



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civ Appli 311 of 2006

1. REV. JACKSON KIPKEMBOI KOSKEY
2. REV. STEPHEN MAINA MWANGI
3. REV. JOSEPHAT KAMAU NG'ANG'A
4. REV. ELIUD KARANJA WANYOIKE
5. REV. STEPHEN KIGURU KAMAU
6. REV. STANLEY WAWERU KAMAU
7. REV. SAMUEL WACHIRA
8. ELISHA ZEBEDEE ONGOYA – ADVOCATE.....

APPLICANTS

AND

1. REV. SAMUEL MURIITHI NJOGU
2. REV. JOSEPH SAMOEI
3. REV. SAMUEL MBITHI KATHITA
4. REV. ELIJAH CHERUIYOT
5. REV. WILDRED

NYAMU.....RESPONDENTS

(Application for stay of execution and for stay of proceedings pending the hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya Nairobi (Mugo, J.) dated 8th December, 2006 in H.C.C.C. NO. 1236 OF 2004)

RULING OF THE COURT

We have before us an application by way of Notice of Motion brought under *Rule 5(2)(b)* of the Court

of Appeal Rules (the Rules) in which the applicants herein, Rev. Jackson Kipkemboi Koskey, Rev. Stephen Maina Mwangi, Rev. Josephat Kamau Ng'ang'a, Rev. Eliud Karanja Wanyoike, Rev. Stephen Kiguru Kamau, Rev. Stanley Waweru Kamau, Rev. Samuel Wachira and their advocate Elisha Zebedee Ongoya seek the following orders:-

1. *THAT this application be certified as urgent.*
2. *THAT the execution of the Orders of the Honourable Lady Justice Mugo made on the 8th December 2006 finding Reverend Jackson Kipkemboi Kosgey and Mr. Elisha Zebedee Ongoya Advocate guilty of contempt of Court and consequently committing the said Reverend Jackson Kipkemboi Kosgey and Mr. Elisha Zebedee Ongoya advocate to prison for a period of one month in H.C.C.C. Number 1236 of 2006 and the subsequent warrants of arrest issued pursuant to the said order be and is hereby stayed pending the hearing and determination of the intended appeal.*
3. *THAT the proceedings in HCCC No. 1236 of 2004 be and are hereby stayed pending the hearing and determination of the intended appeal.*
4. *THAT the costs of this application be provided for.”*

This application is brought on the following grounds:-

1. *THAT the applicants being dissatisfied with the ruling and order of the Honourable Lady Justice Mugo in Nairobi H.C.C.C. No. 1236 of 2004 on 8th December, 2006 have lodged a Notice of Appeal.*
2. *THAT on the 26th July, 2006, the appellants filed a notice of motion application seeking orders that the learned Judge Honourable Lady Justice Mugo disqualifies herself from further hearing H.C.C.C. Number 1236 of 2004 and that costs be in the cause citing the conduct of the Honourable Judge in previous proceedings.*
3. *THAT the said application came up for hearing inter partes on the 18th September, 2006 whereupon the Court reserved the same for a ruling on 6th October, 2006 but the same was not delivered until 8th December, 2006.*
4. *THAT on the said 8th December, 2006, the Honourable Lady Justice Mugo delivered a ruling in which she refused to disqualify herself as prayed by the applicants and further found Reverend Jackson Kipkemboi Kosgey and Mr. Elisha Zebedee Ongoya advocate guilty of contempt of Court and consequently ordered that the said Reverend Jackson Kipkemboi Kosgey and Mr. Elisha Zebedee Ongoya advocate be committed to prison for a period of one month in H.C.C.C. Number 1236 of 2004 and further ordered that warrants of arrest do issue pursuant to the said order.*
5. *THAT there is real and present danger that unless stayed by orders of this Honourable Court, the said orders of committal and arrest warrant are going to be executed to the extreme detriment of the said Rev. Kosgey and Mr. Ongoya and by extension the rest of the applicants who may have to do without an advocate.*
6. *THAT the applicants intend to appeal against the whole of the said orders of the Hon. Mrs. Justice Mugo and the intended appeal has overwhelming chances of success.*
7. *THAT if the execution of the said order is allowed to proceed and the appeal is eventually heard and allowed, the applicants stand to suffer irreparable damage.*
8. *THAT warrants of arrest are in force and the arrest of the applicants is imminent.*
9. *THAT the applicant's (sic) intended appeal against the ruling and order of Honourable Lady Justice Mugo will be rendered nugatory if the orders sought herein are not granted.*

10. THAT the appellant (sic) has raised valid points of law and fact in the annexed memorandum of appeal and the same has overwhelming chances of success.

11. THAT in the circumstances, it is only fair and in the interest of justice that there be a stay of execution of the said order of Honourable Justice Mugo pending the hearing and determination of the intended appeal otherwise the object of the annexed application will be prejudiced, defeated and the reliefs sought thereunder rendered nugatory.

12. THAT this application has been made without any unreasonable delay.”

In support of the foregoing, *Elisha Zebedee Ongoya* swore a detailed affidavit in which he gives the facts leading to the filing of this application. The genesis of this matter can be traced to the ruling of Mugo, J. dated and delivered on 8th December, 2006. The matter reached the superior court via a plaint in which the 1st applicant herein, **Rev. Jackson Kipkemboi Kosgey** and eight other plaintiffs filed suit against **Rev. Samuel Muriithi Njogu** and four other defendants. The dispute appears to relate to the leadership in the Full Gospel Churches of Kenya.

Although the parties are all members of the same church wrangling over church leadership, it would appear that as various applications were made before the superior court the wrangles became quite convoluted. The parties appeared before several judges of the superior court and finally the matter was placed before Mugo, J. What triggered all that was to follow was an application by the 1st applicant herein for the learned judge to disqualify herself from hearing the dispute on the ground that he (*applicant*) and others would not be accorded a fair hearing. This application to disqualify herself from hearing the suit was not taken lightly by the learned Judge who in her ruling stated:-

“For reasons already stated earlier in this Ruling, the application for my disqualification is not genuine but male (sic) fide, highly contemptuous and merely calculated to disparage my position as a judicial officer and to demean the authority, integrity, honour and respect due to this Honourable court without any apparent cause or intention save perhaps a desire by the applicant(s) and their present counsel to derail the proceedings or to delay the same for as long as possible, for reasons only known to themselves.”

Having so stated, the learned Judge proceeded to commit the 1st applicant and his advocate to prison for a period of one month. In committing the two to prison, the learned Judge expressed herself thus:-

“Taking into consideration the application, submissions made in support thereof and all the circumstances of the case I do find that contempt on the face of the court is so glaring that I have no hesitation in finding the 1st Plaintiff/Applicant and Mr. Ongoya guilty of contempt of court. In exercise of the powers vested in me to punish for such contempt and as a clear warning to other beneficiaries of the justice system who have made it their ambition to tarnish the names of judicial officers and pervert the course of justice by any means possible, as has been demonstrated herein I hereby commit the said Reverend Jackson Kipkemboi Kosgei (sic) and Zebedee Elisha Ongoya, advocates to prison for a period of one month, having refused to disqualify myself from these proceedings for reasons already stated.”

Stung by the foregoing order of committal to prison the 1st applicant and his advocate, Mr. Ongoya and other plaintiffs filed a notice of appeal pursuant to **rule 74** of this Court’s Rules. And pursuant to that notice of appeal this application for stay of the order of the superior court was filed.

When this application came up for hearing before us on 12th March, 2007 Mr. Majanja, the learned Counsel for the applicants, submitted that it was an arguable point whether the filing of an application for disqualification of a judge was contempt of court. He went on to state that his clients were not given an opportunity to show cause why they should not be committed. It was Mr. Majanja’s contention that proper procedure was not followed. All these are issues that the applicants intend to raise in their intended appeal.

