



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.2 OF 2010**

**GODFREY KINUU MAINGI..... 1<sup>ST</sup>**  
**PETITIONER/APPLICANT**

**JUSTUS MURUNGI.....2<sup>ND</sup>**  
**PETITIONER/APPLICANT**

**JOSEPH NTURIBI MWITHIMBU.....3<sup>RD</sup>**  
**PETITIONER/APPLICANT**

**HARUN MBURUGU.....4<sup>TH</sup>**  
**PETITIONER/APPLICANT**

**ANDREW GIKUNDA..... 5<sup>TH</sup>**  
**PETITIONER/APPLICANT**

**VERSUS**

**ATTORNEY**  
**GENERAL.....1<sup>ST</sup> RESPONDENT**

**COMMISSIONER FOR**  
**CO-OPERATIVE**  
**DEVELOPMENT..... 2<sup>ND</sup> RESPONDENT**

**NTHIMBIRI FARMERS**

**CO-OPERATIVE SOCIETY.....**  
**....INTERESTED PARTY**

**R U L I N G**

1. The Application dated 6<sup>th</sup> July 2010 is premised on the provisions of **Rules 11, 12, 20** and **21** of the **Constitution** of Kenya (Supervisory Jurisdiction and Protection of fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules. The Applicants seek the following Orders, that;

**“(i) The Application be certified urgent.**

- (ii) *The service of the Application be dispensed with owing to the urgency of the matter.*
- (iii) *The Court be pleased to stay execution of the Judgment entered/Award made against the Petitioners herein on 2<sup>nd</sup> April 2009 in Co-operative Tribunal Case No.230/2006 as consolidated with Co-operative Tribunal Cases Nos.231 to 234 of 2006 pending the hearing and determination of the Application.*
- (iv) *The Court be pleased to stay execution of the Judgment entered/Award made against the Petitioners herein on 2<sup>nd</sup> April 2009 in Co-operative Tribunal cases No.231 to 234 of 2006 pending the hearing and determination of this Petition.*
- (v) *The costs of the Application be provided for.”*
2. The elaborate Grounds in support are that;
- (i) *The Petition herein arises from a purported inquiry which the 2<sup>nd</sup> Respondent undertook when the Petitioners/Applicants were serving as the management committee of the Interested Party from June 1999 to 26<sup>th</sup> November, 2003.*
- (ii) *The Petitioners were respondents in Co-operative Tribunal Cases Nos. 230-234 of 2006 in which an award was delivered against them on 2<sup>nd</sup> April, 2009 for Kshs.5,075,224.50.*
- (iii) *Dissatisfied with the award/judgment of the Co-operative Tribunal, the Petitioners applied on 3<sup>rd</sup> April, 2009 for copies of the proceedings to enable them to lodge the Record of Appeal.*
- (iv) *On 22<sup>nd</sup> April 2009, the Petitioners filed their Memorandum of Appeal in High Court Civil Appeal No.199 of 2009; Godfrey Kinuu Maingi & 4 Others vs. Nthimbiri Co-operative Society Limited.*
- (v) *Until 22<sup>nd</sup> July, 2010 there was an interim stay of execution granted by the co-operative Tribunal on 2<sup>nd</sup> April, 2009. That stay was vacated upon the dismissal of the Petitioners Application.*
- (vi) *Upon refusal of stay pending Appeal by the Co-operative Tribunal, the Petitioners filed another Application for stay pending Appeal in the said High Court Civil Appeal No.199/2009.*
- (vii) *On 1<sup>st</sup> December 2009, after hearing the Petitioners Application dated 27<sup>th</sup> July 2009, this Court granted the Petitioners a stay of execution on condition that they deposit Kshs.1 Million in an interest bearing account in the joint names of the parties’ Advocates to be opened within 45 days from the date of the ruling.*
- (viii) *On 1<sup>st</sup> December 2009, the Petitioners through their counsel reminded the Tribunal of their Application for proceedings and informed it that urgency had developed in view of the fact that they had 90 days within which to lodge a record of Appeal.*
- (ix) *Since 3<sup>rd</sup> April 2009 when the Petitioners requested for proceedings from the Co-operative Tribunal, they have not managed to get them despite filing the aforesaid reminders and their Advocates visiting the Co-operative Tribunal for follow up.*
- (x) *On 29<sup>th</sup> June 2010, this Court dismissed the Petitioners’ Application for extension of time within which to file the record of Appeal in effect vacating the conditional order for stay of execution granted on 1<sup>st</sup> December 2009.*
- (xi) *The Petitioners’ failure to comply with the terms of the stay granted on 1<sup>st</sup> December 2009, has been caused by the Tribunal refusal to supply them with proceedings as from April 2009.*

