

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 413 of 1997

TRUST BANK LTD RESPONDENT

VERSUS

KIRTESH PREMCHAND SHAH APPLICANT

RULING

By a Chamber Summons dated 17th December, 2007, brought under **Section 35** of the Banking Act, **Sections 228** and **241** of the Companies Act and **Section 3A** of the Civil Procedure Act, **Kirtesh Premchand Shah** (*hereinafter referred to as the Applicant*), has come to this court seeking leave to commence proper appeal proceedings against the judgment of this court delivered on the **25th January, 2006**. The suit was originally filed by the Respondent **Trust Bank Ltd** against the Applicant & 4 Others but the suit against the 4 others was withdrawn. In the course of the trial, the Plaintiff company was placed under liquidation but the suit against the applicant proceeded by virtue of leave granted by the court on **3rd October, 2001** under **Section 228** and **241(c)** of the Companies Act. Being dissatisfied with the judgment delivered against him, the Applicant filed a Notice of appeal. The Applicant also filed an application in the Court of Appeal for stay of execution pending appeal.

The Advocate for the Respondent successfully raised an objection to the application for stay of execution, pending the intended appeal on the grounds that, the Applicant had not sought leave of the Court to bring the proceedings. The Applicant has now come to this Court seeking leave of this Court to commence proper appeal proceedings against the judgment of the High Court.

The Respondent has filed grounds of opposition contending that the Applicant having filed a notice of appeal and a record of appeal before the Court of Appeal, the application before the court is an abuse of the court process as no leave has been sought by the Applicant to institute the appeal. It was contended that the appeal filed by the Applicant remains on record and there was no proper basis for granting the orders sought.

I have considered the application, the affidavit in support, the annexures thereto, the grounds of opposition and the submissions of counsels. It is clear to me that the Respondent having been placed under liquidation, no action or proceedings can proceed against it without leave of the court. Indeed that was the basis upon which the Court of Appeal dismissed the Applicant's motion dated **17th July, 2006**, seeking an order for stay of execution pending appeal. The difficulty here appears to be that the Applicant is seeking leave to commence proper appeal proceedings when the proceedings which were filed without leave still remain on record.

I concur with the advocate for the Respondent that that is an abuse of the court process. Without withdrawing the notice of appeal which was irregularly filed, the applicant cannot request the court for leave to file another appeal. At best, the Applicant could only have sought an order for leave and an order to deem the proceedings already instituted as properly filed. However, the appeal proceedings are now within the jurisdiction of the Court of Appeal and such an order can only be granted by the Court of Appeal.

I therefore, find that this application is an abuse of the court process. Accordingly the same is dismissed.

Orders accordingly.

Dated, signed and delivered on this 12th day of March, 2008

H. M. OKWENGU

JUDGE