



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 2 of 2010

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

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

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

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

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

AND

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

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

AND

NTHIMBIRI FARMERS CO-OPERATIVE SOCIETY.....INTERESTED PARTY

JUDGMENT

Introduction

1. This matter arises out of certain proceedings from the *Co-operative Societies Act (Act No. 12 of 1997)*. The petitioners served as members of the Management Committee of Nthimbiri Farmers Cooperative Society, the interested party between 1999 and 2003. During that period an inquiry was instituted into the affairs of the Society and consequently they were surcharged in accordance with the provisions of the Act.
2. The interested party thereafter moved the Cooperative Tribunal in cases No. 230 – 234 of 2006 to enforce the amounts due and judgment was duly entered on 2<sup>nd</sup> April 2009. Aggrieved by that decision the petitioners lodged an appeal to the High Court namely; *Nairobi Civil Appeal No. 199 of 2009*. This appeal, the parties agree, is still pending hearing and determination.
3. The petitioners then applied for a stay of execution pending the hearing and determination of the appeal and on 1<sup>st</sup> December 2009, Hon. Lady Justice H. Okwengu granted a conditional order of stay on terms, inter-alia, that the “*applicants shall file and serve the record of appeal within 90 days from the date*

hereof.”

4. Unfortunately, according to the petitioners, they were unable to file the appeal in compliance with the said order and consequently the judgment and decrees of the Cooperative Tribunal were executed against them.

### **Petitioners' Case**

5. The gravamen of the petitioner's claim is that their fundamental rights and freedoms were infringed by failure of the Tribunal to supply proceedings within time to enable them exercise their statutory and undoubted right of appeal. In the petition dated 6<sup>th</sup> July 2010, the petitioner seeks the following reliefs;

(a) A declaration that the refusal by the Co-operative Tribunal to supply the petitioners with proceedings so that they can lodge their appeals amount to contravention of the petitioners' right to a fair hearing under **section 77(9)** of the Constitution.

(b) A declaration that the vacation of the stay of execution granted by the **High Court in Civil Appeal No. 199 of 2009** is a direct cause of the refusal by the Co-operative Tribunal to supply to the petitioners the proceedings.

(c) A declaration that owing to its refusal to supply to the petitioners the proceedings, the Co-operative Tribunal is not allowed to execute the award made on 2<sup>nd</sup> April 2009.

(d) An order that the Co-operative tribunal do release proceedings in Co-operative Tribunal Cases Nos. 230 -234 of 2006 to the petitioners.

(e) An order that the execution by the Co-operative Tribunal of the award made on 2<sup>nd</sup> April 2009 be stayed pending hearing and determination of this petition.

(f) An order that the respondent satisfy the award made on 2<sup>nd</sup> April 2009 by the Co-operative Tribunal.

(g) The costs of this petition be provided for.

6. Mr Gacheru, counsel for the petitioners, informed the court that prayers (d) and (e) has been overtaken by events since the Tribunal has supplied the typed proceedings and the appeal has since been filed and is pending hearing and determination by the High Court, Appellate Side. Similarly, Justice Lenaola declined to grant conservatory order pending the hearing of the petition.

7. The petitioners founded their case on the fact that the action by the Tribunal of failing to facilitate the hearing and determination of the appeal infringed the right to a fair hearing. Counsel for the petitioners cited the case of **Ndyanabo v Attorney General [2001] 2 EA 484** as authority for the proposition that the right of appeal or any procedure provided by law should not be unnecessarily burdened so as to negate the right. In this case the failure to by the Tribunal to furnish proceedings had unduly restricted the right of appeal and hence access to justice.

8. The petitioners contend that the High Court has jurisdiction to intervene where there has been breach of fundamental rights and freedoms notwithstanding that there are other proceedings. Mr Gacheru submitted that **section 84** of the former Constitution grants the petitioners relief without prejudice to any other lawful action available to the petitioners. Citing the case of **Maharaj v Attorney General of Trinidad and Tobago (No. 2) (1978) 2 ALL ER 670**, counsel submitted that the court could quash the decision of another court even the High Court and provide relief against the State including the judicial arm.

### **Interested Party's Case**

9. The petition was opposed by the interested party on the ground that it was an abuse of the court process

since the matters in issue had been canvassed in proceedings in the **Civil Appeal No. 199 of 2009**. As regards the proceedings, the interested party avers that the petitioners are the authors of their own misfortune as they did not follow up the preparation of the proceedings to enable lodge the record of appeal in accordance with the orders issued by Justice Okwengu.

### **Determination and disposition**

10. I have considered the pleadings, depositions and the arguments preferred by all the parties and I take the following view of the matter.

11. The matters the petitioners complain of arise from the decisions of the Co-operative Tribunal and it is that decision that was the subject of an appeal to the High Court. A stay order was given on condition that the record of appeal was filed. The typed proceedings from Tribunal were an integral part of the record of appeal which was ordered to be filed therefore the issue of “proceedings” was an integral part of that decision made in **Civil Appeal No. 199 of 2009**. Whether or not the typed proceedings were ready and the record of appeal could be filed in time is a matter that could have been properly dealt with by the High Court exercising appellate jurisdiction.

12. I would hasten to add that the High Court exercising any jurisdiction is entitled to enforce fundamental rights and freedoms and if the issue of proceedings was germane it ought to have been brought squarely before the appellate court whose jurisdiction included appraising itself of the proceedings. But in this case the petitioners did in fact exercise their right to seek relief when they prayed for an order for extension of time within which to file and serve the record of appeal of appeal and the said application was dismissed by Hon. Lady Justice R. N. Sitati on 29<sup>th</sup> June 2010.

13. An inquiry into the issue of typed proceedings from the Tribunal which are subject to the appeal would amount to a collateral attack on the order of stay issued by Hon. Lady Justice Okwengu. The grant of prayers (a), (b) and (c) of the petition would be a parallel inquiry in the nature and consequences of the stay order. Furthermore, the consequences which the petitioners complain of are a direct result of the vacation of the orders of stay.

14. The arguments raised by the petitioners are no doubt attractive but the law as to whether the High Court, while enforcing fundamental rights under the Constitution and intervene in proceedings and decisions of the High Court, directly or indirectly by issuing enforcement orders was settled by the Court of Appeal in the case of **Peter Muiruri v Credit Bank Ltd and Another Nairobi CA Civil Appeal No. 203 of 2006 (Unreported)**. Furthermore, the Court of Appeal in **Methodist Church in Kenya Trustees Registered & Another v Rev. Jeremiah Muku and Another CA, Civil Appeal No. 233 of 2008 (Unreported)** observed, “*As the Privy Council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review.*”

15. The High Court should be wary of entertaining civil matters or matters which could be addressed through ordinary processes as matters of enforcement of fundamental rights. This is one such case and I am of the same view expressed by Justice Lenaola when he dismissed the application for stay of execution that this case is an abuse of the court process and since it is, it can only be dismissed and it hereby dismissed with costs to the interested parties.

**DELIVERED** and **DATED** at **NAIROBI** this 7<sup>th</sup> day of December 2012.

**D.S. MAJANJA**  
**JUDGE**

Mr Gacheru instructed by Kamau Kuria and Kiraitu Advocates for the petitioners.

Mr Maina, State Counsel, instructed by the State Law Office for the respondents.

Mr Muthomi instructed by Kiautha Arithi and Company Advocates for the interested parties.