**(xii) The Petitioners are apprehensive that the interested party will commence execution of the Co-operative Tribunals award before their Appeal is heard and determined.**

3. The 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners swore a joint Affidavit on 6<sup>th</sup> July 2010 and stated that the Petition challenges an inquiry undertaken by the Respondents when the Applicants were serving as the Management Committee of the Interested Party between June 1999 and November 2003. Attempts at quashing the inquiry Report failed when the High Court declined to issue Judicial Review Orders in that regard. Subsequently, they filed a case in the Co-operatives Tribunal and a Preliminary Objection by the Respondents was upheld and the same was struck off. An Application to file an Appeal out of time was similarly rejected and the Applicant's fear is that a Surcharge Order entered against them on 27<sup>th</sup> March 2006 may be enforced to their prejudice.

4. The Surcharge Orders were apparently being enforced in Co-operative Tribunal Cases Nos.230-234/2006 and not happy with the Orders of the Tribunal, the Applicants applied for copies of proceedings to enable the filing of an Appeal but the same was dismissed and temporary Orders of Stay of Execution vacated as a consequence.

5. The applicants had meanwhile filed HCCA No.199/2009 and interim orders of stay were granted on condition that Kshs.1 million is deposited in an interest earning Account in the names of Advocates for parties and that the Applicants would file the Record of Appeal within ninety (90) days.

6. At paragraphs 19, 20 and 21 of the Supporting Affidavit the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants have deponed as follows;

***“(19) That since 3<sup>rd</sup> April, 2009 when we requested for proceedings from the Co-operative Tribunal, we have not managed to get them despite filing the aforesaid reminders and our advocates visiting the Co-operative Tribunal for follow up.***

***(20) That our failure to comply with the terms of the stay granted on 1<sup>st</sup> December, 2009 has been caused by the Tribunal refusal to supply us with proceedings as from April 2009.***

***(21) That the Co-operative tribunal has handled the proceedings after its award in a manner which has the effect of our being shut out of this Court.”***

7. Further to the above matters, it is also the case for the Applicants that when they sought extension of time to file the Record of Appeal, their Application was rejected and they are now apprehensive that execution may be levied against them.

8. In the Grounds of opposition filed on 14<sup>th</sup> July 2010, the case for the Respondents is that the Application before me is frivolous, vexatious and an abuse of Court process and that all the issues now raised have been previously canvassed and so there is no reason why discretion should be exercised in favour of the Applicants.

9. The Interested Party on its part, filed an Affidavit sworn on 15<sup>th</sup> July 2010 by the Chairman of its Management committee, Justus Nyiruu, and argued that the Application is *res judicata* in view of previous Rulings on the same subject and which I have reproduced above. That the decisions of Okwengu, J. and Sitati, J. have not been appealed against and so they stand and the present proceedings under the Constitution are fallacious and a misuse of the Jurisdiction of this Court.

10. Further, that failure to supply proceedings was due to the Applicant's lack of diligence and apart from a letter dated 2<sup>nd</sup> April 2009, there is no other evidence that the Applicants and their Advocates were diligent in pursuing the matter.

11. That therefore, the Application is lacking in merit and should be dismissed with costs.

12. I have taken into account the contents of a Further Affidavit sworn on 29<sup>th</sup> May 2011 by Julius Nyiruu, the Further Affidavit by the 2<sup>nd</sup> Applicant sworn on 17<sup>th</sup> August 2011 as well as the elaborate Submissions by the Advocates for the parties.

13. I should begin by stating that in the Petition dated 6<sup>th</sup> July 2010, the single issue that I find relevant is that the failure by the Co-operative Tribunal to supply proceedings to enable an Appeal to be filed contravenes **Section 77** of the repealed **Constitution**. That Section provides for protection by the Law especially in Criminal trials.

14. Reading the Section, the Petition and the Application before me, the Applicants are saying that failure to obtain proceedings from the Co-operative Tribunal has occasioned them injustice and the right to a fair hearing within a reasonable time. A stay of execution of the Orders issued by the Tribunal is now sought in the interim. **Is there reason why such Orders should be issued?**

15. It must be remembered that the High Court has previously declined to grant similar Orders and I have read the Ruling of Okwengu, J. in HCCA No.199/2009 which is still pending before and unheard by this Court. The learned judge in the Ruling dated 1<sup>st</sup> December 2009 granted orders of Stay of Execution on certain conditions and the Applicants admit that they failed to meet those conditions. When they sought enlargement of time to do so, Sitati, J. in her Ruling of 29<sup>th</sup> June 2010 declined to grant the orders sought and stated *inter alia* as follows;

***“A party seeking protection of these provisions must come to Court with clean hands. The Appellants in this case have not come to Court with clean hands. They have also been indolent and their Application is res judicata the earlier Application dated 15<sup>th</sup> January 2010.”***

16. The Applicants are in the same position today because they have Orders of Stay of Execution which they have failed to comply with and they have not appealed against refusal to extend time to do so. Instead of pursuing those legal channels they have now clothed their difficulties in Constitutional guise and come to the High Court in its mandate as a Constitutional Court to obtain Orders which the same Court in its Civil Jurisdiction has declined to give. That is what is called abuse of the Court process.

17. In an erudite Ruling in HCCC No.80/2005 (Meru), Ouko, J. stated as follows;

*“But it must be remembered that constitutional references are not a panacea for resolution of all types of legal disputes. Invocation of constitutional remedies should only be reserved for serious breaches of the Constitution and not for correction of errors either of substantive Laws or procedure committed by Courts in the course of litigation. The fact that a Judgment or a Ruling of the Court is wrong does not mean that any fundamental rights of the party aggrieved by it has been breached.*

*The remedies for such errors are many. They include review, setting aside, stay of execution or even Appeal. It has been held in Chokolingo vs Attorney General of Trinidad and Tobago (1981) U.L.R. 108 at page 112 and Maharaj vs Attorney General of Trinidad and Tobago (No.2) (1979) AC 385 that a collateral attack of judgment (or ruling) through Appeal (or through other means) and later through a constitutional reference would be subversive of the Rule of Law entrenched in the Constitution itself.*

*On the other hand, it has been held that if a remedy is available to an Applicant/Petitioner under some other legislative provision, the Court will decline to determine it if the Applicants/Petitioner’s constitutional rights have been violated.*

*See Ministry of Home Affairs vs Bicle and Others (1985) LRC 755 at page 758 Para (f). See also Harrison vs Attorney General of Trinidad and Tobago (1980) AC 265. In the latter decision the privy Council delivered itself this;*

***“The notion that whenever there is a failure of any organ of a government, a public authority or public officer to comply with the Law, this necessarily entails the contravention of some human rights or***

*fundamental freedoms guaranteed to individuals under Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those significant freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicants has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexation or an abuse of the process of the Court as being more solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom”.*”

18. I am persuaded by the reasoning above and although we are in a new Constitutional dispensation, the above words still ring true. If we allow parties to pursue remedies in the usual manner and on failing to achieve their ends, they invoke breach of fundamental rights, then the Courts will lose their credibility and more so, where clearly the parties are avoiding their obligations under the Law, such as the Applicants are doing in this case.

19. I am convinced that the Applicants have exhibited little diligence in obtaining proceedings from the Co-operative Tribunal and in fact that issue is to my mind a mere excuse for seeking Stay Orders. The real reason as can be seen from the history of the dispute, is that they are completely bent on not meeting their obligations including abiding by the Orders of Okwengu, J. elsewhere mentioned above.

20. With respect, there is little more to say as I see no reason whatsoever why I should grant the Orders sought as the Application dated 6<sup>th</sup> July 2010 is in that group aptly titled abuse of Court process and it is hereby dismissed with costs to the Respondents.

21. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH, 2012**

**ISAAC LENAOLA**

**JUDGE**

**CORAM**

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mr. Ngala hold brief for Mr. Gacheru for Petitioner

No appearance for Respondents

**ORDER**

Ruling duly delivered.

**ISAAC LENAOLA**

**JUDGE**

**16/3/2012**

**FURTHER ORDER**

Directions to be taken on 4<sup>th</sup> May 2012

Notice to issue.

**ISAAC LENAOLA**

**JUDGE**

**16/3/2012**