



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 936 OF 2004**

**KETAN PATEL.....1<sup>ST</sup> APPELLANT**

**VIPUL PATEL.....2<sup>ND</sup> APPELLANT**

**- V E R S U S -**

**NILA PHARMACEUTICALS LIMITED.....RESPONDENT**

***(Being an appeal from the ruling and order of the Chief Magistrate's Court in CMCC NO. 6646 of 2004 at Nairobi given by the Hon. PM, Mr. A El Kindiy (ESQ), dated 30<sup>th</sup> September 2004)***

**JUDGEMENT**

1) On 30<sup>th</sup> September 2004, Hon. E. L. Kindiy, learned Principal Magistrate, made orders allowing an application for summary judgment taken out by Nila Pharmaceuticals Ltd, the Respondent herein. Being aggrieved, Ketan Patel and Vipul Patel, the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively filed this appeal and put forward the following grounds:

- a) The learned Judge erred in law and fact in failing to consider the certificate of registration dated 11/8/1998.***
- b) The learned Judge erred in law in finding that the appellants had admitted personal liability for the debts of Nyanza Pharmacy.***
- c) The learned Judge erred in law in failing to consider that the appellants were acting as agents of a disclosed principal.***
- d) The learned Judge erred in law in finding that an agent acting under a power of attorney was personally liable for the acts of the principal.***
- e) The learned Judge erred in law in failing to consider that the respondent did not satisfy the conditions for granting of summary judgment.***
- f) That the learned Judge erred in law in failing to find that the appellants' defence raised triable issues.***

2) When the appeal came up for hearing this court gave directions for the same disposed of by written submissions.

3) I have re-evaluated the arguments that were presented before the trial court. I have also considered the rival submissions. The brief background of this appeal is short and straight forward. The respondent herein filed a claim against the appellants before the Chief magistrate's Court Milimani, vide the plaint dated 18.6.2004 in which it sought for payment of ksh.776,941/69 plus interest and costs. The aforesaid amount is said to be the outstanding balance of the agreed price of pharmaceutical products sold and delivered by the respondent to the appellants in the year 2003. The appellants filed a defence denying the respondent's claim.

4) The respondent successfully applied for the aforesaid defence to be struck out and for entry of summary judgment against the appellant on 30<sup>th</sup> September 2004.

5) Having set out in brief the background of this appeal, I now turn my attention to the merits or otherwise of this appeal. On the first ground of appeal, the appellant argued that they had exhibited the registration certificate of Nyanza Pharmacy as a business name but the learned Principal Magistrate did not deem it necessary to take that into account. The respondent did not address this court over the issue.

6) I have carefully perused the ruling delivered on 30.9.2004 which gave rise to this appeal and it is clear that the learned Principal Magistrate did not consider that issue. I have re-evaluated the material placed before the trial court. In paragraph 4 of the appellants'

defence and it is apparent that they pleaded that they were agents of Nyanza Pharmacy and that they were wrongly sued.

7) In paragraph 3 of the replying affidavit of Ketan Patel, the 1<sup>st</sup> appellant herein, which was filed to oppose the motion for summary judgement, the deponent averred that they (appellants) were acting under a Power of Attorney from the proprietors of Nyanza Pharmacy.

8) They also averred that they were their employees. In the same paragraph, the appellants attached a copy of the registration certificate of the Nyanza Pharmacy which shows that the partners of Nyanza Pharmacy business are Dipak Zajabah Kotecha and Ela Dipak Kotecha.

9) Had the learned Principal Magistrate considered the certificate of registration he would come to the conclusion that the appellants were not the proprietors of Nyanza Pharmacy. This was an matter in that it would have proved that the appellants were wrongly sued since they were not partners in Nyanza Pharmacy.

10) The second ground is closely related to grounds (c) and (d) hence grounds b, c and d will be determined together. It is argued that the trial magistrate erred by making a finding that the appellants had admitted personal liability for the debts of Nyanza Pharmacy. It is the submission of the appellants that they did not expressly admit personal liability in the pleadings and in their affidavit evidence.

11) The appellants further argued that the trial Principal Magistrate had no basis to reach at such a conclusion.

12) The Respondent are of the view that the appellants actually admitted owing it the amount claimed in their letter dated 29.1.2004. In the aforesaid letter the appellants' stated *inter alia* as follows:

**“We Nyanza Pharmacy hereby acknowledge owing you the sum of ksh.856,941/69 and we undertake to pay the same by weekly instalments of ksh.15,000/= with effect from 02.02.2004 and thereafter week till payment in full.”**

13) The respondent stated that pursuant to the aforesaid letter, the appellants paid a total sum of ksh.80,000/= leaving a balance of ksh.776,941/=. The respondent pointed out that the defence was therefore a mere denial which was not sufficient in an action for a debt or liquidated amount and therefore the defence did not provide a reasonable defence therefore the trial court was right to dismiss the defence.

14) I have carefully examined the judgment, and it is clear that in his judgment, the learned Principal Magistrate stated that the appellants expressly admitted the debt. It is not in dispute that the appellants wrote the letter dated 29.1.2004 in which they admitted owing a sum of ksh.856,941/69. The appellants jointly signed the aforesaid letter on the basis of a Power Attorney of Ela Dipak Kotecha for Nyanza Pharmacy. It is obvious that the appellants used the Power of Attorney to make the admission on behalf of Nyanza pharmacy and not in their individual capacities. It was therefore erroneous for the learned Principal Magistrate to allude that the appellants had expressly admitted the claim.

15) The other issue is whether the appellants are liable for the acts or omissions of a disclosed principal. It is the opinion of the learned principal Magistrate that the appellants are liable. The appellants are of the submission that they are not liable for the acts, or omissions of the disclosed principal.

16) In the case of **Antony Francis Wareham t/a AF Wareham ( 2 others –s- Kenya Post Office Savings Bank (2004) eKLR**, the Court of Appeal unanimously held in part as follows:

**“..... It was also prima facie imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal.”**

17) With respect, I am persuaded by the appellants agreement that they should not be held liable for the acts or omissions of a disclosed principal.

18) The final issue is whether or not summary judgment should have been entered against the appellants. The appellants have urged this court to find that their defence raised triable issues and therefore summary judgment should not have been entered. The respondent on the other hand is of the submission that there were no triable issues and further that the appellants had admitted the claim hence summary judgment was properly entered.

19) In the case of **Gupta =vs= Continental Builders Ltd (1976-80) 1 KLR 809 Madan JA** stated *inter alia*:

**“If a defendant is able to raise a prima facie triable issue he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issue ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily.”**

20) Applying the above principles to this appeal, it is crystal clear that the learned Principal Magistrate fell into error when he entered summary judgement. It is apparent that the appellants' defence raised triable issues which could only be determined at a trial.

21) Those issues included *inter alia*

*i. Whether the appellants were agents and or employees of Nyanza Pharmacy.*

*ii. Whether the appellants could be held personally liable for the acts and omissions of a disclosed principal.*

*iii. Whether the appellants expressly admitted the claim in personal capacity.*

22) In the end, I find the appeal to be meritorious hence it is allowed. Consequently, the order allowing the motion dated 30.09.2004 is set aside and is substituted with an order dismissing the aforesaid motion. The suit is hereby reinstated to be determined on its merits by another magistrate of competent jurisdiction other than Hon. E. L. Kindiy (ESQ).

23) In the circumstances of this appeal, a fair order on costs is to direct which I hereby do that costs shall abide the outcome of the reinstated suit.

**Dated, Signed and Delivered in open court this 24<sup>th</sup> day of May, 2019.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent