



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 425 OF 2017

SUNRISE CHEMIST LIMITED.....APPELLANT

-VERSUS-

NILA PHARMACEUTICALS LIMITED.....RESPONDENT

(Being an appeal from the ruling of Hon. D. O. Mbeja (Mr.))

delivered on the 31st day of July 2017 in Milimani CMCC no. 8854 of 2009)

JUDGEMENT

- 1) Nila Pharmaceuticals Ltd, the respondent herein, filed an action before the Chief Magistrate's Court, Milimani, Nairobi, in which it sought to recover a sum of ksh.501,747/25 plus interest and costs from Sunrise Chemists Ltd vide the plaint dated 17th December 2009.
- 2) The appellant filed a defence to deny the respondent's claim.
- 3) The suit proceeded for hearing ex parte before Hon. D. O. Mbeja (Mr.) on 17th May 2016 when the appellant and its advocate failed to turn up in court. On 1st August 2016, Hon. D. O. Mbeja (Mr.) delivered judgment in the sum of ksh.501,745/25 plus costs and interest in favour of the respondent.
- 4) The respondent attempted to execute the decree thus prompting the appellant to take out the motion dated 18th April 2017 whereof it sought to have the ex parte judgment to be set aside on the basis that it was not served with a hearing notice. The respondent opposed the appellant's motion. Hon. D. O. Mbeja proceeded to hear the motion dated 18.4.2017 and had it dismissed on 31st July 2017.
- 5) The appellant, being aggrieved preferred this appeal and put forward the following grounds:

i. THAT the learned magistrate erred in law and in fact in holding that the matter had proceeded regularly despite there being an express court order barring hearing of the matter in the absence of a pre-trial conference.

ii. THAT the learned magistrate acted in contempt and contrary to an express and existing order directing that the matter should proceed for a pre-trial conference.

iii. THAT the learned magistrate erred in law and in fact in proceeding to render a final judgment in the matter despite there being an interlocutory application which has not been heard and determined on merits or even been withdrawn by the relevant party.

iv. THAT the learned magistrate erred in law and in fact in holding that the defendant/appellant was properly represented by counsel when it is clear no such instructions had been given to the purported counsel by the defendant/appellant.

v. THAT the learned magistrate erred in law and in fact in failing to hold and find that the purported firm of Ochola Mambo, Onyango & Associates Advocates was not properly on record for the defendant/appellant in the absence of a filed Notice of change of Advocates.

vi. THAT the learned magistrate erred in law and in fact in holding that the defendant/appellant was properly represented by an advocate called Mr. Onyango who is unknown or unascertainable within the Law Society of Kenya fraternity and who the defendant/appellant expressly and in unequivocal terms denied ever instructing.

vii. THAT the learned magistrate erred in law and in fact in failing to realize and uphold the sanctity of the judicial process and failed to give the defendant/appellant an opportunity to be heard.

viii. THAT the learned magistrate erred in law and in fact in failing to hold that alleged service by post instead of physical service upon the defendant/appellant or its advocates on record whose physical addresses are known and have never changed was not proper service as envisaged by law.

ix. THAT in view of the circumstances set out herein above, the learned magistrate totally misdirected himself in dismissing the defendant/appellant's application dated 18th April, 2017 and delivering a ruling in favour of the respondent.

6) When the appeal came up for hearing this court gave directions to have the appeal disposed of by written submissions.

7) I have re-evaluated the arguments presented before the trial court in respect of the motion dated 18th April 2017. I have also considered the rival written arguments. Though the appellant put forward a total of nine (9) grounds of appeal, those grounds revolve the question as to whether the appellant and its advocates were properly served with a hearing notice for 17.5.2016.

8) It is the submission of the appellant that it did not instruct the firm of Ochola, Mambo, Onyango & Associates Advocates to appear for it in the suit. The appellant pointed out that it failed to defend the suit because there was a breakdown of communication between its advocates namely M/s Agure Odera & Co. Advocates and the respondent's advocates M/s Kabue Thumi & Co. Advocates.

9) It is averred that unknown to the appellant, the firm of Ochola, Mambo, Onyango & Associates filed a notice of appointment of advocates to act for the appellant dated 13.11.2012. It is stated by the appellant that it had initially instructed the firm of Kitheka & Co. Advocates and later it also the firm of Agure Odera & Co. Advocates.

10) In response to the appellant's averments, the respondent stated that the appellant has had a history of changing advocates and that the move to disown the firm of Ochola, Mambo, Onyango Associates is a mere afterthought.

11) The respondent further stated that the firm of Agure Adero & Co. Advocates had been served with a hearing notice for 14th November 2012 since they were still on record and that is when a representative of the firm of Ochola, Mambo, Onyango & Associates Advocates appeared and sought for an adjournment meaning that firm of advocates was not innocent.

12) The respondent was emphatic that the appellant was served with a hearing notice for 17th May 2016. The respondent further argued that the learned trial magistrate was right to dismiss the appellant's application.

13) Faced with the rival arguments, the learned Senior Resident Magistrate came to the conclusion that the respondent's advocate on record was duly served with the relevant court documents as shown by the affidavit of service. He also concluded that the exparte judgment was regular since there was proper service.

14) It is not in dispute that the firm known as Ochola, Mambo, Onyango & Associates Advocate came on record as appearing for the appellant by filing the notice of appointment of advocates dated 13.11.2012.

15) The respondent relied on the affidavit of service of Johnstone Nzivu, sworn on 28th April 2016 to prove that a hearing notice for 17th May 2016 had been served upon the firm of Ochola, Mambo, Onyango & Associates by registered post. The process server averred that he did not locate the offices of the aforesaid firm and that is why he opted to serve by registered post.

16) The learned Senior Resident Magistrate clearly stated that she was satisfied that the firm of Ochola, Mambo, Onyango & Associates Advocates were properly served. He however failed to determine the question as to whether the aforesaid law firm was instructed by the appellant to appear for it.

17) The appellant denied ever giving instructions to the aforesaid law firm. Agure Odera also swore an affidavit in which he averred that his law firm known as Agure Odera & Co. Advocates at all material times appeared for the appellant until it was replaced by the firm of Gichuru & Gichuru Advocates.

18) He stated that his law firm was never served with the notice of appointment by the firm of Ochola, Mambo, Onyango & Associates Advocates. It is not in dispute that a hearing notice for 17th May 2016 was never served upon the firm of Agure Odera & Co. Advocates, therefore that firm was not aware of the hearing date.

19) After a careful re-evaluation of the material and arguments presented before the trial court, I am convinced that the appellant had made credible averments which positively suggest that the appellant did not actually instruct the law firm known as Ochola, Mambo, Onyango & Associates.

20) The physical address of the aforesaid firm has never been known and no one knows whether that firm ever existed.

21) The letter from the Law Society of Kenya expressly states that the Law Society of Kenya has no knowledge of any advocate practicing in the style and name of the aforesaid firm. It is therefore, abundantly clear, that given such evidence, it cannot be correct to state that the appellant was properly served with a hearing notice.

22) The learned Senior Resident Magistrate therefore fell into error in dismissing the appellant's application.

23) In the end, I find this appeal to be meritorious hence it is allowed. Consequently, the order dismissing the appellant's motion dated 18th April 2017 is set aside and is substituted with an order allowing the motion.

24) For the avoidance of doubt, the following orders are issued on appeal:

i. The exparte proceedings and the resultant judgment delivered on 1st August 2016 are hereby set aside.

ii. The suit before the trial court to be fixed for pre-trial conference and be heard afresh on priority basis by another magistrate of competent jurisdiction other than Hon. D.O. Mbeja (Mr.)

iii. Each party to bear its own costs on appeal and on the application dated 18th April 2017.

Dated, signed and delivered via Microsoft Teams at Nairobi this 30th day of July, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent