



**Kioko & 6 others v Ojwang & 17 others (Civil Appeal 78 of 2019)
[2024] KECA 1424 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KECA 1424 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 78 OF 2019
DK MUSINGA, MSA MAKHANDIA & P NYAMWEYA, JJA
OCTOBER 11, 2024**

BETWEEN

**JOHN MUANGE KIOKO 1ST APPELLANT
NZISA BETH WAMBU 2ND APPELLANT
JOSEPH MBALUTO 3RD APPELLANT
MBITHI MULELA 4TH APPELLANT
NANCY MAILU 5TH APPELLANT
JOSEPH NDONY 6TH APPELLANT
JANET NZILANI 7TH APPELLANT**

AND

**SAMSON OJWANG 1ST RESPONDENT
HARRISON NYAMU 2ND RESPONDENT
LAZARUS MUEMA NDIVO 3RD RESPONDENT
ROSEMARY MWANIKI 4TH RESPONDENT
PETER KAMBA KIITI 5TH RESPONDENT
DAVID NZOMO 6TH RESPONDENT
CATHERINE NZILA 7TH RESPONDENT
NATHAN MUANGE NGWILI 8TH RESPONDENT
COLLINS KITAKA KALOKI 9TH RESPONDENT
ROMANA NGINA KITUSA 10TH RESPONDENT
DAVID NDOLO 11TH RESPONDENT**



GEOFFREY OMONDI	12 TH RESPONDENT
ROSE KASUU	13 TH RESPONDENT
MOSES TAMA	14 TH RESPONDENT
PATRICK MULAA	15 TH RESPONDENT
JOSHUA KAVITHI	16 TH RESPONDENT
KATELEMBO ATHIANI MUVUTI FARMING AND RANCHING COOPERATIVE SOCIETY	17 TH RESPONDENT
COUNTY COMMISSIONER FOR CO-OPERATIVES MACHAKOS COUNTY	18 TH RESPONDENT

*(Being an appeal from the ruling and order of the High Court at Machakos
(Kemei, J.) dated 4th December 2018 in Civil Suit No. 13 of 2018)*

JUDGMENT

1. The facts leading to this appeal are fairly straightforward. The appellants filed suit against the respondents in the High Court at Machakos by a plaint dated 12th June 2018. They sought various prayers with regard to the running and management of the affairs of Katelembo Athiani Muvuti Farming and Ranching Co-operative Society, (“the 17th respondent”) by the management committee. Pursuant to the suit, the appellants filed an application by way of Notice of Motion dated 12th June 2018, seeking orders of injunction in terms that the 1st to 9th respondents who were then members of the 17th respondent Task Force Committee, either by themselves, their agents, servants or in any manner whatsoever be restrained from running and managing the 17th respondent’s affairs; be restrained from in any manner whatsoever taking up office pending the hearing and determination of the suit, and that the court do issue an order directing the County Commissioner for Co- operatives in Machakos County, (“the 18th respondent”) to convene a valid Annual General Meeting and thereafter oversee and conduct elections under the 17th respondent’s Constitution and the *Co-operatives Societies Act*, so as to elect a new management committee.
2. In response to the suit and application, the 5th, 7th, 10th to 18th respondents filed notices of preliminary objections dated 27th June 2018, 28th June 2018, and 9th August 2018, respectively. They were all to the effect that the trial court had no jurisdiction to entertain a dispute concerning the business of a Co-operative Society as provided for in section 76 of the *Co-operative Societies Act* as that jurisdiction was a preserve of the Co-operative Societies Tribunal (“the Tribunal”). Further, that the entire suit and the application offended the provisions of section 81(1) of the said Act which provides for appeals from the decision of the Tribunal to the High Court within 30 days of the decision.
3. To these preliminary objections, the appellants responded by filing grounds of opposition, stating that the subject matter of the suit was about the composition and management of the 17th respondent’s task force committee, therefore it did not fall within those matters that must be handled by the Tribunal in the first instance as envisaged and contemplated under section 76 of the *Co-operative Societies Act*.
4. The trial court upon hearing the preliminary objections inter- partes, upheld them, stating that whatever the appellants were raising did not fall outside the realm of section 76 of the *Co-operative Societies Act*. The suit as well as the application were accordingly struck out.



5. Aggrieved by the ruling and order, the appellants filed the instant appeal challenging the decision on grounds, inter alia, that the trial court erred in law and in fact by failing to consider the appellants' written submissions; in finding that the preliminary objections had merit; by only considering the arguments raised in the respondents' submissions; and in failing to consider the authorities filed by the appellants, which demonstrated that the dispute was not one of those contemplated by section 76 of the *Co-operatives Societies Act*.
6. The appeal was canvassed by way of written submissions, with limited oral highlights. At the plenary hearing of the appeal on 15th May 2024, Mr. Mocha held brief for Ms. Sawe, learned counsel for the appellants, whereas Mr. Mutua, learned counsel, appeared for the 5th and 8th to 18th respondents. The appellants compressed the grounds of appeal into one main issue, that is, whether the trial court erred in law in upholding the preliminary objections.
7. The appellants submitted that the trial court wrongly agreed with respondents that the appellants' suit was purely a dispute relating to the business of the Co-operative Society and therefore, a preserve of the Tribunal. To the appellants, the dispute related to elections, illegal holding of office and failure to convene a general meeting by the management committee to allow for elections to be held and therefore the trial court had jurisdiction. That the disputes raised by the appellants were not the kind of business of the Society falling within the ambit and purview of section 76 of the *Co-operative Societies Act* and therefore, the trial court misdirected itself by holding otherwise. Counsel relied on the case of *Alex Malikhe Wafubwa & Others v Elias Nambakha Wamita & 4 Others* [2012] eKLR, for the propositions.
8. The respondents on the other hand submitted that their Preliminary Objections were anchored on section 76 of the *Co-operative Societies Act*. Their argument was that the appellants' suit was purely a dispute relating to the business of the affairs of a Co-operative Society and therefore, a preserve of the Tribunal. Accordingly, the trial court did not have jurisdiction to entertain the suit.
9. At the plenary hearing of the appeal, Mr. Mocha indicated that the 1st to 4th and 6th to 7th respondents did not appear, though served with hearing notices. We also noted that they had not participated in the proceedings in the trial court. Both counsel reiterated the appellants' and respondents' positions already set out elsewhere in this judgment. Suffice to add that the 18th respondent through its submissions dated 13th May 2024, equally submitted that the High Court was right in upholding the Preliminary Objections as raised by the respective respondents. That the appellants' argument that a dispute relating to election, illegal holding of office, and failure to convene a general meeting by the management committee did not concern the business of the society was misleading. That such disputes cover not only the internal management of the Society but also part of the activities of the society within the ambit of its bylaws and rules. That the court was right therefore in holding that the dispute fell within section 76 of the *Co-operative Societies Act* and that it was a dispute that the Tribunal could handle in the first instance.
10. We have carefully considered the record of appeal, the submissions of respective counsel, the authorities cited, and the law. To our minds, the only issue for determination is whether the trial court was right in upholding the preliminary objections raised by the respondents. From the plaint, the appellants expressly pleaded that they were members of the 17th respondent and that what concerned them was the interim committee which had been put in place to oversee the affairs of the Society for a three-months period, and that they had failed to do, what they were required to do that is, putting in place measures to safeguard the members' interest. They had also failed to address issues concerning the Society's properties. That despite there being definite time within which the members were to stay in the office, and the same having expired, they had refused to vacate the offices. The appellants also



attacked the mode of appointment of the task force members. They thus sought prayers already set out elsewhere in this judgment. This was, therefore, ideally a dispute between members of the 17th respondent and their management team as correctly held by the trial court.

11. It has constantly been stated that jurisdiction is a threshold issue that goes to the competence of the Court to hear and determine a suit. Jurisdiction can be raised at any stage of the proceedings in court, by any of the parties, or by the court, and once raised the court would do well to examine it and render a considered ruling on it. Jurisdiction, a mantra in adjudication, connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceedings. Where a court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency, and objectivity injected into it, will be marooned in the intractable web of nullity. See *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 Others* [2023] KECA 80 (KLR).
12. Were the preliminary objections raised in the suit in the trial court well taken? In the Tanzanian case of *Karata Ernest & Others v Attorney General* [2010] TZCA 30, the court put the issue of preliminary objections in a more succinct manner:

“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 clear implication out of the pleadings. 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.”

We entertain no doubt at all that the preliminary objections raised were purely on a point of law and were therefore properly taken.

13. Section 76 of the *Co-operative Societies Act* is the principal section that hems the scope of disputes which fall within the jurisdiction of the Tribunal. It provides that:

76.

- (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 license or any other due, from the Authority.”
14. From the foregoing, it is clear that a dispute that falls under section 76 of the [act](#) must be referred to the Tribunal.
15. The appellants’ suit in the main revolved around the complaints by members of the Society as against the management team. The dispute therefore clearly involved members of a Co-operative Society and its business, which ideally meant that the High Court had no jurisdiction to entertain the suit. The proper forum was none other than the Co-operative Societies Tribunal. The High Court only had appellate jurisdiction in the circumstances pursuant to section 81 of the Act and its decision flowing therefrom was final.
16. We note though that the expression “business of the society” has not been defined in the Act, 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. In the case of *Gatanga Coffee Growers Co- operative Society Ltd v Gitau* Civil Appeal No. 135 of 1967, for instance, Harris and Simpson, J. held as follows:
- “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.”
17. Clearly, from the pleadings in the High Court, the issues raised were disputes that relate to the business of a Co-operative Society and no other, and as such, the dispute ought to have been referred to the Tribunal and not the High Court. The forum provided for ventilating the aggrieved party’s claim is clear, it is the Tribunal. The High Court is not clothed with original jurisdiction in Co- operative Societies disputes, but can hear parties by way of appeals only as per section 81(1) of the [Co-operatives Act](#) which provides:
- “Any party to the proceedings before the Tribunal who is aggrieved by any order of the Tribunal may, within thirty days of such order, appeal against such order to the High Court.”
- Also, section 81(5) provides:
- “The decision of the High Court on any appeal shall be final.”
18. We think we have said enough to show that the trial court was right in downing its tools with regard to the dispute. Before we pen off, we wish to reiterate what Lenaola, J. (as he then was), said in the case of [John Richard Ouma Nyamai v The Co-operative Tribunal & 2 Others](#) [2013] eKLR:
- “The [Constitution](#) has thus donated power to the courts and Tribunals to exercise judicial authority and the mechanisms of dispute resolution with regard to the Co- operative



Societies are contained in the parent Act which is the *Co-operative Societies Act* which has established the 1st respondent whose provisions are well articulated and defined in subsidiary legislation. The High Court should not be seen to be usurping the powers of Tribunals and inferior courts without good reasons for doing so.”

19. Courts over the years have been constantly reminded that where Parliament has through statute provided a clear procedure for redress or resolution of disputes, that procedure ought and must be followed. This principle was reiterated in the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR. The appellants’ first pit stop therefore should have been the Tribunal and not the High Court.
20. In the light of our conclusions above, we are satisfied that the ruling and order of the trial court was arrived at on well-reasoned grounds. Accordingly, the appeal is devoid of merit and we dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

