



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 676 of 2008**

**PETER KARIUKI KIMUGO.....1<sup>ST</sup> APPELLANT**  
**BENARD LUVAI.....2<sup>ND</sup> APPELLANT**  
**GILBERT KIPELIAN MALELE.....3<sup>RD</sup> APPELLANT**  
**RICHARD K. MAWEU.....4<sup>TH</sup> APPELLANT**  
**MICHAEL MUTUKU.....5<sup>TH</sup> APPELLANT**  
**SAMUEL SIAHI.....6<sup>TH</sup> APPELLANT**  
**JOSEPH W. THUO.....7<sup>TH</sup> APPELLANT**  
**GRACE W. NJARA.....8<sup>TH</sup> APPELLANT**  
**MUTHURI KIUGI.....9<sup>TH</sup> APPELLANT**  
**JACKSON K. LIMO.....10<sup>TH</sup> APPELLANT**  
**MARGARET W. KIMANI.....11<sup>TH</sup> APPELLANT**

**VERSUS**

**D.M.K. WAROE.....1<sup>ST</sup> RESPONDENT**  
**GEORGE M.K. OYUGI.....2<sup>ND</sup> RESPONDENT**  
**SIMON G. KARIUKI.....3<sup>RD</sup> RESPONDENT**  
**VITALIS P. LUKIRI.....4<sup>TH</sup> RESPONDENT**  
**GEORGE O. ODHOJI.....5<sup>TH</sup> RESPONDENT**  
**WILLIAM O. MACHOKA.....6<sup>TH</sup> RESPONDENT**

**WALTER OJIAMBO.....7<sup>TH</sup> RESPONDENT**

**PHILIP O. WANDERA.....8<sup>TH</sup> RESPONDENT**

**GABRIEL O. OTIENO.....9<sup>TH</sup> RESPONDENT**

**AFYA SAVINGS & CREDIT SOCIETY.....10<sup>TH</sup> RESPONDENT**

### **R U L I N G**

1. The application before me is a Notice of Motion brought under a certificate of urgency seeking orders as follows:

(i) that the appeal be admitted for hearing and directions given;

(ii) that there be a stay of proceedings in Cooperative Tribunal Case No. 157 of 2006 pending the determination of the appeal;

(iii) that costs be in the appeal.

2. The application is anchored on grounds which have been stated on the body of the application. It is also supported by an affidavit sworn by Gilbert Kipelian Ole Malele who is one of the applicants.

3. The applicants who were claimants in the proceedings before the Cooperative Tribunal are dissatisfied with the ruling of the Cooperative Tribunal which was delivered on 13<sup>th</sup> November, 2008. The applicants filed a memorandum of appeal in this Court against that ruling on the 8<sup>th</sup> December, 2008. The applicants have now moved this Court for the aforementioned orders under section 3A, Order XLI Rule 4 (1) and 8A, 8B, and Order L Rule 1 of the Civil Procedure Act and Rules, contending that the Tribunal has declined to forward its record to the High Court and this is causing grave injustice and economic hardship to the applicants as the respondents continue to disobey the Tribunal orders to the detriment of the applicants.

4. Gilbert Kipelian Ole Malele swears that the Tribunal has no intention of imposing its orders against the respondents. He urges the Court to grant the orders sought as the appeal cannot be admitted for hearing and determination without the record of the Tribunal.

5. The application is opposed through a replying affidavit sworn by D.M. K. Waroe who is one of the respondents. He contends that the application is misconceived, as it is intended to stay orders issued by the Tribunal dismissing an application, which orders are not capable of such stay. It is further deponed that the application concerned grievances against the Tribunal which has not been made a party to the proceedings. Moreover it is stated that the issue of the delay by the Tribunal to determine the Cooperative Tribunal Case No. 157 of 2006 is *sub judice* as it is the subject of the High Court Constitution Reference No. 722 of 2007. Further it is maintained that the application is defective, as the Commissioner of Cooperative Societies, who was a party to the application in the Tribunal proceedings subject of the pending appeal, has not been joined as a party to this appeal.

6. In a further affidavit sworn by Gilbert Kipelian Malele by leave of the Court, it is deponed that in accordance with s.83 of the Co-operative Act D.M.K. Waroe is not competent to hold office having been convicted of contempt. D.M.K. Waroe is therefore not competent to swear an affidavit on behalf of other respondents. Malele further depones that the respondents having continued to act in contempt of Court orders by holding Annual General Meetings on 24<sup>th</sup> and 25<sup>th</sup> of April, 2009. Malele swears that the respondents' averments are mischievous, as the respondents have refused to obey the Court order of 13<sup>th</sup> March, 2008 which required them to file and serve documents. Malele states that the respondents are therefore only bent on abusing the Court process in order to defeat the ends of justice.

7. Mrs. Madahana who appeared for the applicants urged the Court to admit the appeal for hearing and give directions. Mr. Mbaka who appeared for the respondents urged the Court to dismiss the application as it was an abuse of the Court process.

8. I have given due considerations to this application. Firstly, the applicant is seeking admission of the appeal to hearing. Such power is entrusted exclusively to a Judge under section 79 B of the Civil Procedure Act. It is not for the applicant to move the Court to exercise the power. Secondly the applicant is seeking directions under Order XLI rule 8A and 8B of the Civil Procedure Rules. Again under those rules it is not for a party to move the Court for directions. Rule 8A and 8B (1) states as follows:

***“8A. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent.***

***8B.(1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the registrar shall list the appeal for the giving of directions by a judge in chambers.***

9. It is evident from the above rules, that it is for the Registrar of the Court to give notice to the parties and list the appeal before the Court for directions by a Judge in chambers.

10. By moving this Court for directions the applicants are usurping the powers of the Registrar of this Court. Further although the applicants complained of the delay by the tribunal in issuing copies of its proceedings, the proceedings have apparently been availed and the applicant has already prepared a record of appeal. That hurdle has therefore been overcome.

11. As regards the prayer for stay of the proceedings of the Tribunal pending the hearing of the applicants' appeal against the ruling of the Tribunal delivered on 13<sup>th</sup> November, 2008, it is evident that in the ruling the Tribunal dismissed the applicants' application dated 14<sup>th</sup> July, 2008.

12. The application dated 14<sup>th</sup> July, 2008 sought to have the 1<sup>st</sup> to 9<sup>th</sup> respondents, their counsel Mr. Musyimi Mbaka and the Commissioner of Cooperative punished for contempt of Court orders given on 13<sup>th</sup> March, 2008 in accordance with s.94 of the Cooperative Act. The orders of 13<sup>th</sup> March, 2008 were orders which *inter alia* barred the respondents from running or participating in the affairs of Afya Savings, Credit and Cooperative Society Ltd; nullified all elections held on 29<sup>th</sup> April, 2008, 28<sup>th</sup> April, 2007 and 26<sup>th</sup> April, 2006; and ordered the office of the Commissioner and Cooperative Development and Marketing to call a special general meeting within 15 days to put in place a central management committee. The applicant maintained that the respondents had acted contrary to these orders.

13. In its ruling of 13<sup>th</sup> November, 2008 the Tribunal dismissed the application being of the view that it could not sit on appeal on matters before the Deputy Chairman. The question is what loss the applicants will suffer if the proceedings before the Tribunal proceed whilst the appeal before this Court remains pending. The applicants have not demonstrated in what way they will suffer substantial loss. The issue of contempt of Court is an independent issue which cannot affect the proceedings in the Tribunal. Moreover contempt is a continuing offence and the applicant cannot anticipate the future orders that may be made by the Tribunal. The allegation that the Tribunal may not enforce its orders is based on mere speculation.

14. For the above reasons, I find no merit in the applicant's motion. It is accordingly dismissed with costs.

**Dated and delivered this 9<sup>th</sup> day of July, 2009**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Madahana for the appellant

Njeru for the respondent