



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appli 18 of 2007 (UR.15/07)

**REV. JACKSON KIPKEMBOI
REV. STEPHEN M. MWANGI
REV. JOSEPHAT KAMAU NGANGA
REV. ELIUD KARANJA WANYOIKE
REV. ENOCK K. KIPLAGAT
REV. STEPHEN KIGURU KAMAU
REV. STANLEY W. KAMAU
REV. SAMUEL WACHIRAAPPLICANTS**

AND

**REV. SAMUEL MURIITHI NJOGU
REV. JOSEPH SAMOEI
REV. SAMUEL M. KATHITA
REV. ELIJAH CHERUIYOT
REV. WILFRED NYAMURESPONDENTS**

(An application for the release of Mr. Elisha Zebedee Ongoya Advocate pursuant to the orders of (Hon. Justice Mugo) dated 6th February, 2007

In

H.C.C.C. NO. 1237 OF 1999)

RULING OF THE COURT

We have before us an application brought under certificate of urgency in which the applicant is seeking two main orders namely:-

“(b) That there be a stay or execution(sic) of the orders of Hon. Lady Justice Mugo made on 6th February, 2007 committing Mr. Elisha Zebedee Ongoya, Advocate in HCCC No. 1237 of 1999 pursuant to her earlier orders in HCCC No. 1236 of 2004 hearing (sic) determination of the intended appeal.

(c) That the said Mr. Elisha Zebedee Ongoya Advocate be and is hereby released forthwith pending the hearing determination of intended appeal.”

The application is brought under **rule 5 (2)(b)** of this Court’s Rules (the Rules). That in effect means that

the applicant has to demonstrate the now well known two principles namely first that the intended appeal is arguable i.e. is not frivolous. Secondly that the results of the intended appeal were it to succeed would be rendered nugatory if this application is not allowed.

Mr. Albert Khaminwa for the respondent does not oppose the application and rightly too. Elisha Zebedee is an advocate. In another suit HCCC No. 1236 of 1999 he had been held in contempt of the court by the same learned Judge. He applied to this Court in CA Nai. 311 of 2006 and we ordered stay of that order of the superior court. Armed with that order he rightly, in our view, appeared before the same Judge on 6th February, 2007 in HCCC 1237 of 1999 and after that matter was partly heard, the learned Judge on her own motion found him guilty on contempt of court on grounds that he did not purge the earlier contempt notwithstanding that a stay had been granted in respect of that earlier allegation and that that earlier allegation was subject of an intended appeal the decision of which might go either way. We on our view feel that the intended appeal is arguable and to that effect we agree with both learned counsel.

Elisha Zebedee Ongoya was sent to jail for 21 days. It is obvious that by the time his intended appeal will be heard, he will have served the sentence, hence the appeal even if it were to succeed the results will be rendered nugatory if we do not grant stay at this juncture.

We do allow the application and order that Elisha Zebedee Ongoya be released from prison forthwith till his intended appeal will be heard and decided.

As a parting shot, we feel being in control of a court should not amount to making it difficult for the parties before the Court to freely carry out their duties through fear.

Dated and delivered at Nairobi this 8th day of February, 2007.

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR