



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 1031 OF 2001

LADHOPHARMA COMPANY LIMITED.....1ST PLAINTIFF/APPLICANT

LADISLAUS ADUWO.....2ND PLAINTIFF

SILFANUS ADUWO MIYAGA.....3RD PLAINTIFF

- VERSUS -

NATIONAL BANK OF KENYA.....DEFENDANT/RESPONDENT

RULING

1. This case was filed in the year **2001** and there is no doubt that there has been delay in its conclusion. That delay, however, cannot be blamed on any party in this matter.

2. The case has been partly heard before different Judges and it was not until **30th May, 2017** that it was concluded before **Justice Ochieng**. That Judge was transferred from the Commercial & Tax Division of Milimani Court in **May, 2018**. On the Judge's said transfer, there was a pending application dated **31st May, 2017**, in this matter, filed by the Plaintiff.

3. By that application, the defendant seeks three orders as follows:

*i. For the order made on **30th May, 2017** closing the plaintiffs counsel's cross examination of the defence witness be reviewed, varied or set aside;*

*ii. That the order made on **30th May, 2017** closing the defence case be reviewed, varied or set aside; and*

*iii. That the defence witness **Stephen Tarus** be recalled for further cross examination by the plaintiffs' counsel.*

4. On **30th May, 2017**, the plaintiffs' learned counsel, who had previously indicated that he would cross examine the defendant's only witness **Stephen Tarus** for one hour, was requested by the court to terminate cross examination of that witness on expiry of that one hour.

5. The plaintiffs learned counsel, **Mr Gichuru Ngugi**, in his affidavit in support of the application deponed that when he was cross examining the defence witness, that witness was elusive and several questions he had prepared for that witness needed reframing. That as a consequence the one hour intimated by him was not sufficient to ask, what he termed as, several and critical questions. That as a consequence of that failure to ask those questions the court will not be able to reach a just decision in this matter if the case is not re-opened for further cross examination of the defendant's witness.

6. I have considered the affidavit evidence of both the plaintiff and the defendant and the submissions on record. The plaintiff seeks the exercise of the court's discretion in his favour. The defendant opposed the application terming the plaintiff's prayer as **'seeking second bite to the cherry'**. Defendant regards the application as being *mala fide* and mischievous. Defendant also submitted that the plaintiff's counsel failed to make the application to further cross examine the defence witness before that witness was re-examined.

7. Although the defendant submitted that there was no legal or constitutional basis to grant the orders the plaintiff seeks, the court has inherent power to make such orders as are necessary for the end of justice: see Section 3 A of the Civil Procedure Act Cap 21.

8. Accordingly, in the interest of Justice the court will accede to the plaintiff's application and will permit the defendant's witness to be recalled for further cross examination by the plaintiffs counsel.

9. The court makes the following orders:

- a. The defence witness **Stephen Tarus** shall be recalled for further cross examination by the plaintiffs learned counsel for 30 minutes and shall be re-examined by the defence learned counsel for 15 minutes.*
- b. At the reading of this ruling, the court shall allocate a date for further cross examination.*
- c. The costs of the **Notice of Motion** dated **31st May, 2017** shall be in the cause.*

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of July 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the 1st Plaintiff

..... for the 2nd Plaintiff

..... for the 3rd Plaintiff

..... for the Defendant