



REPUBLIC OF KENYA



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**Cilpa Limited v Lords Healthcare Limited (Civil Suit 025 of 2020)  
[2021] KEHC 434 (KLR) (Commercial and Tax) (17 December 2021) (Judgment)**

Neutral citation: [2021] KEHC 434 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 025 OF 2020  
MW MUIGAI, J  
DECEMBER 17, 2021**

**BETWEEN**

**CILPA LIMITED ..... PLAINTIFF**

**AND**

**LORDS HEALTHCARE LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed a Plaint dated 30<sup>th</sup> March 2016. The Plaintiff entered into an arrangement for manufacture and subsequent supply of pharmaceutical products with Global Fund. Under the arrangement, the Plaintiff supplied the Defendant with the Brand name ‘Co-Falcinum’ in various batches as the 1<sup>st</sup> line buyer, during the period between September 2012 to October 2013.
2. Global Fund settled 70% of the total invoice value due and owing to the Plaintiff. The Plaintiff raised an invoice dated 17<sup>th</sup> October 2013 amounting to USD 91, 176 for the remaining 30% of the total payments due to the Plaintiff. The Defendant failed to settle the amount and is liable for payment of interest at the agreed rate of 18% per annum on the overdue amounts.
3. The Plaintiff prayed for judgment against the Defendant for;
  - a) The Principal sum of USD 91, 176.
  - b) Interest on the amount above at the rate of 18% per annum from 2<sup>nd</sup> February 2014 until payment in full.
  - c) Cost of the suit.
4. The Defendant filed an Amended Defence and Counterclaim dated 11<sup>th</sup> May 2016. The Defendant denied owing the Plaintiff the invoice value of 30%. The Defendant contended that the supply of



- the said products through the Defendant's distributorship was on agreed commission basis which the Plaintiff refused to settle.
5. In the Counterclaim the Defendant averred that on or about 10<sup>th</sup> March 2014 the Defendant gave the Plaintiff a no objection letter for the supply of certain medicines under the Global Fund arrangement in consideration of the Plaintiff giving a total commission for USD 36 055.40 but the Plaintiff refused to pay.
  6. Further, in the course of business with the Plaintiff, the Defendant was entitled to refunds due to short expiry stocks sent to the defendant instead of fresh stocks. Amounting to USD 11,250
  7. In June 2009, the plaintiff and the defendant participated in supply Tender (OT) GF ATM-Rd4Ph2-08/-9-01T-001 and delivery of Artemether Lumefontrine drugs. On or about 15<sup>th</sup> October 2009, the Plaintiff informed the Defendant that the vessel transporting the medicine had been stuck in a collision by another vessel. The medicine was destroyed and the ship subsequently sunk. The Defendant averred that pursuant to the said accident it was forced to pay USD 368, 100 paid directly to the salvor to pay for a re-shipment of the salvaged container at a cost of USD.1, 425, 228. Therefore, the Defendant's claim against the Plaintiff on the sunken ship is a sum of USD 1, 506, 133.30.
  8. The Defendant prayed for judgment in the following terms;
    - a. USD 2, 620, 645
    - b. Interest on (a) from the date of the suit till payment in full.
    - c. Costs.
  9. In response to the Counterclaim, the Plaintiff argued that it is not disputed that as a result of a negotiation between the Plaintiff and the Defendant, the Plaintiff supplied various batches of "Co-Falcinum" products to Harleys Limited and as a result, the Plaintiff agreed to pay the Defendant a 3% commission of each consignment. Consequently, the Plaintiff paid total amount of USD 36,055.40 as commission to Defendant for the invoice numbers P1314/0346, 00226, Z1314/1207 raised by Plaintiff on the Harleys Limited for the supply of various batches of "Co- Falcinum" products to Harleys Limited.
  10. Further, the Plaintiff denied the alleged claim of non-payment of the commission amount of USD 30,620.60 for the Tender Reference GFA-Rd10HIV SSF-11/12-01T 002 and states that the Defendant raised a debit note dated 84 February 2013 for the aforesaid commission amount which was duly paid by the Plaintiff through a demand draft dated 26<sup>th</sup> December 2013 of amount USD 29,934 in the name of Shailesh Hirani of the Defendant. The difference in the amount mentioned in the debit note and demand draft was due to change in exchange rate and this position was clarified to the Defendant by the Plaintiff. Furthermore, Defendant duly acknowledged the receipt the commission amount for the Tender Reference GFA-Rd10HIV SSF-11/12-01T 002 in email communication dated 7<sup>th</sup> March 2014 and 8<sup>th</sup> March 2014 but failed to disclose this fact to the Court.
  11. This notwithstanding, and in response to the alleged supply of pharmaceutical products under the Tender Reference ATM Rd4 Ph2-08/09-01T-001/KEN161) resulting to an alleged commission of USD 1,023,287 due to the Defendant, the Plaintiff denies owing the Defendant such commissions from these consignments

