



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

Civil Appli 159 of 2007

DANIEL KAMITA GICHUHI1ST APPLICANT

JOSEPHINE KABURA GICHUHI2ND APPLICANT

AND

CONSOLIDATED BANK OF KENYA LTD.....RESPONDENT

(Application for an injunction in an intended appeal from the order the High Court of Kenya at Nairobi Milimani Commercial Court (Mr. Justice Warsame) dated 26th June, 2007

in

H.C.C.C. NO. 500 OF 2006)

RULING OF THE COURT

This is an application under **rule 5 (2) (b)** of the Court of Appeal Rules by **Daniel Kamiti Gichuhi** and **Josephine Kabura Gichuhi** (“*the Applicants*”) by Notice of Motion dated 3rd July, 2007 and lodged on 9th July, 2007 seeking Orders:-

- “1. That an urgent injunction do issue forthwith restraining the respondent, its agents, servants and/or employees from selling by Public Auction and/or otherwise, the applicants’ suit premises known as L.R. No. 7660/114 (I.R. No. 38645) Tigoni, Kiambu while pending the hearing and determination of the applicants’ intended appeal by this Honourable Court.**
- 2. That the costs of this application be provided for.**
- 3. That such other and/or further relief be granted as this Honourable Court might deem fit and just to grant in the circumstances of this matter.”**

The numerous grounds for the application were stated to be:-

- i) The applicants’ injunction application dated 8th September 2006, seeking to restrain the respondent from selling the applicants’ suit premises (known as L.R. No. 7660/114 (I.R. No. 38645) Tigoni, Kiambu) was heard and dismissed by the Honourable Mr. Justice Warsame on 26th June, 2007.**

- ii) *The Honourable Judge by his said ruling of 26th June, 2007 also dismissed the applicant's plaint dated and filed in Court on 8th September, 2006.*
- iii) *The superior court did not have jurisdiction to dismiss the appellants' entire suit when there was no application for such dismissal.*
- iv) *At the time the superior court dismissed the appellants' aforesaid injunction application and the entire suit, on 26th June, 2007, interlocutory judgment had already earlier on been entered in favour of the appellants on 13th October, 2006, in default of filing Memorandum of Appearance and defence by the respondent.*
- v) *The superior court did not have jurisdiction (and acted unfairly) to dismiss the appellants' injunction application and the entire suit, on the face of interlocutory judgment in favour of the appellants, and the said decision by the superior court is a contradiction of the interlocutory judgment aforesaid entered by the same court.*
- vi) *The respondent had earlier on threatened to sell the applicants' aforesaid suit premises by public auction, which was due to take place on 12th September, 2006, but which was averted by the applicants' aforesaid injunction application before the superior court.*
- vii) *The 1st applicant had been employed by a company known as Home Savings & Mortgages Limited as a Managing Director, during which period the applicants borrowed a sum of Kshs.1.3 million, which sum was secured by a legal charge over the suit premises.*
- viii) *As the 1st applicant was an employee of the said company, and also lived in the suit premises with his family, the rate of interest payable over the said loan was 5% p.a. only, as provided in the charge.*
- ix) *During his employment with the said company, a sum of Kshs. 791,951/= was deducted from the 1st applicant's salary, up to the month of December, 1990, by way of repayment of the said loan and thus leaving a balance of Kshs. 508,049/= only.*
- x) *The assets and liabilities of the said company have since been transferred to the respondent bank under provisions of the Consolidated Bank of Kenya Act, No. 5 of 1991.*
- xi) *The respondent is now purportedly claiming a sum of Kshs. 8,803,343.30, and unless this Honourable Court grants the injunction sought herein, it shall proceed to sell the suit premises as threatened.*
- xii) *The respondent's aforesaid claim of Kshs. 8,803,343.30 is based on fundamental breach of contract by the respondent inter alia in that the respondent has charged abnormally high rates of interest, over a period of time, varying between 14% p.a. to even up to 71.5% p.a.*
- xiii) *The said rate of between 14% p.a. and upto 71.5% p.a., charged by the defendant over the said loan is illegal and unlawful inter alia in that it violates not only the mandatory provisions of both Central Bank of Kenya Act and the Banking Act, but also the agreement between the parties as provided in the charge.*
- xiv) *In fact at various times the respondent has acknowledged owing the 1st applicant various sums of money (and which sums of money were more than enough to liquidate the balance of the loan of Kshs. 508,049/= at the time aforesaid), but the respondent stubbornly refused to give the 1st applicant an equivalent credit thereof.*
- xv) *The applicants' suit premises known as L.R. No. 7660/114(I.R. No. 38645) Tigon, Kiambu has*

an estimated value of about Kshs. 15 million, according to recent valuation carried out sometimes in the month of August, 2006, and the same is applicants' family home.

