



**Gitonga Michuki & Company Advocates v Murang’a Farmers  
Co-operative Union Limited (Insolvency Notice E107 of 2023)  
[2025] KEHC 3618 (KLR) (Commercial and Tax) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3618 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY NOTICE E107 OF 2023**

**AA VISRAM, J**

**MARCH 24, 2025**

**BETWEEN**

**GITONGA MICHUKI & COMPANY ADVOCATES ..... CREDITOR**

**AND**

**MURANG’A FARMERS CO-OPERATIVE UNION LIMITED ..... DEBTOR**

**RULING**

1. The Creditor filed a Statutory Demand dated 23<sup>rd</sup> August, 2023, demanding payment of a sum of Kshs. 29,184,570/- from the Debtor on account of an Inspection Report of the Commissioner of Co-operative Development dated 23<sup>rd</sup> April, 2018, and outstanding legal fees for representation in numerous legal proceedings (“the Statutory Demand”).
2. In response, the Debtor filed a Notice of Preliminary Objection dated 13<sup>th</sup> December, 2023, citing the Creditor’s failure to comply with the mandatory provisions under Sections 58, 59, 60 and 61 of the *Co-operative Societies Act* (Chapter 490 of the Laws of Kenya).
3. The Creditor responded to the Objection through the replying affidavit of Gitonga Kithinji Muriuki, an Advocate practicing in the Creditor’s firm, sworn on 9<sup>th</sup> February, 2024, and further, the parties filed rival submissions dated 4<sup>th</sup> March, 2024, and 14<sup>th</sup> March, 2024 respectively.
4. Given that a Preliminary Objection ought to be canvassed on the basis of written submissions only, this court has not considered the contents in the said replying affidavit.



## Analysis and Determination

5. The crux of the Objection is that the Creditor failed to comply with the mandatory procedures set out under the *Co-operative Societies Act*, namely, Sections 58, 59, 60 and 61 of the said Act.
6. An Objection set out above is subject to the test set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696* and affirmed by the Supreme Court in *Joho & another v Shahbal & 2 others [2014] KESC 34 (KLR)*. In *Mukisa(supra)*, Law J.A., and Newbold P. respectively at 700 and 701, held as follows:

Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.” (Emphasis mine)

Newbold, P.:

“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 if 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 increases costs and, on occasion, confuse the issues. This improper practice should stop.”(Emphasis mine)

7. For a Preliminary Objection to succeed, the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.
8. In the present matter, the mandatory provisions outlined by the Debtor raise a legal question, which if affirmed, will dispose of the Petition.
9. The relevant Sections of the *Co-operative Societies Act*, which form the basis of the Objection, and are in the Debtor’s view, mandatory, provide as follows:-

### 58. Inquiry by Commissioner

- (1) The Commissioner may, of his own accord, and shall on the direction of the Cabinet Secretary, as the case may be, or on the application of not less than one-third of the members present and voting at a meeting of the society which has been duly advertised, hold an inquiry or direct any person authorized by him in writing to hold an inquiry, into the by-laws, and the working and financial conditions of any co-operative society.
- (2) All officers and members of the co-operative society shall produce such cash, accounts, books, documents and securities of the society, and furnish such information in regard to the affairs of the society, as the person holding the inquiry may require.



- (3) The Commissioner shall report the findings of his inquiry at a general meeting of the society and shall give directions for the implementation of the recommendations of the inquiry report.
  - (4) Where the Commissioner is satisfied, after due inquiry, that the Committee of a co-operative society is not performing its duties properly, he may—
    - (a) dissolve the Committee; and
    - (b) cause to be appointed an interim Committee consisting of not more than five members from among the members of the society for a period not exceeding ninety days.
  - (5) A person who contravenes subsection (2) shall be guilty of an offence and shall be liable to a fine not exceeding two thousand shillings for each day during which the offence continues.
59. Inspection of books of indebted society
- (1) The Commissioner may, if he thinks fit, on the application of a Creditor of a co-operative society, inspect, or direct some persons authorized by him in writing to inspect, the books of the society, if—
    - (a) the Creditor satisfies the Commissioner that the debt is a sum then due, and that he has demanded payment thereof and has not received satisfaction within a reasonable time; and
    - (b) the applicant deposits with the Commissioner such sum as security for the expenses of the inspection as the Commissioner may require.
  - (2) The Commissioner shall inform the Creditor of the results of the inspection. (Emphasis mine)
60. Expenses of inquiry
- (1) Where an inquiry is held under Section 58, or an inspection is made under Section 59 of this Act, the Commissioner may, by a certificate under his hand, make an order apportioning the expenses, or such part of the expenses as he considers proper, between the society, the members or Creditor demanding the inquiry or inspection, and the officers or former officers of the society; and the decision of the Commissioner thereon shall be final.
  - (2) Any sum awarded by way of expenses under sub-Section (1) shall be a civil debt recoverable summarily on production of the certificate referred to in that sub-Section.
61. Procedure for dissolution



- (1) If the Commissioner, after holding an inquiry Section 58 or making an inspection under Section 59 of this Act, or receiving an application made by at least three fourths of the members of a co-operative society, is of the opinion that the society ought to be dissolved, he may, in writing, order the dissolution of the society and subsequent cancellation of registration.
  - (2) Any member of a co-operative society who feels aggrieved by an order under subsection (1) may, within two months after the making of such order, appeal against the order to the Cabinet Secretary with a final appeal to the High Court.
  - (3) Where no appeal is filed within the prescribed time, the order shall take effect on the expiry of that period, but where an appeal is filed within the prescribed time the order shall not take effect unless it is confirmed by the Cabinet Secretary or by the High Court, as the case may be.
  - (4) Where the Commissioner makes an order under subsection (1) he shall make such further order as he thinks fit for the custody of the books and documents and the protection of the assets of the society.
  - (5) No co-operative society shall be dissolved or wound up save by an order of the Commissioner. (Emphasis mine)
10. In response to the Objection, the Creditor submitted that Section 58 as set out above, is not applicable to the instant proceedings because the inquiry referenced therein is at the instance of the Commissioner for the Co-operative Development suo moto.
  11. The Creditor submitted that Sections 59 and 60, provide for two types of inspections, which can be called in respect of the affairs of a co-operative society, and that one of them is requested for by the society itself. The Creditor asserted that the Debtor called for the same, an inspection was undertaken, and the same confirmed the indebtedness of the Debtor, and culminated in the Inspection Report of 23<sup>rd</sup> April, 2018. The said debt is not disputed.
  12. The Creditor further submitted that an inspection ordered by the Commissioner does not have to be preceded by an inquiry as the two are separate processes. The Creditor faulted the Debtor's reliance on Section 61, stating that the same is baseless, and does not, in any way, extinguish, vitiate or set aside the Creditor's rights under the *Insolvency Act*.
  13. Additionally, the Creditor was of the view that the *Co-operative Societies Act*, related only, and contemplated a scenario where the Creditor was also a member of the society. It was of the view that, because it is not a member of the society, the applicable provisions in the present matter is the *Insolvency Act* and Regulations, rather than the Cooperative *societies Act*. The Creditor submitted that the Act expressly states that the provisions of the *Companies Act* may apply, and the *Insolvency Act*, being its successor, in relation to matters of insolvency, accordingly also apply.
  14. Having considered the submissions of the parties, it is clear from a reading of the above, that Section 59(1) allows a Creditor who is a non-member of the Co-operative Societies to request an inspection into the affairs of the Company. The Creditor's position that it is precluded from invoking the process, as it were, or that the process applies to members only, is therefore untenable.



15. Section 59 expressly states that, in the event the Creditor satisfies the Commissioner that the debt is a sum then due, and that he has demanded payment thereof and has not received satisfaction within a reasonable time, then the commissioner may either inspect, or direct some persons authorized by him in writing, to inspect the books of the society.
16. As regards the argument that the Insolvency Act and Regulations apply, Section 61 (5) is unequivocal, it states that no co-operative society shall be dissolved or wound up, save by an order of the Commissioner. Therefore, while Section 64 of the Act states that certain provisions of the Companies Act may apply, reading the two sections together and bearing in mind the objectives and purpose of the Act, my interpretation is that the Companies Act may apply where there is no conflict between the provisions of co-operative societies Act and the Companies Act. Further, the Act expressly states that that Companies Act may apply, not the Insolvency Act.
17. I am not persuaded by the Creditor's submission that the Insolvency Act is the successor and accordingly applies to the present matter. I do not think that provisions of the Insolvency Act may apply where there are express provisions governing the process of dissolution set out in the Co-operative Societies Act, which to my knowledge, are in force, and have not been repealed.
18. It must be remembered that the purpose of serving a Statutory Demand is to commence insolvency proceedings. It is not to be used as the starting point for debt collection, but rather, as a means by which liquidation proceedings are commenced on the basis that the company is no longer commercially viable. Therefore, if the intention was to commence liquidation proceedings against the Debtor, based on the provisions above, the appropriate process governing the same is found in the Co-operative Societies Act, and not the Insolvency Act.
19. Having found that the process governing dissolution of a society is not the Insolvency Act, the upshot is that the service of the Statutory Demand issued by the Creditor was irregular and of no legal effect. The same is unenforceable.
20. Finally, it is worth stating that Section 61 of the Co-operative Societies Act, additionally provides for appellate process after compliance with internal process in the event a party is aggrieved with the outcome. The process contemplates in the first instance, an appeal to the Cabinet Secretary, and subsequently, a final appeal to the High Court.
21. In this regard, expressing itself on the doctrine of exhaustion, the court in *Speaker of National Assembly v Karume* [1992] KLR 21, stated as follows:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”
22. Further, in *Geoffrey Muthinja Kabiru & 2 Others – Vs – Samuel Munga Henry & 1756 Others* [2015] eKLR, the Court of Appeal stated that:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte



Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.” (Emphasis mine)

22. Guided by the above, I am further persuaded that this Court ought to postpone judicial making considerations and allow for the statutory dispute resolution mechanism to take their course in the first instance.
23. Based on the reasons set out above, the Preliminary Objection is upheld. The Statutory Demand is hereby set aside with costs.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF MARCH, 2025**

**ALEEM VISRAM, FCIArb**

**JUDGE**

**In the presence of;**

.....**Court Assistant**

.....**for Creditor**

.....**for Debtor**