#### PLAINTIFF'S SUBMISSIONS

12. The Plaintiff submitted that the Defendant had the obligation to pay the price in exchange of the property granted having confirmed delivery and receipt of the Products. For these reason alone, the



claim should be upheld, as allowing the Defendant's to enjoy the Products without paying for the same would amount to unjust enrichment, leaving the Plaintiff with no remedy.

13. Despite these facts, the Defendant's Defence consists of mere denials. It is trite that parties are bound by their own pleadings (see *Civil Appeal No. 219 of 2013 Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR*), and for this reason this line of defence should be disregarded.
14. Further, despite alleging that the disputed sum was fully settled, it is worth noting that the Defendant did not provide any shred of evidence to support this claim. For these reasons, it was submitted that the Defendant owes the Plaintiff USD 91, 176 arising from the supply and delivery of the Co Falcinum Products.
15. On whether the Plaintiff owes the Defendant commissions arising from the supply and delivery of various pharmaceutical products. It was submitted that the Plaintiff does not owe the Defendant commissions arising from the supply and delivery of various other pharmaceutical products. More specifically: Claim for commission amounting to USD 30,620.60. This commission arose from the Plaintiff's supply of products to the Defendant around March 2014, for the Tender Reference GFA-Rd10HIV SSF-11/12-01T 002.
16. The Plaintiff duly raised a debit note dated 8<sup>th</sup> February 2013 for the commission, amounting to USD 30,620.60 (See page 1 of Plaintiff's Supplementary Bundle of Documents dated 20<sup>th</sup> July 2020 ("Plaintiff's Supplementary Bundle of Documents")).
17. The said commission was paid by the Plaintiff through a demand draft dated 26<sup>th</sup> December 2013 of amount USD 29,934.00 in the name of Shailesh Hirani of the Defendant, (page 2 of Plaintiff's Supplementary Bundle of Documents). The difference in the amount mentioned in the debit note and demand draft was due to change in exchange rate and this position was clarified to the Defendant by the Plaintiff, to which the Defendant duly acknowledged the receipt the commission and in an email dated 8<sup>th</sup> March 2014 at pages 3 to 9 of the Plaintiff's Supplementary Bundle of Documents.
18. The Plaintiff also paid the total amount of USD 36,055.40 as Commission to Lords for the invoice numbers P1314/0346, 00226, Z1314/1207 raised by the Defendant for the supply of various products to Harleys Limited (see the invoices at pages 10 to 14 of Plaintiff's Supplementary Bundle of Documents).
19. It was the Plaintiff's submission that the Defendant's claim on alleged negligence on the part of the Plaintiff in respect of Tender GFA TM-Rd4ph2-08/-901T-001 is time barred. The claim for negligence ought to have been filed within 3 years.

#### DEFENDANT'S SUBMISSIONS

20. The Defendant submitted that the cause of action in respect with commission on ATM Rd4 Ph2-08/09-01T-001/KEN0161 arose when the fully performed, that is, 15<sup>th</sup> October 2010 and therefore the six years expired on 15<sup>th</sup> October 2016 which is perfectly within the statutes of limitation. The cause of action in respect with the sunken ship consignment (sunk on 15<sup>th</sup> October 2010) expired after six years that is on 15<sup>th</sup> October 2016. The same is not statute barred.
21. The Defendant relied on the case of *Kiamokama Tea Factory Co. Limited v Joshua Nyakoni [2015] eKLR* where it was held;

“Where a plaintiff pleads this claim both as tort and contract, then he has the benefit of relying on either of the limitations periods set out for tort and contract. In the present case the



plaintiff's case is grounded both on tort and contract which do have a limitation period of 3 and 6 years respectively. In that regard I would not deem appropriate to sniff out the Plaintiff's claim at this point. I deem it proper that the suit proceeds to hearing on the issue and a determination be made at full hearing.”

22. On whether the Plaintiff proved the claim of 30% value of the invoice, the Defendant argued that the list of invoices produced by the Plaintiff does not state any price but just quantities which are not backed by specific Bill of Lading. There was no individual invoice payable by the Defendant on three alleged invoices. There were no particular figures for what was due on the three invoices and no individual invoices have been exhibited at all.
23. The Defendant submitted that the Plaintiff did not deny that there was a supply of short expiry drugs which the Plaintiff was to refund their worth. The Plaintiff agreed to give free goods worth the said products. The Plaintiff did not give evidence of reimbursement.
24. It was the Defendant's contention that the Commission allegedly paid by the Plaintiff to the Defendant was not a payment to the Defendant but to Shailesh Hirani. The Defendant is a separate legal entity and the amount was due to it. (Salomon v Salomon)
25. On whether the Defendant has proved payment of USD 1, 506, 133 pursuant to sunken shipment. The Defendant stated that vide a letter of undertaking (marked no. 11) in the Defendant's list, the Plaintiff undertook on 3<sup>rd</sup> November 2009 that they were jointly and severally liable for the performance of the contract(s) if awarded.

#### DETERMINATION

26. Having considered the pleadings and submissions filed by the parties herein the issues for determination are; -
  1. Whether the Defendant owes the Plaintiff USD 91, 176 arising from the supply and delivery of Co Falcinum products?
  2. Whether the Plaintiff owes the Defendant commissions arising from the supply and delivery of pharmaceutical products?
  3. Whether the Defendant's Counterclaim is merited?

Whether the Defendant owes the Plaintiff USD 91, 176 arising from the supply and delivery of Co Falcinum products?

27. The Plaintiff contended that it supplied the Defendant with the Brand name 'Co-Falcinum' in various batches as the 1<sup>st</sup> line buyer, during the period between September 2012 to October 2013. The Plaintiff raised an invoice dated 17<sup>th</sup> October 2013 amounting to USD 91, 176 for the remaining 30% of the total payments due to the Plaintiff. The Defendant failed to settle the amount.
28. The Defendant on the other hand argued that the distributorship was agreed on a commission basis which the Plaintiff had failed to pay and therefore it was the Plaintiff that owed the Defendant.
29. The fact that the Defendant received the products is not disputed and Page 6 of the Plaintiff's documents confirms that the Defendant herein acknowledged receipt of the goods. There is also a form of Buyer Statement dated 5<sup>th</sup> September 2012 which names the Defendant as the buyer. The Form of Buyer Statement dated 28<sup>th</sup> May 2013 issued by The Global Fund also names the Defendant as the buyer.



30. The Plaintiff argued that it raised invoices for the amount owing by the Defendant as provided for in the Plaintiff's list and bundle of Documents. The Defendant did not disprove this information but instead argued that the Plaintiff failed to produce a consolidated invoice for the USD 91, 176 allegedly owed by the Defendant.

31. Under Section 109 of the *Evidence Act*;

“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person”

32. The Plaintiff had the burden to lay the basis for its claim by proving that it was owed by the Defendant. This burden was discharged when the Defendant acknowledged receipt of the goods. Since the Defendant in its Defence did not dispute that it owed the said amount and had not paid for it, the burden shifted to the Defendant to prove this fact. In this case it was the duty of the Defendant to prove that it has paid the debt.

Whether the Defendant's Counterclaim is merited?

33. The Defendant filed a counterclaim against the Plaintiff for a commission totaling USD 36, 055.40 as provided under Order 7 rule 3 of the Civil Procedure Rules states as follows;

A Defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the Plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to Defendant to avail himself thereof.

Whether the Plaintiff owes the Defendant commissions arising from the supply and delivery of pharmaceutical products?

34. The Plaintiff admitted in its reply to the Counterclaim that;

“As a result of a negotiation between the Plaintiff and the Defendant, the Plaintiff supplied various batches of “Co-Falcinum” products to Harleys Limited and as a result the Plaintiff agreed to pay the Defendant a 3% commission for each consignment.”

35. After considering the bundle of documents produced herein, it is my understanding that this agreement was different from the initial agreement that involved the Global Fund. In this arrangement, the Plaintiff and the Defendant formed a Distributorship agreement in which the Defendant was to distribute the products at a commission.

36. The Plaintiff claimed that it paid a total amount of USD 36,055.40 as commission to Defendant for the invoice numbers P1314/0346, 00226, Z1314/1207 raised by Plaintiff on the Harleys Limited for the supply of various batches of "Co- Falcinum" products to Harleys Limited.



37. Section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:
- “107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”
38. The proof of payment produced by the Plaintiff show that the payment was directed to one Shailesh Hirani on 30<sup>th</sup> May 2014. In the case of *Kolaba Enterprise Ltd v Shamsudin Hussein Varvani & Anor. (2014) eKLR* the Court stated;
- “It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality.”
39. The Defendant that the said amount of USD 36, 055 was not a payment to the Defendant. The Defendant is a separate legal entity and the amount was indeed due to the Defendant. The Defendant in this case remained unpaid for the sad commission and the same owing by the Plaintiff. (See *Salomon v Salomon*.) Having considered the documents filed herein, there is an overseas debit note dated 11<sup>th</sup> March 2014 addressed to the Plaintiff and at the bottom of the said note it is stated “Make all checks payable to Shailesh Hirani”. A further perusal of the documents filed by both parties indicates that Shailesh Hirani is the Chairman of the Defendant company. I am of the view that it is on this basis that the said payments for commission were made. In light of this, the payment was validly made.
40. On the issue about refund for the expired stock, it was the Defendant’s contention that in the course of business with the Plaintiff, the Defendant was entitled to refunds due to short expiry stocks sent to the defendant instead of fresh stocks amounting to USD 11,250.
41. The Plaintiff responded to this issue by stating that it committed to refunding for the expired stock via email dated 2<sup>nd</sup> December 2013. However, the Plaintiff contended that the onus was on the Defendant to prove that it was not refunded. I find this to be mischievous on the part of the Plaintiff because if it indeed had refunded the said stock it should have discharged the burden of proof as it had already shifted to it. On this issue I find the Plaintiff liable.
42. Regarding the sunken shipment, the Defendant stated that it incurred cost amounting to USD 1, 506,133.30 as being the cost of salvaging the consignment paid for solely by it. Vide a letter of undertaking (marked no. 11) in the Defendant’s list, the Plaintiff undertook on 3<sup>rd</sup> November 2009 that they were jointly and severally liable for the performance of the contract(s) if awarded. I find the Plaintiff liable on this.

## DISPOSITION



1. Consequently, I enter Judgment for the Plaintiff in the sum of USD.91, 756 as prayed for in the Plaintiff against the Defendant.
2. Similarly, it is my finding that the Defendant's Counterclaim against the Plaintiff has partial merit and as such
3. Judgment is hereby entered in favor of the Defendant in the sum of USD 11, 250 for the short expiry stock and USD 1, 506, 138.30 pursuant to sunken ship from which the Plaintiff would be entitled to a set off of the aforesaid sum of USD 91, 756.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 17<sup>TH</sup> DECEMBER 2021 (VIRTUALLY)**

**M.W.MUIGAI**

**JUDGE**

