preliminary objection raised by the respondents challenged the jurisdiction of the High Court to determine the appellant’s suit on the basis of sections 76 and 81 of the *Co-operative Societies Act* precluded the court from hearing such matters.

23. Section 76 of the said Act 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 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.
24. Section 81 of the said Act confers original jurisdiction to the Co-operative Tribunal to hear disputes outlined in section 76 of the *Co-operative Societies Act*, while the High Court has appellate jurisdiction as provided under section 81(1) of the said Act.
25. The basis of the Preliminary objection was that, since the appellant was a member of the 1<sup>st</sup> respondent, the Cooperative Tribunal and not the High Court had jurisdiction to hear their dispute. This was notwithstanding that, at all material times, and as evidenced in the pleadings, the appellant denied being a member of the 1<sup>st</sup> respondent. Clearly, this was one of the contested issues in the suit.
26. Addressing the Preliminary objection, the trial Judge went into great lengths to determine whether the appellant was or was not a member of the 1<sup>st</sup> respondent. The trial Judge held thus:
36. The plaintiff denied having any knowledge of the membership application form, the membership number and the membership register. She averred that she did not fill the said membership application form or recognize the handwriting and signature thereon. It was averred that she had written to the police to subject the said document to forensic investigation. She however did not support her claim with any documentary evidence such as the letter written to the police requesting them to undertake investigations. The exhibits marked JW1E and JW1F are FEP Sacco Ltd withdrawal forms duly filled and signed by Claudia Mueni Mutunga. The said forms are dated 24<sup>th</sup> April, 2020 and 6<sup>th</sup> April, 2020, respectively.
37. The position of the law is that he who asserts must prove his case. No evidence such as copies of account opening forms was adduced by the plaintiff to prove the allegations that she was a depositor and the 1<sup>st</sup> defendant a deposit-taker. On the other hand, the 1<sup>st</sup> defendant adduced evidence in support of its claim that the plaintiff was its member. In the said circumstances, the burden of proof lies with whoever would want the court to find in his favour, in support of what he claims.
41. In my view the issue herein arose in the course of a transaction where the 1<sup>st</sup> defendant was receiving non-withdrawable deposit from its member which deposit was not available to the member for the duration of the membership. This is evidenced by the fact that the plaintiff filled withdrawal forms so that she could access her money. That was in line with the provisions of Section 2 of the *Sacco Societies Act*, which provides as follows: -
- “Sacco business” means financial intermediation and any other activity by a Sacco society based on co-operative principles and in accordance with this Act, or in compliance with Islamic law by way of—
- a. receipt of withdrawable deposits, domestic money transfer services, loans, finance advances and credit facilities; or
- b. receipt of non-withdrawable deposits from members and which deposits are not available for withdrawal for the duration of the membership of a member in a Sacco society and may be used as collateral against borrowings providing finance and domestic money transfer services; (emphasis added).
42. The 3<sup>rd</sup> defendant submitted that the preliminary objection did not meet the threshold and standards of what would legally be a preliminary objection on the basis that the plaintiff denied



being a member of the 1<sup>st</sup> defendant therefore the Court has to investigate further to establish this aspect”.

27. After the foregoing holding, the trial Judge proceeded to find that the Court had no jurisdiction and downed its tools.
28. As stated in the Mukisa Biscuit case (supra), a Preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
29. In this case, a question of jurisdiction had arisen in the pleadings that required to be ascertained by the court. This was a matter in controversy that was not capable of being determined as a pure point of law since the parties’ documentation in contention required to be tested and verified on cross examination. A mere analysis by the court on contested materials annexed to the parties’ affidavits was not sufficient to determine the question of jurisdiction. By proceeding to make a determination as to whether or not the appellant was a member of the 1<sup>st</sup> respondent, this being a contested issue, we find that the court misdirected itself by considering matters that it ought not to have considered at the preliminary stage, thereby calling for our interference with that decision.
30. Further, we have considered the ruling, and it is apparent that the trial Judge having found that it had no jurisdiction to determine the suit, did not address the Notice of motion dated 11<sup>th</sup> September 2020. Having found as we have that the question of jurisdiction remains an outstanding question, we consider it appropriate to reinstate the suit and remit it to the High Court for determination.
31. In sum, we find that the appeal is merited and is hereby allowed with costs to the appellant. The ruling dated 19<sup>th</sup> March 2021 be and is hereby set aside and, consequently, the substantive suit being Mombasa High Court Civil Case Number 52 of 2020 and the Notice of Motion dated 11<sup>th</sup> September 2020 are hereby reinstated for determination on their merits by a Judge other than Njoki Mwangi, J.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 26<sup>TH</sup> DAY OF APRIL, 2024.**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

I certify that this is the true copy of the original

Signed

**DEPUTY REGISTRAR**

