



**Mhasibu Sacco Society Limited v Mnene (Civil Suit 5 of 2021)
[2024] KEHC 3982 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3982 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 5 OF 2021**

**FR OLEL, J
APRIL 22, 2024**

BETWEEN

MHASIBU SACCO SOCIETY LIMITED APPLICANT

AND

CLEOFA MARIA MNENE RESPONDENT

RULING

A. Introduction

1. The Application before this court for determination is the Notice of motion application dated 26.10.2022 brought pursuant to section 67(1) and (3) of the *Sacco societies Act*, Section 76(1) and (2) of the *Cooperative societies Act* and all other enabling provisions of law. The Applicant seeks the following prayers, That;
 - a. That this suit be and is hereby dismissed with costs to the respondent for want of jurisdiction.
 - b. That costs of this Application and the entire suit be provided for.
2. The Application is supported by the grounds on the face of the said application and the supporting affidavit of the respondent dated 26.10.2022, Wherein he deposed that the plaintiff in this suit is a Sacco society established under the Sacco society Act with a mission of mobilizing and economically empowering its members and that he was a member of the said sacco holding membership No MHS02212. Previously, he had served as a board member of the plaintiff- sacco between the year 2016 and 2018 and had a share capital worth Kshs 1,800,000/=, which evidenced his many years of saving with the plaintiff- sacco.
3. On 11th October 2011, the plaintiff- sacco had extended a loan of Kshs 19,268,652.00/= to him, which loan was fully guaranteed by other members of the plaintiff- sacco. Unfortunately, he defaulted from paying the said loan and the plaintiff- sacco proceeded to recover huge amounts from his



guarantors hence the outstanding amount as at 30th April 2021 was Kshs 553,594.00/=. Despite the obtaining position, the plaintiff filed this suit seeking to recover the whole amount of Kshs 19,268,652.00/= through registration of an informal charge over his property known as Land reference No 12715/4058(IR 98968).

4. The applicant averred that he had been advised by his counsel that all disputes arising out of sacco business between the sacco and its members in their ordinary cause of business were to be heard exclusively at the cooperative tribunal as established and mandated under Section 76(1), (b) and (2) of the Cooperative societies Act. The claim herein was a debt arising from ordinary business between the sacco and its members and the right forum to hear this dispute in the first instance was the cooperative tribunal as established in law. Further clause 35.0 of the plaintiffs by-law too, required that all dispute's concerning the business of the plaintiff-sacco society with its member be referred to the cooperatives tribunal as established under the Cooperative societies Act.
5. It was thus the Applicants contention that this court was bereft of jurisdiction to handle this dispute and should proceed to dismiss the entire suit with costs. The plaintiff/respondent did not file any replying affidavit and/or grounds of opposition in response to this Application. Be that as it may, since the issue raised is purely on a point of law, the court will proceed to determine the same on its merit.

B. Submissions

(a) The Defendant/Applicant/chargor submissions

6. The Applicant filed his submissions on 05.09.2023, where he rehashed the facts as pleaded in the said application and emphasized on the fact that this dispute was one between the society sacco and its member and had to be dealt with as provided for under Section 67(1) &(2) of the sacco societies Act, which referred such matters to the cooperative tribunal. Provisions of clause 35.0 of the plaintiff- sacco by law also recognized this fact and referred such disputes concerning the business of the sacco with its member to the cooperative tribunal.
7. The applicant relied on the Supreme Court case of Samuel Kamau Macabria & Another Vrs Kenya commercial Bank Ltd & 2 others (2012) eKLR, where it was held that jurisdiction flowed from either the constitution or legislation or both. The court could only exercise conferred jurisdiction and could not arrogate itself jurisdiction exceeding that which was conferred by law. The law was that these kinds of dispute ought to be heard and determined by the cooperative tribunal, which was the proper dispute resolution mechanism provided for in law.
8. In the alternative, even if the plaintiff - Sacco was right in insisting that the (OS) relating to an informal charge cannot be heard by the tribunal, Section 79(9) of the land Act did provide that “a charger shall not possess or sell land whose title documents have been deposited by a charge under an informal charge without an order of the court.” The Court as defined under Section 2 of the said Act was; “the Environment and land court”. The suit as filed was therefore incompetent and was ripe for dismissal.

(b) The plaintiff/respondent/charge submissions.

9. The plaintiff/ respondent did file their submissions on 22. 09. 2023 and stated that they had demonstrated that they hold an informal charge over the suit property, which was used as security by the chargor/Applicant when he was granted a financial facility of Kshs 19,268,652/=. The jurisdiction of the cooperative tribunal was derived from section 76(1) of the Cooperative societies Act, and the said provisions of law did not allow the tribunal to deal with matters raised for determination in the originating summons under consideration by court. The suit was premised on Order 37(4) of the Civil Procedure Rules, 2010, which allowed a chargor to move to court and seek its intervention by way of



(OS) and further Section 79(6) & (7) of the land Act did provide that a person holding an informal charge could only sell the said property after obtaining a court order.

10. The court which had jurisdiction to deal with the issues raised was the high court and not the cooperative tribunal and therefore the applicant's prayer to strike out the suit was baseless and could not be granted. Reliance was placed on the case of Nicholas osenda & 55 others Vrs Gusii Farmers cooperative Union Ltd & 5 others (2021) eklr, Shadrack Mogesi obebo & Another Vrs Commissioner for cooperative Development & 6 others (2018) eklr, & Alex Malikhe Wafubwa & 7 others Vrs Elias Nambakha Wamita & 4 others (2012) eklr where in the said cases it was held that the tribunal could not act in excess of its jurisdiction.
11. The plaintiff/chargor thus prayed that the said Application be dismissed with costs.

Analysis & Determination

12. I have considered the Application, its supporting affidavit and the parties' submissions as filed. The only issue the springs up for determination is whether the Cooperative Tribunal had jurisdiction to hear and determine this matter.
13. The subject of jurisdiction is by now well settled by the constitution, the law and legal principles.
14. Jurisdiction is defined in Halsbury's Laws of England 4th Ed Vol 9 as "...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision." Black's Law Dictionary, 9th Edition, defines jurisdiction as the court's power to entertain, hear and determine a dispute before it.
15. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

"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..."
16. The Court of Appeal in Jamal Salim v Yusuf Abdulabi Abdi & another Civil Appeal No 103 of 2016 [2018] eKLR stated as follows: -Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties.
17. This much was also appreciated by the court in Adero & another v Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;

1).....2) The jurisdiction either exists or does not ab initio ...3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.
18. Section 76 of the Cooperative societies Act provides that;

76

- (1) If any dispute concerning the business of a cooperative society arises;
 - a. Amongst 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 cooperative society; it shall be referred to the tribunal.

2. A dispute for the purpose of this section shall include;

- a. A claim by a cooperative 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 person, 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 cooperative society, whether such debt or demand is admitted or not.
- c. A claim by a sacco society against a refusal to grant or revocation of license or any other due, from the Authority.

19. The originating summons dated 24th August 2021 Sought the following prayers:

- a. That this Honourable court do issue declaration that an informal charge was created by depositing with the defendant the certificate of title to the property known as land reference No 12715/4058(IR 98968) to secure a loan facility of Kenya shillings Nineteen Million, two hundred and sixty eight thousand, six hundred and fifty two(Kshs 19,268,652.00/=).
- b. That this Honourable court do order that the property known as land reference No 12715/4058(IR 98968) be sold so as to recover the sum secured by the loan of Kshs 19,268,652.00/= together with interests accrued and currently due from the defendant to the plaintiff as at 20th April 2021.
- c. That upon grant of prayers 1 and 2 above, an order of vacant possession do issue over property known as land reference No 12715/4058(IR 98968) as against the respondent to enable the charge/Applicant to sell the suit property.

20. It is clear without a shadow of doubt that the issue in dispute is whether the plaintiff/chargor holds an informal charge over the suit property and if the court were to find in their favour, they be granted leave to sell the same to recover what is due to them. This then is the primary basis of this dispute and the law provides that it be filed by way of originating summons under Order 37 rule 4 of the civil procedure rules as read with Section 79(6) and (7) of the *Land Act*.

21. It is trite law that all originating summons must be filed at the High court and not the Magistrate court and/or before a tribunal. Secondly even though the respondent in the alternative did aver that the court under section 2 of the *land Act*, referred to Environment and land court, It has been held by the court Court of Appeal in the case of *Cooperative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 Others* (2017) eKLR that the ELC court lacks jurisdiction to deal with such disputes concerning contracts of mortgages, charges, collection of dues and rents and that such disputes fall within the jurisdiction of the High Court. Also see; *Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Limited & Another* (2016) eKLR, *Kipnetich Saina (suing as the legal representative of the Estate of the late Kipsaina Arap Tarus (deceased) vs Rachel Tarus & 7 Others* [2018] eKLR and *Al – Riaz International v Ganjoni Properties Limited* [2020] eKLR.



22. It is the finding of this court, that the cooperative tribunal does not have jurisdiction to make the declarations as sought as that would be in excess of what they are allowed to determine in law. Therefore, it cannot be said that this matter has been filed in the wrong court. In the supreme court case Petition No 007 of 2023 *Abidha Nicholas Vs The Attorney General & 7 others; (The National Environmental Complaints Committee & 5 others -Interested Parties)* a (a recent five Bench decision) dealt with the “ doctrine of Exhaustion” and established, where the tribunal could not adequately deal with issues raised(in that matter it was the fundamental rights of the Applicant), the litigant could not be denied a chance to access justice. In conclusion at paragraph 107, the court stated that that;

“Flowing form the above finding and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd vrs Kenya Breweries Ltd & 6 others* (Pet. No.15 of 2020) [2023] KESC 14 (KLR) (Const. and JR) (17 February 2023) Judgement.”

Diposition

23. Flowing from the above, it is clear that the Application dated 26th April 2022 lacks merit and the same is dismissed with costs.
24. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22ND DAY OF APRIL, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 22ND DAY OF APRIL, 2024.

In the presence of;

Ms Njoroge for Plaintiff/Respondent

Mr Waweru for Respondent/Applicant

Sam Court Assistant

