



**Winas Savings & Credit Co-operative Society Limited v Mwaniki t/
a Grafjam Energy Limited & another (Miscellaneous Civil Application
E076 of 2024) [2025] KEHC 5538 (KLR) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CIVIL APPLICATION E076 OF 2024
RM MWONGO, J
APRIL 30, 2025**

BETWEEN

**WINAS SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED APPLICANT**

AND

**GENANDO NYAGAH MWANIKI T/A GRAFJAM ENERGY
LIMITED 1ST RESPONDENT**

NEXUS AUCTIONEERS 2ND RESPONDENT

RULING

1. By a notice of motion dated 03rd October 2024, the applicant seeks for orders that:
 1. Spent;
 2. Spent;
 3. This Honourable Court be pleased to issue an order staying and/or setting aside proceedings in Embu MCCC No. E169/2024 Genando Nyagah Mwaniki T/A Grafjam Energy Limited vs Winas Savings & Credit Co-operative Society Limited and Nexus Auctioneers pending the hearing and determination of this Application;
 4. Spent;
 5. This Honourable Court be pleased to call and place before it the proceedings before the Principal Magistrate's Court sitting at Embu in MCCC No. E169/2024 Genando Nyagah Mwaniki vs Winas Savings & Credit Co-operative Society Limited and Nexus Auctioneers for purposes of interrogating the correctness/legitimacy of the proceedings before the subordinate court and make any appropriate orders/directions to ensure fair administration of justice;



6. This Honourable Court be pleased to make a finding that the Proceedings before Learned Magistrate Honourable Hon. M.N Kinyua, Resident Magistrate and issuance of the ex-parte Orders of 27th September 2024 despite not being clothed with neither pecuniary nor original jurisdiction was irregular, un-procedural, ultra vires and unlawful hence prejudicial and a miscarriage of justice;
 7. This Honourable Court be pleased to make a finding that the Proceedings Learned Magistrate Honourable Robert G Mundia Principal Magistrate, and subsequent of the ex- parte Orders of 2nd October 2024 despite not being clothed with neither pecuniary nor original jurisdiction was irregular, un-procedural, ultra vires and unlawful hence prejudicial and a miscarriage of justice;
 8. This Honourable Court be pleased to issue/make a declaration of a mistrial and find that the suit Embu MCCC No. E169/2024 lacks merit for want of jurisdiction having not been filed in the proper forum and therefore dismiss the suit;
 9. In the alternative to the above, this Honourable Court be pleased to issue/make a declaration of a mistrial and thereby order a de novo trial/ a retrial of Embu MCCC No. E169/2024 before another court of proper jurisdiction;
 10. This Honourable Court be pleased to grant/issue any other orders/directions as may be just and expedient with a view to dispensing justice; and
 11. The costs of this application be provided for.
2. The application is supported by the grounds set out on its face and facts deposed in the supporting affidavit thereof. The applicant withdrew the application against the 2nd respondent, who is now no longer a party.
 3. The applicant contended that the subject matter of the suit was a loan of Kshs.30,000,000/= advanced to the 1st respondent by the applicant. The 1st respondent having defaulted in servicing the said loan, the applicant repossessed the 1st respondent's motor vehicle registration number KCW 192Z. The 1st respondent moved the Magistrate's court for stay orders pending hearing and determination of the suit.
 4. It is the applicant's claim that its advocate was denied admittance to the virtual court session where the Magistrate granted stay orders and ordered release of the motor vehicle to the 1st respondent. The applicant asserted that given the subject matter in the plaint, the Magistrate did not in fact have pecuniary jurisdiction to make the orders made. As such, the plaint having been filed before a court lacking jurisdiction to entertain the suit, it should be struck out.

Response

5. In opposition of the application, the 1st respondent filed grounds of opposition stating that the application is unfounded in law and the court lacks jurisdiction to entertain it.

Submissions

6. The application was canvassed by way of written submissions.

a. The Applicant's Submissions

7. The applicant submitted that the orders of the Magistrate's court should be set aside because that court lacked jurisdiction to entertain the suit in light of section 67(3) of the [Sacco Societies Act](#) 2022 and



section 76 of the *Co-operative Societies Act*. That the dispute should have been referred to the tribunal and not to court. It relied on the cases of *Oucho v Joseph Otieno Bee, Chief Executive Officer Bandari Sacco Ltd & 12 others; Sacco Society Regulatory Authority (SASRA) (Interested Party)* [2022] KEHC 6 (KLR) and *Mwiki PSV Sacco Society v Karangu & 3 others* [2024] KEHC 7897 (KLR). In these cases, the doctrine of exhaustion was discussed in the context of disputes subject to the *Co-operative Societies Act*.

8. Further, the applicant submitted that the subject matter of the suit before the Magistrate's court is Kshs.30,989,579/=, which amount is above the pecuniary jurisdiction of that court. Reliance was placed on the case of *Owners of The Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* [1989] KECA 48 (KLR) it was urged the court to set aside the proceedings ongoing in the trial court. The applicant also sought that the orders given by the Magistrate be set aside because they were made in its absence since its counsel was not admitted into the virtual court session. Reliance was placed on the case of *Karani v Judicial Service Commission* [2023] KEELRC 2880 (KLR) where the court appreciated the technological challenges associated with virtual court sessions.
9. Finally, the applicant urged the court to consider the edicts in the case of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358 to grant the interlocutory injunction prayed. It concluded by relying on the provisions of Articles 165(6) and (7) of *the Constitution* and the case of *Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot* [2020] eKLR. It urged the court to allow the application.

b) The 1st Respondent Submissions

10. In his submissions, the 1st respondent stated that the impugned order is limited to Kshs.10,000,000/= which is within the jurisdiction of the Magistrate's court that issued it. He denied having defaulted on servicing the loan and that the applicant relied on the seized motor vehicles to repay the loan. He stated that the application was not properly before the court since the applicant had not sought review or appeal against the impugned orders. He urged that the court has no jurisdiction to entertain the application which is not an appeal where substantive orders can be granted.

Issue for Determination

11. The main issue for determination is whether this court has jurisdiction in this matter.

Analysis and Determination

12. The impugned order issued by the Principal Magistrate determined the Notice of Motion dated 26th September 2024. That application was filed alongside a plaint of even date, whose subject matter is a loan for the amount of Kshs.30,989,579/=. Through a notice of motion dated 02nd October 2024, on the day when the impugned order was made, the applicant filed an application before the same Magistrate's court, seeking stay of execution of that order. That application is pending hearing and determination in that court. The following day, the applicant filed the present application and interim orders were granted in terms of prayers 2 and 4.
13. The 1st respondent in his grounds of opposition stated that the application is not grounded on any law and that this court lacks jurisdiction. Without jurisdiction nothing else can be determined. The jurisdiction of a court is drawn from *the Constitution* or from statute or from both. The Supreme



Court in *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR) stated as follows: -

“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.”

14. In the locus classicus case on jurisdiction, the case of *Owners of The Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd (supra)* the court stated:

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

15. In this case, the applicant filed the miscellaneous application herein seeking that the proceedings before the magistrate’s court be set aside. The basis of the application is that Principal Magistrate’s court lacked pecuniary jurisdiction to issue the impugned order. In his written submissions, the 1st respondent stated that the Principal Magistrate gave an order based on a subject matter that is within the jurisdiction of that court.

16. Section 10 of the Magistrates’ Court Act establishes the pecuniary jurisdiction of the Magistrates’ Court. The question of jurisdiction is one that ought to be determined by the court before which it arises: In other words, in this case, the issue of jurisdiction cannot arise outside the Principal Magistrate’s court in the first instance.

17. A party aggrieved by the decision of the Magistrates court has two options for recourse. First, he may seek review of the decision before the same court that issued the order as provided under Section 80 of the Civil Procedure Act which states:

“Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

18. Secondly, the aggrieved party who has not opted to seek review of the decision before the Magistrate’s court may prefer an appeal against that decision to the High Court under Section 65(1)(b) of the Civil Procedure Act which provides:

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court from any original decree or part of a decree of a subordinate court, on a question of law or fact.”

19. The applicant did not seek review the impugned order neither did it file an appeal. In essence, through this application, the applicant wants this court to, inter alia, set aside the proceedings before the Magistrate’s court on grounds that the court did not have jurisdiction ab initio. There is no doubt that



there is an arguable case through this application. In fact, there is the glaring fact that the suit filed at the Magistrate’s court is incompetent owing to lack of jurisdiction.

20. However, there is procedural flaw in the manner in which this court has been moved; a flaw that cannot be cured even by this court’s discretion. This procedural flaw takes away the jurisdiction of the court to determine this application in the manner that it has been lodged. An appeal to this court would have been more appropriate in the circumstances. In any event, through determination of a proper appeal, this court would be equipped with jurisdiction to make the orders sought herein.
21. The Court in the case of Ocharo v Ocharo & another [2024] KEELC 3568 (KLR) found itself in similar circumstances as those herein. The court conceded that indeed the Magistrate’s court suit was incompetent but the High Court (ELC) found itself lacking jurisdiction to stay the proceedings before the subordinate court.
22. In my view the procedure for moving the High Court in this matter is just as important as the matter itself. In the case of Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] KESC 2 (KLR), the Supreme Court stated thus:

“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent. Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of *the constitution*, which proclaims that, “...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”

Conclusions and Determination

23. Simply put, in a case such as this where the jurisdiction of the lower court is challenged, the correct means and manner to do so is by way of review before that Court or upon an appeal against the impugned decision. The decision being challenged being one concerning the absence of that Court’s jurisdiction, the substance of that decision ought to be decided either by the Court whose decision is challenged, or upon a substantive appeal in this Court, and not in an application for review.
24. In the result, the present application dated 3rd October 2024 is hereby struck out for being mis-procedural and for want of jurisdiction.
25. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 30TH DAY OF APRIL, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:



Mr. Micheni holding brief for Kiragu for Applicant

Mr. Mogusu for Respondent

Francis Munyao - Court Assistant

