



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL SUIT 1243 OF 2001**

**TRUST BANK LIMITED.....PLAINTIFF**

**VERSUS**

**PARAMOUNT UNIVERSAL BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**AJAY SHAH.....2<sup>ND</sup> DEFENDANT**

**PRAFUL SHAH.....3<sup>RD</sup> DEFENDANT**

**RULING**

All the three Defendants are the Applicants herein with their respective applications seeking similar orders which are for leave be granted to the Defendants to file Appeal against the decision of this court given on 5<sup>th</sup> June, 2009 in respect of the 2<sup>nd</sup> Defendant, any other or further relief this court may find fit to grant.

I considered submissions and cases cited by Mr. Ogunde for the 1<sup>st</sup> Defendant, Mr. Billing for the 2<sup>nd</sup> Defendant and Mr. Gitonga for the 3<sup>rd</sup> Defendant.

Mr. Oyatsi for the Plaintiff has filed grounds of opposition against each Defendant's application which I have considered. I have also considered Mr. Oyatsi's submission and cases relied upon.

Having considered these submissions it is my view that the applications are not seriously opposed as it is appreciated that the court has power to exercise its discretion to allow or disallow the application. In regard to the principles to be had in mind while considering this application, I do not think that at this stage the Applicants have to satisfy me of the manner in which I erred in the ruling sought to be appealed against. The case relied upon for this preposition was **Samken Limited & Anor. vs. Mercedes Sanchez Rau Tussel and Anor. CA No. 21 of 1999 (UR)** and it does set out what judicial discretion is at page 2 and 3 where the Justices of Appeal stated:

***“Though the discretion is unfettered, like all judicial discretion, it must be exercised on reason, not caprice, and the exercise must not be arbitrary oppressive.”***

Apart from the above holding which Mr. Oyatsi also relied upon with due respect to him, the paragraph at page 9 does not apply to cases in the High Court. The justices were in the cited case considering the

discretion given to a Judge of Appeal under Rule 4 of the Court of Appeal Rules, whose parameters are clearly set there under. The issue before the Justices of Appeal was the delay in bringing an application for enlargement of time to file the record of Appeal before the Court of Appeal against decision of the High Court. What the Justice of Appeal held is that the Applicant ought to have placed before the single Judge of appeal who heard the matter initially, certain specified material in order for the judge to exercise his discretion in his favour. Since the material was not so placed before it, the Court of Appeal set aside the decision of the single judge of Appeal.

Delay is not an issue before me as the applications have all been brought within time. The Applicants have a right to appeal against the court's ruling and there is no reason why that right should be clogged or taken away from them. Secondly, the Applicants cannot exercise that right unless this court grants them leave to do so. I do not see any real reason why the leave sought should not be granted. Thirdly, no prejudice will be suffered by the Plaintiff if the applications are allowed.

I will allow each of the application by each of the Defendants by:

**(1) Granting each Defendant leave to appeal against the ruling of this court and the order of 5<sup>th</sup> June, 2009; and**

**(2) Granting each Defendant leave to file record of appeal before the Court of Appeal.**

**(3) Defendants to meet costs of these applications.**

**Dated at Nairobi this 3<sup>rd</sup> day of July 2009.**

**LESIIT, J.**

**JUDGE**

***Read, delivered and signed in presence of:***

Mr. Gichuhi holding brief Mr. Ogunde for the 1<sup>st</sup> Defendant/Applicant

Mr. Billing for the 2<sup>nd</sup> Defendant/Applicant

Mr. Gitonga for the 3<sup>rd</sup> Defendant/Applicant

Ms.Kamende holding brief Mr. Mr. Oyatsi for the Plaintiff/Respondent

***Dated at Nairobi this 17<sup>th</sup> of July 2009***

**LESIIT, J.**

**JUDGE**