



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI  
Civil Appli 7 of 2005**

**HOUSING FINANCE COMPANY OF KENYA LTD.....  
.....APPLICANT**

**AND**

**RICHARD NDERE JOHNSON PAUL.....1<sup>ST</sup>  
RESPONDENT**

**SAMWEL KAHIGA MUIGAI.....2<sup>ND</sup>  
RESPONDENT**

**CHERI (K) LTD.....3<sup>RD</sup>  
RESPONDENT**

**COMMISSIONER OF LANDS.....4<sup>TH</sup>  
RESPONDENT**

*(Application for stay of proceedings in the High Court of Kenya at Nairobi (Kasango, Ag. J) dated  
16<sup>th</sup> June, 2004*

**In**

**H.C.C.C. NO. 2095 OF 2000)**

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**RULING OF THE COURT**

**By this application expressed to be brought under rule 5(2)(b) of the Rules of this Court the applicant, HOUSING FINANCE COMPANY OF KENYA LIMITED, seeks orders; inter alia:**

***“THAT pending the hearing and determination of the Applicant’s Appeal in the Court of Appeal Civil Appeal No. 52 of 2003 the orders and decision given by Honourable Judge Mary Kasango on 16<sup>th</sup> June, 2004 in Milimani HCCC NO. 2095 of 2000 there be an order staying proceedings in Nairobi Milimani HCCC No. 2095 of 2000 pending the outcome of the Appeal.”***

**The short history of the dispute is that the 1<sup>st</sup> respondent, RICHARD NDORE JOHNSON PAUL, filed suit against the applicant and three others on 24<sup>th</sup> November, 2000. The subject matter of the dispute is Land Reference No. Nairobi/Block 129/86 sold by the applicant as chargee in exercise of its statutory power of sale at a public auction after allegedly the 1<sup>st</sup> respondent had**

defaulted in servicing a loan which he had secured towards the purchase of the property. It is the 1<sup>st</sup> respondent's case, that the applicant acted fraudulently in disposing of the property and has sought orders to declare the sale null and void. The 2<sup>nd</sup> respondent is the purchaser thereof and the property has since been registered in his favour. The 3<sup>rd</sup> respondent is an auctioneering company.

It is apparent on the record that the 1<sup>st</sup> respondent obtained an *ex-parte* judgment against the applicant in default of appearance and an application to set aside that judgment was dismissed by *Mwera, J.* on 31<sup>st</sup> October, 2002. A further application to stay all proceedings in the suit pending the hearing and determination of Civil Appeal No. 52 of 2003 was also dismissed by *Mary Kasango J* on 16<sup>th</sup> June, 2004.

This motion was lodged on 18<sup>th</sup> January, 2005 but the appeal was filed way back on 21<sup>st</sup> March, 2003 and is pending hearing and determination.

It is trite that the power of the Court under *rule 5(2)(b)*, is discretionary and like all judicial discretion it must be exercised on the basis of evidence and sound legal principles. Two principles guide the Court in considering whether or not the orders prayed for should be granted. The first one of those principles is whether the applicant has shown that his appeal or intended appeal is arguable. Secondly, whether the applicant has shown that if he is not granted a stay or injunction as the case may be, his appeal or intended appeal will be rendered nugatory.

As we are not seized of the appeal, it would not be prudent for us to express any firm conclusion or definitive views except that we do not think that the appeal is frivolous.

In the circumstances, it follows also, that the property the subject matter of the dispute should be preserved to await the determination of the appeal.

In the result, the application is allowed and the orders and decision given by *Mary Kasango, J.* on 16<sup>th</sup> June, 2006 in HCCC 2095 of 2000 (Milimani) are stayed pending the hearing and final determination of the said appeal. Costs shall be in the appeal.

*DATED and DELIVERED at NAIROBI this 14<sup>th</sup> day of July, 2006.*

*P.K. TUNOI*

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*JUDGE OF APPEAL*

*E.M. GITHINJI*

.....

*JUDGE OF APPEAL*

*W.S. DEVERELL*

.....

*JUDGE OF APPEAL*

*I certify that this is*

*a true copy of the original.*

**DEPUTY REGISTRAR**