xvi) The suit premises is extremely unique in that it is situated in Tigoni Area (Limuru), it has been our Family Home since the year 1978, it is strategically situated just opposite Tigoni Police Station, and it is extremely difficult, if not impossible, to find such a property in the market.

xvii) The respondent has threatened and is inclined to sell the applicants' suit premises by public auction purportedly in exercise of its statutory power of sale unless an urgent injunction order is granted.

xviii) The respondents' purported statutory power of sale is null and void inter alia in that the respondent has served the applicants with several different Statutory Notices and demands, claiming sums of money at different rates of interest, ranging between 14% p.a., 37% p.a. and 71.5% p.a.

xix) The applicants have filed Notice of Appeal and have applied for proceedings.

xx) The applicants have an arguable appeal, which would be rendered nugatory if the injunction is not granted as sought."

The ruling of Warsame J in the superior court dated and delivered on 26th day of June, 2007 which is being challenged in the intended appeal was a ruling on an application made under **Order 39, rule 1, 2 and 3** of the Civil Procedure Code seeking an order to restrain the Consolidated Bank of Kenya (hereinafter "*the Bank*") from selling, disposing of or in any manner whatsoever dealing with the applicants' property L.R. No. 7660/114 title No. 38645, Tigoni, Kiambu (hereinafter referred to as "*the Tigoni property*").

The applicants had previously been issued on 11th September, 2006 with an ex-parte order of injunction against the Bank which had been extended from time to time.

In his ruling the learned Judge dismissed the application under **order 39** and in doing so stated, inter alia, as follows:-

"It is my decision that the present suit is res judicata and more so an abuse of the judicial process. My brother Justice Ombija in HCCC No. 466/2002 (Milimani Commercial Court) rejected a similar application like the present application. He was of the view that the reliefs sought in HCCC 466/2002 were substantially similar to reliefs sought in HCCC No. 5056/92 and HCCC No. 4520/94. On my part I am satisfied beyond doubt that the issues and reliefs sought in this matter were substantially and directly in issue in the earlier suits. The issues now raised were raised in the earlier attempts but the court told the plaintiffs that the way ahead is blocked.

In deed (sic) it is my decision that the suit being res judicata and an abuse of the judicial process cannot stand. It cannot stand because the plaintiffs are bent on abusing the law that they seek protection from. A party cannot be allowed to seek protection from a process, which he/she continually and persistently disregard, and/or abuses. That is what the plaintiffs are doing in this matter. The application therefore has no merit and it is dismissed with costs. And since the foundation of this suit is based on an abuse of the judicial process, it too cannot stand, it is dismissed with costs to the defendant."

We consider that the intended appeal raises sufficient arguable issues and the appeal cannot be considered to be frivolous.

The next point for us to consider in relation to the application for stay is whether, if the stay now sought was not to be granted, the intended appeal, were it to succeed, would have been rendered nugatory by the refusal by this Court to grant the stay sought in the application before us. See **RELIANCE BANK LTD (IN LIQUIDATION) V. NORLAKE INVESTMENTS LTD** Civil Application No. NAI. 93/02

(unreported), **GITHUNGURI VS JIMBA CREDIT CORPORATION LTD** (No.2) (1988) KLR 838 and **J. K. INDUSTRIES LTD VS. KENYA COMMERCIAL BANK LTD** [1987-88] 1 KAR 1688.

We have considered this aspect of the application. In our view the applicant has not shown that in the event that his appeal is successful the bank (respondent) is not financially capable of fully compensating him.

We are not therefore satisfied that, unless the order of injunction is granted, the intended appeal would be rendered nugatory.

We therefore dismiss this application. The costs of the application shall be in the intended appeal.

Dated and delivered at Nairobi this 9th day of November, 2007.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR