



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MURGOR, SICHALE & KANTAL, J.J.A.)**

**CIVIL APPLICATION NO. NAI E021 OF 2021**

**BETWEEN**

**NILESH JAYANTILAL KOTEDIA.....APPLICANT**

**AND**

**GUARANTY TRUST BANK LIMITED**

**(formally FINA BANK LIMITED).....1<sup>ST</sup> RESPONDENT**

**JAGDEEP LALJI KOTEDIA.....2<sup>ND</sup> RESPONDENT**

***(Being an application for stay of execution pending the hearing and determination of an intended appeal against the judgment***

***and orders of the High Court at Nairobi (Tuiyott, J) delivered 23<sup>rd</sup> November 2020***

***in***

***Milimani Commercial Civil Suit No 638 of 2005)***

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**RULING OF THE COURT**

By a Notice of motion dated 26<sup>th</sup> January 2021, brought under **Article 159** of the **Constitution** and **rule 5 (2) (b)** the **Court of Appeal rules, the applicant, Nilesh Jayantilal Kotedia**, sought orders for stay of execution pending the hearing and determination of an intended appeal against the judgment and orders of the High Court at Nairobi (Tuiyott, J.) delivered on 23<sup>rd</sup> November 2020 pending the hearing and determination of the intended appeal.

The motion was brought on grounds that **the 1<sup>st</sup> respondent, Guaranty Trust Bank Limited (Formally Fina Bank Limited)** obtained judgment against **the applicant, Nilesh Jayantilal Kotedia, the 2<sup>nd</sup> respondent Jagdeep Lalji Kotedia and Mechanized Cargo Systems Limited (the Principal borrower)** jointly and severally in the sum of Kshs. 49,949,459/30 together with interest at the rate of 13.5% per annum from 30<sup>th</sup> June 2005 until payment in full; that thereafter the applicants were granted stay of execution orders for 21 days which orders were due to lapse on 14<sup>th</sup> December 2020.

Dissatisfied with the decision, the applicant intends to appeal against the judgment of the High Court and has filed Notice of Appeal on 2<sup>nd</sup> December 2020. In the meantime, the applicant seeks the orders of stay of execution as it is apprehensive that the 1<sup>st</sup> respondent will proceed with execution of the trial court's orders.

It was contended that the appeal is arguable because the trial court had found that the applicant was liable pay on the basis of the guarantees proffered to the 1<sup>st</sup> respondent, notwithstanding that such guarantees had been discharged; that furthermore, the trial judge failed to appreciate that the bank statements were inconsistent. It was further contended that the subject matter of the intended appeal being a money award will be lost if execution were to be effected and the 1<sup>st</sup> respondent paid; that in the interest of justice, the applicant should be provided an opportunity to ventilate its intended appeal. The applicant also filed written submissions in support of their application.

In an affidavit in reply sworn on 4<sup>th</sup> February 2021 by **Josephine Gachuru** the 1<sup>st</sup> respondent's Legal Officer, it was deponed that the applicant and the 2<sup>nd</sup> respondent were directors of the Principal borrower and had executed guarantees and indemnities in favour of the 1<sup>st</sup> respondent in consideration of the loans to the Principal borrower; that contrary to assertions, the applicant regularly received its bank statements, interest rate variations and all general correspondence; that furthermore, the applicant had severally admitted that it owed the outstanding sums of Kshs. 48,949,459.30 as at 30<sup>th</sup> June 2005 to the 1<sup>st</sup> respondent. It was also deponed that the applicant had failed to testify in the suit before the High Court, and went so far as to expressly decline to cross examine the 1<sup>st</sup> respondent; that therefore the intended appeal was not arguable, and there was nothing that would be rendered nugatory in the event that it were to succeed. The replying affidavit was supported by written submissions.

In so far as applications filed under **rule 5 (2) (b)** of this Court's rules are concerned, the threshold requirements to be satisfied as exemplified in the case of **Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR**, are that;

***“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the Court must also be persuaded that were it to dismiss the application for stay and later the appeal or intended appeal succeeds the results or success could be rendered nugatory.”***

As to whether the intended appeal is arguable, the applicant contends that the 1<sup>st</sup> respondent failed to discharge the evidentiary burden of proof to show that the applicant owed the 1<sup>st</sup> respondent the sums demanded. If indeed this be the case, then we are satisfied that the intended appeal is arguable.

As to whether the appeal would be rendered nugatory the applicant case is that the amount of Kshs. 48,949,459.50 is substantial and the 1<sup>st</sup> respondent has not demonstrated that it is entitled to be paid such sums. In this regard, we would begin by observing that the applicant has not specified how the intended appeal would be rendered nugatory in the event the sums were to be paid, or that the 1<sup>st</sup> respondent would not be in a position to refund any amounts paid.

At paragraph 29 of the replying affidavit, the 1<sup>st</sup> respondent has provided an assurance that;

***“The 1<sup>st</sup> Respondent Bank is a premier, respectable and well-established Bank with a sizeable market share in the Banking Industry in Kenya. It is therefore capable of settling an award of damages made by the Honourable Court where such an award is held as merited by a Court of requisite jurisdiction.”***

On this basis, we are not persuaded that the intended appeal would be rendered nugatory.

As such, with the second limb having failed, the Notice of motion dated 26<sup>th</sup> January 2021 is unmerited, and is dismissed. Costs in the intended appeal.

**It is so ordered**

**DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MAY, 2021.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**