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

Civil Appli. Nai 188 of 2006 (UR. 109/06)

KIRTESH PREMCHAND SHAH .....APPLICANT

AND

TRUST BANK LIMITED .....RESPONDENT

(An application for stay of execution pending an intended appeal from the judgment and

decree of the High Court of Kenya Nairobi (Ransley, J.) dated 25th January, 2006

in

H.C.C.C. NO. 413 OF 1997)

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RULING OF THE COURT

The notice of motion dated 17th July, 2006 and filed in court on 18th July, 2006 seeks an order for stay of execution of a decree issued by the superior court and it came up for hearing on 26th September, 2007. Before the hearing however, the respondent raised an issue of jurisdiction and we gave an order that the issue be argued *in limine*. It is this: the applicant has not obtained any sanction of court under *section 228* of the Companies Act, Cap 486 Laws of Kenya, to institute any appeal or file the application against the respondent and therefore the court has no jurisdiction to hear the matter. This ruling is limited to the determination of that narrow issue. Some few background facts will illuminate the issue:

M/S. Trust Bank Ltd (the "Bank") sued, some five defendants in **H.C.C.C No. 413** of **1997** claiming unpaid huge loans advanced to those defendants. The applicant here, ***Kirtesh Premchand Shah*** ("Shah") was the 2nd defendant in that suit. During the pendency of the suit, however, the Bank was placed under liquidation and the **Deposit Protection Fund** ("DPF") was appointed as the liquidator on 15th August, 2001 under the Banking Act, Cap 488, Laws of Kenya. The liquidator then applied to the court for orders under section ***241 (1)(c)*** of the Companies Act for appointment of M/S. Hamilton Harrison and Mathews as the advocates to assist DPF in the liquidation, and also under ***section 228*** and ***241 (1) (a)*** of the Act to continue with the pending suit. The orders were granted by the court on 3rd October, 2001 and were issued on 5th October, 2001. The suit was subsequently set down for hearing but only against Shah and it was heard fully. Judgment was then made against Shah by Ransley, J. (as he then was) on 25th January, 2006 and he was ordered to pay the Bank some Shs.22 million together with interest thereon at court rates

from the date of the suit. Shah applied for a stay of that decree pending appeal and Ransley J. granted the stay on condition that Shah deposited Shs.10 million in an interest earning bank account within 30 days. That was on 23rd February, 2006. Shah did not comply with that order but instead came before this Court on 18th July, 2006 and filed the application now objected to.

The submissions of learned counsel Ms. Kirimi who raised the objection are premised on the provisions of ***section 228*** of the Companies Act and on a recent decision of this court in **Kissi Petroleum Products Ltd vs. Kobil Petroleum**, **Civil Appl. NAI. 309/03 (UR.156/2003)** made on 5th May, 2006.

Section 228 provides as follows:

"**When a winding up order has been made or an interim liquidator has been appointed, under Section 235 no action or proceedings shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."**

There is no dispute that Trust Bank is in liquidation and that a liquidator was appointed in that regard on 15th August, 2001. There is also no dispute that Part VI of the Companies Act on "*Winding Up"*, which encompasses ***sections 212*** to ***344*** of the Act, applies to liquidation of Banking institutions by the Central Bank of Kenya. ***Section 35*** of the Banking Act expressly provides for that application. By the time the liquidator of the Bank was appointed, there were numerous cases pending before courts either instituted by the Bank or against it. There were also others which the Bank contemplated instituting. A long list of some of those matters is exhibited with the record before us and it formed part of the orders issued by the superior court sanctioning either continuation or commencement of such actions. But those orders were sought by and granted in favour of the Bank. The issue is whether the benefit of the orders could enure to the benefit of other persons or parties and whether the orders are limited in scope to the proceedings specifically disclosed to the court or would extend to consequential proceedings and appeals.

The view expressed by Ms. Kirimi is that the leave granted to the Bank in the superior court to proceed with the suit before that court was spent when that suit was determined. She submitted that the jurisdiction of this Court can only be invoked by the filing of a notice of appeal and then the application or appeal. The application now before the Court is a proceeding commenced against the Bank and it should therefore, in Ms. Kirimi's view, have been sanctioned by the court for filing or continuation otherwise the proceeding flies in the face of ***section 228*** and is rendered incompetent. She found support for such submissions in the ***Kissi Petroleum Case*** (supra) which was a reference to the full court after refusal by a single Judge of this Court to extend time for filing an appeal. The single Judge upheld an objection raised by the respondent that the applicant had no power to institute the application since a debenture holder had appointed a Receiver Manager of the applicant Company and it was the receiver therefore who had the power to proceed in court. After examining the facts and circumstances of that case, including confirmation that a liquidation order had been made against the applicant company in a separate suit but was stayed pending appeal, the full court adverted to ***section 228*** of the Companies Act and concurred with a view expressed by the superior court that the stay order did not nullify, vacate or discharge the winding up order and that the stay did not justify non-compliance with the section. The full Court stated:-

"**The winding up order has already been made by the winding up court. It is not however operational because this Court has stayed its rigors. Such an order of stay cannot however, whittle down the provisions of the section 228. Until the winding up order is set aside, leave of the court is still required for the continuation of the proceedings by the company. Leave to institute the appeal has not been obtained. The applicant is seeking a discretionary order. In dealing with the application, the court cannot ignore provisions of Section 228 as any appeal without leave of the court would be incompetent."**

On the facts of that case, the court was right in making such a finding since no application for continuation of the suit with leave of the court had been made in the superior court although the matter was squarely governed by the provisions of section 228. We will consider shortly, as earlier postulated, whether, where the Company in liquidation, as in this case, obtains leave to continue with a suit in the

superior court, further leave ought to be obtained on appeal against that decision.

The response made to the submissions of Ms. Kirimi by learned counsel for the applicant, Mr. Ngugi Muhindi, was that ***section 228*** did not apply to applications or appeals. The specific words used in the section were "*action or proceedings"* which are not defined in the Act. In his view, if Parliament wanted to include applications and appeals in the section it would have expressly done so. Mr. Muhindi further submitted that the rules of this Court do not place any fetter on an intended appellant and therefore the objection raised had no basis.

We have considered the issues raised in the matter and we think, with respect, that there is considerable merit in the objection raised by the Bank. The starting point is the rationale for the provisions of ***section 228***. The section was lifted *verbatim* from provisions of English law relating to companies which was in force at least since the **Companies Act 1862** was enacted. Its operation commenced in 1962 and, like most of the other provisions of the Kenyan Companies Act, it has remained unchanged since then. In passing, we may observe that this is a sad commentary on this country's legislative reform agenda considering that the provisions of the mother Act has over the centuries drastically changed in England to accommodate the ever changing nature and environment of business companies and Company Law. Be that as it may, English decisions and commentaries on the construction and application of section 228 are relevant today as they were in 1862. Without indulging in any comprehensive discourse on the subject, we think the rationale for the provisions of the section was to ensure that the court, the acknowledged neutral arbiter of disputes, takes control of the disabled commercial entities and ensures justice and fairness to all creditors, whether secured or unsecured, and the contributories. That is why the liquidator must answer to the court for all his activities as he owes a statutory duty to the creditors and the contributories. The elaborate provisions and procedures under ***Part VI*** of the Act and "The Companies (Winding Up) Rules" made thereunder attest to the jealous concern of the court in guiding the process of liquidation. It matters not that the words used in section 228 are "*action"* and "*proceeding"* and that they are not defined. The construction of the words must be wide enough to include any form of proceedings in court brought by any lawful procedure before such court. In **Palmers Company Law, Volume 1 (22nd Edition)** we find the following passage:

"***The object of the winding-up provisions of the Companies Act 1862",* said Lindley L.J. in *Re Oak Pitts Colliery Co*., "….is *to put all unsecured creditors upon an equality and to pay them pari passu*." To accomplish this it was indispensable that proceedings against the company by way of action, execution, distress or other process should be suspended; otherwise the winding up would resolve itself into a scramble for the assets. Section 226 gives the court jurisdiction after presentation of the petition to restrain proceedings, and by section 228 and 231, on winding-up order being made, or a provisional liquidator appointed, proceedings are automatically stayed and cannot be proceeded with without leave of the court. In this way creditors and others are compelled to come in and prove their claims in winding up, and a rateable and just distribution of the company's assets is effected. "Proceedings" under section 231 is given a wide meaning, and includes execution and interpleader summonses. The words "any other action or proceeding" in section 226 (b) likewise are general and not limited to actions in England but extend to actions and proceedings in Scotland; Northern Ireland being covered by section 226 (c). The court can also, in a voluntary winding up on application under section 307, restrain executions and other proceedings."**

We think the passage, with necessary changes to suit local circumstances, underscores the rationale for the control of the winding up process by the court and also the wide construction of the actions and proceedings targeted in that process.

The application before us is targeted at the Bank which is in liquidation. Expenses are likely to be incurred in that process and that may be materially detrimental to the creditors and contributories. We find no provision in the Companies Act precluding applications and appeals to this Court from the rigours of section 228. They are in the category of "*actions"* and "*proceedings"* referred to in that section. It seems logical to us therefore that a party intending to proceed against the Bank in this court must seek the leave or sanction of the winding up court and it matters not that the superior court granted leave in the same matter earlier. The sanction or leave of the court is sought and granted on the basis of facts and

circumstances existing when the matter is laid before the court and the court exercises its discretion on those particular facts.

It is for those reasons that we uphold the objection raised by the respondent and find that the application is incompetent. We order that it be and is hereby struck out with costs to the respondent.

Dated and delivered at Nairobi this 12th day of October, 2007.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR