



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 122 of 2006**

PAUL ODHIAMBO EDWARD GONDIAPPLICANT

AND

NATIONAL BANK OF KENYA LTD.....RESPONDENT

(An application for stay of execution and injunction pending an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mr. Justice Anyara Emukule) dated 13th

April, 2005

in

MILIMANI COMMERCIAL COURTS

H.C.C.C. NO. 1938 OF 2000)

RULING OF THE COURT

This is an application by Notice of Motion under **rules 1(2) and 5(2)(b)** of the Court of Appeal Rules (“*the Rules*”) seeking, pending the hearing and determination of Nairobi Civil Appeal No. 271 of 2005, a stay of execution of the judgment and decree of the superior court (Emukule J.) dated 13th April 2005 in H.C.C.C. No. 1938 of 2000. In that suit the applicant herein, Paul Odhiambo Edward Gondi (hereinafter “**Gondi**”) was the plaintiff. The defendant and respondent herein is the National Bank of Kenya (hereinafter “the **Bank**”).

It is now well settled that the original and discretionary jurisdiction bestowed upon this Court by **rule 5(2)(b)** of the Rules requires us to satisfy ourselves that the intended appeal is arguable or, in other words, not frivolous. Secondly, we need to consider whether, if the appeal is granted, it is likely that the appeal will be rendered nugatory if no injunction and/or stay were to be granted.

The Memorandum of Appeal filed by the Bank contains no less than seventy grounds of appeal against the superior court’s forty seven-page judgment. At this stage it will be sufficient to satisfy the issue as to the arguability of the appeal if there is only a single arguable issue raised. We are satisfied that the appeal does raise at least one such issue and indeed **Mr. Kenneth Kariuki**, learned counsel for the respondent conceded that this was so. This arguable issue is that the superior court in its judgment erred in failing to appreciate that the defendant Bank had not filed any counterclaim against the plaintiff and yet the learned Judge concluded his judgment thus:-

“Considering the foregoing summary, of the findings herein, the plaintiff fails substantially in its suit, and there shall therefore be judgment for the defendant in the terms following:-“

To quote from the decree, it was ordered *inter alia* that: -

- 1. “ That the plaintiff shall pay to the defendant the sum of Kenya Shillings Three Hundred and Ninety Three Thousand Five Hundred and Thirty Seven and Twenty Cents (Kshs. 393,537.20).....on account of the Plaintiff’s personal account number 011-043-806 together with interest thereon at 15.5%.....**
- 2. That there shall be judgment for the defendant in the sum of Kenya Shillings Four Million One Hundred and Fifty Thousand (Kshs. 4,150,000.00) together with interest thereon at 15.5% per annum.....”**

We now turn to the second limb as to which we need to be satisfied before we grant the stay and injunction sought and that is as to whether the intended appeal will be rendered nugatory if no stay and/ or injunction is granted.

Mr. Ochieng Oduol, learned counsel for the applicant, stressed that **Gondi** is a business man who is embarrassed by the judgment irregularly granted against him for approximately Shs.80 million inclusive of interest and that he is likely to lose further business-standing in society; a standing that is unlikely to be recovered if the appeal succeeds. The Bank clearly intends, if not enjoined from so doing, to sell **Gondi**’s property in Nakuru being L.R. Nakuru Municipality Block 5/169. A 45 day statutory notice and a notification of sale, both dated 21st February 2006 have been issued by Saddabri Agencies the auctioneers appointed by the Bank. We agree with **Mr. Ochieng’ Oduol**, that unless an injunction is granted the applicant’s business standing is likely to suffer and such embarrassment is unlikely to be erased should his appeal eventually succeed.

We consider that in the circumstances the nugatory test has been satisfied and that the application should be allowed.

Mr. Kariuki submitted that there were some amounts admitted by **Gondi** to be due which amounts should constitute a security payable to the respondent if an injunction is granted. **Mr. Oduol** stated that **Gondi** is ready to deposit that amount in escrow within 14 days of the ruling on this application.

The amount so admitted by **Gondi** is **Shs.392,340.20**, which he has been ready and willing to pay against discharge of the charge in respect of his property L.R. Nakuru Municipality Block 5/169 Nakuru since February 2000 if not before. We do not wish to say anything more on this issue as the applicant’s appeal is yet to be heard. In the result we make the following orders: -

- 1. The execution of the Decree of the Hon. Mr. Justice Emukule J. dated 13th April 2005 in H.C.C.C. No 1938 of 2000 be and is hereby stayed pending the hearing and final determination of Nairobi Civil Appeal No. 271 of 2005.**
- 2. An injunction be and is hereby issued restraining the National Bank of Kenya Limited, whether by itself or its servants or agents, or advocates or auctioneers or any of them from advertising for sale, selling by public auction or private treaty or otherwise howsoever the applicant’s property known as L.R. Nakuru Municipality Block 5/169 Nakuru Town pending the hearing and final determination of Nairobi Civil Appeal No. 271 of 2005.**
- 3. The costs of and incidental to this application shall be in the appeal.**

Dated and delivered at Nairobi this 26th day of May, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR