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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 170 of 2002

ASHOK KUMAR PUNJA SHAH.....PLAINTIFF

VERSUS

LIQUIDATION AGENT, RELIANCE BANK LIMITED AND 6 OTHERS.....DEFENDANT

R U L I N G:

On the 8th February 2006, the Honourable Lady Justice Gacheche made the following orders:-

“I had decided that the applications of 8/11/2004 and 6/12/2004 be heard. They were to be heard on a first come first serve basis, as it is clear that the application of 6/12/2004 was triggered by the application of 8/11/2004.

At the request of Mr. Mbugua who feels that I may be prejudiced in the matter, I do order that they be placed before Justice M. Ibrahim for his directions on 15th March, 2006.”

When this matter was placed before me, I have been called upon to interpret the meaning and effect of the Judge’s order. Mrs. Manani for the 1st Defendant submitted that the Judge made an order to the effect that the application dated 8/11/04 would be heard first before that dated 6/12/2004. Mr. Ngigi Mbugua for the Plaintiff agrees with this suggestion but goes further to state that the Honourable Judge subsequently disqualified herself from hearing the two(2) applications and as a result, I had a free hand in giving directions and deciding which application ought to be heard first.

It has been suggested by Mrs. Manani, that in case of any doubt on my part, then I should consider whether I should refer the matter to Justice Gacheche to interpret her order. It is my view that since Justice Gacheche has disqualified herself regarding the hearing of the two(2) applications, it would be unfair to her to take this matter back to her for any interpretation of her order or otherwise. A court order ought to speak for itself as it is a matter of record and ought only go to the Judge or judicial officer who made the order where there is an ambiguity resulting from the construction thereof. In the present case, I see no ambiguity as the words and content of the order is simple and clear to me.

It is my view that the Honourable Judge on 1st February, 2006 fixed the hearing of the two(2) applications on 8/2/2006. At the said time, she did not indicate which application would take priority and be heard first. On the 8th February, 2006 the Honourable Judge confirmed that the two(2) applications were to be heard on the said date she added as follows:-

“..... They were to be heard on a first come first served basis, as it is clear that the application was

triggered by the application of 8/11/04”

My interpretation of this is that the Judge intended to have the applications heard on “a first come first served basis” and she gave the reason for this proposal. This intention or approval was not effectuated as there was an application which lead to a decision by the Ladyship to disqualify herself. In my view, this would definitely affect the proceedings. The Judge did not proceed with the hearing and the proposals to hear the two(2) applications on “a first in, first out basis.” Before she made a positive and express order on these lines, she disqualified herself. She indicates what she would have done had she heard the two(2) applications. Upon disqualification, she said as follows:-

“..... I do order that they be placed before Hon. Justice Ibrahim for his directions on 15/3/2006.”

I do hold that the Honourable Judge did not make any specific or express order as to which application was to be heard first. She merely disclosed, the approach she would have taken. She then referred the matter to me for my “directions.” This clearly shows that there was no order and I was free to give directions on the way forward. If there was any order, the Honourable Judge would have said that the matter was referred to me for hearing of the applications and in what order.

Since the applications were referred to me for my directions, I have the discretion as to which application ought to be heard first.

In the event I am wrong on my interpretation of the Judge’s order, I wish to state that even if there was an order that the application dated 8/11/2004 be heard first, once the judge disqualified herself and referred the matter to me, I would still have considered to re-open or re-visit the issue of priority upon application. I would not be bound by the order in the circumstances considering the disqualification and the fact that I would possibly have a different view on the question of priority.

I, therefore invite counsel to address me on which application ought to be heard first since they were placed for directions on the same day.

DATED AND DELIVERED AT ELDORET ON THIS 29TH DAY OF MARCH 2006.

M. K. IBRAHIM

JUDGE