



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Appeal 75 of 2008

FELIX KIPRONO KEMBOI PLAINTIFF

VERSUS

BARCLAYS BANK (K) LTD 1ST DEFENDANT

GARAM INVESTMENTS 2ND DEFENDANT

RULING

I have considered the Preliminary Objections which have been raised by the Defendant.

Under the High Court (Practice and Procedure Rules) under the Judicature Act, Rule 3 (1), it is provided that:-

“Any party to any case or matter may at any time apply by summons for the trial or hearing of such a cause or matter during a vacation, and the Judge being satisfied that there is urgent need for such a trial or hearing may make an order for the trial or hearing of such case or matter during the vacation and may fix a date.”

From the foregoing, it is clear that for one to be heard during the vacation he/she must come by way of summons. This is expressly provided for in the Vacation Rules which is a different procedure from the Civil Procedure Rules. Order 50 of the Civil Procedure Rules has no rule in respect of the mode in which the admissions of matter to be heard during the Vacation are to take place.

The applications for admission during the Vacation Rules must be made distinctly and separately. It is my view now with hindsight that the application under Rule 3 (1) and (2) must be heard and orders made before the substantive application or cause is heard on merit. So, the court must make an order upon the application under Rule 3 (1) first. The application for leave to be heard during the Vacation cannot be made in the same application or cause which should be heard during the Vacation.

My view is fortified by the provisions of Rule 3 (2) which provides:-

“2. Any party to a cause may, at any time during a Vacation file an urgent application with an affidavit giving the grounds thereof and the Judge may deal with that application if satisfied that it is urgent, and where an application filed under Sub rule 2 is referred to the Judge the Judge may deal with that application during the Vacation if satisfied that it is urgent.”

The only way for the Court to consider whether the application should be admitted and is urgent is through the filing of an affidavit setting out the grounds or factors justifying the urgency, it is not by way of a Certificate of Urgency.

The application under Rule 3 (1) must be supported by an affidavit. In the present case there was no application under Rule 3 (1) and no affidavit as contemplated under Rule 3 (2).

The question of procedure is not res judicata neither is the Defendant estopped, prevented or shut out in raising the matter during the inter partes hearing. I made my order when the matter came up ex parte. I certified the application as urgent and ordered that it be heard during the Vacation. I now agree that the said procedure was irregular and what happened that Friday was a nullity. This Court could not admit the hearing during the Vacation on the basis of a Certificate of Urgency which itself was not even pegged on any affidavit.

This Court has the power to correct its own wrongs “ex debito justicie” and even suo moto. It would be improper to hear the application herein when it was admitted irregularly. The Defendant has a right to demand correction and there is no requirement for review or appeal. The Defendant was not in Court last Friday and this was his earliest opportunity to raise the matter.

The other question/matter raised was that the Plaintiff has to date not complied with the Order of this Court given on 23.6.08. The Court extended the Interim ex parte Orders on the basis that the Plaintiff pays the applicant the auctioneers charges and the costs of the Advocate pending the delivery of the Ruling. The Ruling was delivered on 6-08-08. Good faith required that the Plaintiff show what steps he took to have the amount payable ascertained and for it to make arrangements to pay the money. There is nothing to show that he paid for the charges and cost or made any effort to ascertaining the amount. The Applicant comes to this Court seeking equitable reliefs. One who seeks equity must come to Court with clean hands and must also do equity. This could have been a further ground for rejecting the applicant to be heard.

However, since, I have already stated that the application was admitted irregularly and that there was no compliance with the Vacation Rules, the question of costs is superfluous.

I do hereby set aside my order made on 5th September, 2008 as there is no application for the Notice of Motion to be heard during the Vacation. The application is stood over generally. The Plaintiff shall pay the Defendants costs for today which shall be paid within the next 14 days. I shall assess the costs right away.

The Plaintiff shall not be allowed to be heard by this Court in respect of any matter in this suit unless and until he has paid the charges and costs ordered to be paid on 23/06/08.

DATED AND DELIVERED AT ELDORET ON THIS 8TH DAY OF SEPTEMBER, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:-

Mr. Otieno for the Defendant

Mr. Obwatinya for the Plaintiff