On the nugatory aspect of the application, Mr. Majanja pointed out that if his clients were sent to prison for one month, then by the time the appeal is heard they will have served the sentence since committal to jail cannot be reversed.

In opposing the application Dr. Khaminwa, the learned counsel for the respondents, submitted that the notice of appeal was invalid since no leave had been sought from Mugo, J. Dr. Khaminwa went on to argue that a judge ought to be given respect and that the applicants ought to go back to the judge and purge the contempt. Finally, Dr. Khaminwa concluded that there were serious issues to be addressed.

This being an application under **rule 5(2)(b)** of the Rules it is upon the applicants to satisfy us not only that the intended appeal is arguable, and is not frivolous but also that the same intended appeal if successful, will be rendered nugatory if stay orders are not granted at this stage. This is now settled law and if any authority is required it is readily available in the case of **KIRAN CHANDUBHAI PATEL VS. TRANSWORLD SAFARIS LIMITED – CIVIL APPLICATION NO. NAI. 197 OF 2003** (unreported) where this Court stated:-

“It is trite law that in an application such as this for an applicant to succeed he is principally obliged to show, firstly, that his intended appeal is arguable and not frivolous. Secondly, that, unless he is granted an injunction, the intended appeal if successful will be rendered nugatory. In deciding the matter before it the Court exercises discretionary jurisdiction which discretion has to be based on evidence and sound legal principles. The duty, obviously squarely falls on the applicant to place such evidence before the Court hearing his application.”

And in its recent decision in **BOB MORGAN SYSTEMS LTD & ANOTHER VS. JONES [2004] 1 KLR 194** at p. 196 this Court stated:-

“The powers of the Court under rule 5(2)(b) aforesaid, are specific. The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal if successful, will be rendered nugatory.”

A point was taken by Dr. Khaminwa to the effect that the notice of appeal filed herein was invalid and for that reason this application should fail. To answer that argument we can do no better than refer to **rule 5(2)(b)** of the Rules which provides:-

(2) but the Court may -

“(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 74, order a stay of execution; or an injunction or stay of further proceedings on such terms as the court may think just.

As can be seen from the foregoing the rule talks of **“a notice of appeal”** and not **“a valid notice of appeal”**. We must accordingly reject Dr. Khaminwa’s submission on the validity of the notice of appeal.

We have considered the material placed before us together with submissions by both Mr. Majanja, for the applicants, and Dr. Khaminwa, for the respondents, and it would appear that even Dr. Khaminwa conceded that the intended appeal would raise serious issues. The intended appeal will not, therefore, be frivolous. If we refused to grant a stay, **Rev. Jackson Kipkemboi Koskey** and his advocate **Mr. Elisha Zebedee Ongoya** will have to be committed to jail for a period of one month. By the time their intended appeal is heard and determined even if they were to succeed their success would be rendered nugatory since they will have served the prison sentence.

In **STANISLUS NYAGAKA ONDIMU VS. KALYASOI FARMERS CO-OPERATIVE SOCIETY & OTHERS – Civil Application No. Nai. 337 of 2005** (unreported) this Court dealing with a matter similar to what is before us said:-

“In view of what this Court has said in its two previous decisions in MWANGI WANGONDU VS. NAIROBI CITY COMMISSION – Civil Appeal No. 95 of 1988 and P.R. KOTECHA AND ANOTHER VS. N.R. PAV AND ANOTHER – Civil Application No. Nai. 63 of 2003 (unreported) we are of the view that this is a proper case in which we should exercise our discretion in favour of the applicant. It cannot be denied that to refuse the application would render the intended appeal nugatory since the applicant is likely to have served the six months jail sentence by the time his appeal comes up for hearing. “

We think we have said enough in this matter. In view of the foregoing, this application is granted in terms of *prayers 2 and 3* of the *Notice of Motion* dated 13th December, 2006. Costs of the application shall be in the intended appeal.

Dated and delivered at Nairobi this 23rd day of March, 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

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR